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Contract Law: New Mexico Interprets the Insurance Clause in the Oil and Gas Anti-Indemnity Statute: Amoco Production Co. v. Action Well Service, Inc.

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CONTRACT LAW: New Mexico Interprets the Insurance Clause in the Oil and Gas Anti-Indemnity Statute: *Amoco Production Co. v. Action Well Service, Inc.*

I. INTRODUCTION

Until 1971, the New Mexico courts and legislature permitted contractual indemnity agreements that required one party to assume legal and financial responsibility for another party's negligence.[1] In 1971, the New Mexico Legislature created a limitation on indemnity agreements pertaining to wells for oil, gas, or water or mineral mines.[2] The well and mine anti-indemnity statute prohibits indemnity agreements obligating one party to pay for the sole or concurrent negligence attributable to the other party in contracts pertaining to a well or mine.[3] The statute declares such agreements to be void and unenforceable as against the public policy of New Mexico.[4] It also provides that the validity of any insurance contract will not be affected by the statute.[5]

In *Amoco Production Co. v. Action Well Service, Inc.*,[6] a case of first impression, the New Mexico Supreme Court held that the

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1. Metropolitan Pav. Co. v. Gordon Herkenhoff & Assoc., 66 N.M. 41, 341 P.2d 460 (1959).

2. N.M. STAT. ANN. 1978 § 56-7-2(A) (Repl. Pamp. 1986). This section provides:

> A. Any agreement, covenant or promise contained in, collateral to or affecting any agreement pertaining to any well for oil, gas or water, or mine for any mineral, which purports to indemnify the indemnitee against loss or liability for damages, for:
> (1) death or bodily injury to persons; or
> (2) injury to property; or
> (3) any loss, damage or expense arising under either Paragraph (1) or (2) or both; or
> (4) any combination of these, arising from the sole or concurrent negligence of the indemnitee or the agents or employees of the indemnitee or any independent contractor who is directly responsible to the indemnitee, or from any accident which occurs in operations carried on at the direction or under the supervision of the indemnitee or an employee or representative of the indemnitee or in accordance with methods and means specified by the indemnitee or employees or representatives of the indemnitee, is against public policy and is void and unenforceable. This provision shall not affect the validity of any insurance contract or any benefit conferred by the Workmen's Compensation Act [Chapter 52, Article 1 NMSA 1978].

In the same year the legislature also created a limitation for construction contracts. *See infra* note 38.

3. *Id.*
4. *Id.*
5. *Id.*
6. 107 N.M. 208, 755 P.2d 52 (1988).

legislature did not intend the insurance clause in the well and gas anti-indemnity statute to function as an exception to the statute.[7] At issue was a contract between Amoco, a well owner, and Action Well Service, the independent contractor on the site.[8] The contract included an indemnity provision which required Action Well Service to indemnify Amoco for all losses arising from the work, including losses caused by Amoco's own negligence.[9] In addition, the contract required Action Well Service to cover this assumption of the risk with liability insurance.[10] In *Action Well Service*, the New Mexico Supreme Court held that Amoco could not require Action Well Service to indemnify Amoco for Amoco's own negligence with contractual liability insurance purchased by Action Well Service pursuant to its promise to insure the indemnity agreement.[11] According to the court, the legislature intended the insurance clause in the statute to guarantee only that in the oil, gas, and mineral industries each contracting party could insure itself to protect its own interest.[12]

This Note first describes the decision in *Action Well Service*. The Note then discusses the historical background for interpretation of the anti-indemnity statute and reviews the New Mexico Supreme Court's reason for interpreting the statute's insurance clause narrowly. Finally, the Note considers the implications of *Action Well Service* for companies working in the oil, gas, and mineral industries.

II. STATEMENT OF THE CASE

On May 15, 1984, at an oil field site owned and maintained by Amoco Production Company [Amoco], Freddie Wagoner, a derrick man for Action Well Service, was killed when the drilling rig upon which he was standing collapsed.[13] Wagoner's personal representative filed suit in the United States District Court for the Southern District of Texas alleging Amoco's negligence for failing to provide a safe workplace and failing to supervise the drilling rig operation.[14] Amoco demanded that Action Well Service defend the Texas lawsuit. Action Well Service refused. Subsequently, Amoco settled with Wagoner's estate for $500,000.[15]

Amoco and Action Well Service were parties to a contract that included an indemnification clause.[16] Relying on the contract, Amoco

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7. *Id.* at 211, 755 P.2d at 55.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 209, 755 P.2d at 53.
14. Brief for Appellee at 2, Amoco Prod. Co. v. Action Well Serv., Inc., 107 N.M. 208, 755 P.2d 52 (1988).
15. Amoco Prod. Co. v. Action Well Serv., Inc., 107 N.M. at 209, 755 P.2d at 53.
16. *Id.*

brought suit against Action Well Service seeking indemnification for its settlement with Wagoner's estate, attorneys' fees, and court costs.[17] Action Well Service filed a motion to dismiss Amoco's lawsuit, contending that the indemnification paragraph of the contract violated the well and mine anti-indemnity statute.[18]

Paragraph 10 of the well and lease service contract between Amoco and Action Well Service provided:

> 10. In order to eliminate controversies between Contractor, [Action Well Service] its Subcontractors and Amoco and its joint owners, if any, and their respective insurers, Contractor assumes all liability for and hereby agrees to defend, indemnify and hold Amoco, its joint owner or owners, if any, and their insurers, harmless from and against any and all losses, costs, expenses and causes of action, including attorneys' fees and court costs, for injuries to and death of Contractor's and its Subcontractor's employees, arising out of, incident to, or in connection with any and all operations under this contract and whether or not such losses, costs, expenses and causes of action are occasioned by or incident to or the result of the negligence of Amoco, its joint owner or owners, if any, and its agents, representatives and employees. Contractor agrees to insure this assumption of liability. The liability assumed by Contractor pursuant to this clause shall be limited to the amounts carried by Contractor's current liability insurance, but in no event shall it be less than the minimum limits set out in Paragraph 11(b), below.[19]

The contract specified the amounts and kinds of insurance Action Well Service was obligated to purchase.[20]

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17. *Id.*

18. *Id.* at 210, 755 P.2d at 54.

19. Brief for Appellee at 3, Amoco Prod. Co. v. Action Well Serv., Inc., 107 N.M. 208, 755 P.2d 52 (1988).

20. The contract states in pertinent part:

> 11. As to all operations provided for herein, Contractor shall secure and maintain during the term of this agreement the following insurance:
>
> (a) Workman's Compensation Insurance which shall fully comply with the requirements of state laws as well as federal laws, if applicable,
>
> (b) Comprehensive General Liability Insurance, including Contractual Liability coverage, with minimum limits of $100,000.00 each person and $300,000.00 each occurrence for Bodily Injury and $100,000.00 each occurrence for Property Damage.
>
> (c) Automobile Liability Insurance covering owned, hired and non-owned vehicles used by Contractor with minimum limits of $100,000.00 each person and $300,000.00 each occurrence for Bodily Injury and $100,000.00 each occurrence for Property Damage.
>
> If requested by Amoco, Contractor shall furnish Amoco insurance certificates to evidence the insurance required herein. Maintaining the prescribed insurance shall not relieve Contractor of any other obligation under this agreement.

Id.

Following the agreement, Action Well Service purchased two policies of contractual liability insurance.[21] One policy with United General Insurance Company allowed $300,000 single limits for each occurrence of bodily injury; the other, an umbrella policy with Harbor Insurance Company, covered bodily injury with single limits of $1,000,000 each.[22]

Amoco argued that it should be indemnified by the insurance policies Action Well Service had purchased because the insurance clause in the well and mine anti-indemnity statute was intended to allow indemnity agreements if covered by insurance.[23] Amoco maintained that the insurance clause in the statute would protect the validity of any agreement between two contracting oilfield companies concerning their insurance coverage.[24]

The Eleventh Judicial District Court rejected Amoco's argument and dismissed the complaint on the grounds that it failed to state a claim upon which relief could be granted because the indemnity agreement between Amoco and Action Well Service violated the well and mine anti-indemnity statute.[25] The court held that the insurance clause in the statute did not allow indemnification of a negligent party under an indemnity agreement supported by insurance obtained by the other party.[26]

The New Mexico Supreme Court affirmed the district court.[27] It agreed that the insurance clause in the statute does not create an exception to the prohibition of indemnity agreements covering indemnitee negligence in well and mine contracts. The statute only protects a party's right to insure its own interests, not the interests of the other party.[28] To arrive at its decision, the court referred to the public policy behind the statute: the promotion of safety in the occupations pertaining to wells and mines known for their dangerous working conditions.[29]

The court refused to permit indemnification of Amoco through liability insurance purchased by Action Well Service to cover the indemnity agreement, thus denying Amoco's claim for indemnification for the $500,000 it owed Wagoner's estate, attorneys' fees, and costs.[30]

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21. Amoco Prod. Co. v. Action Well Serv., Inc., 107 N.M. at 209, 755 P.2d at 53.
22. *Id.*
23. Brief for Appellant at 20, Amoco Prod. Co. v. Action Well Serv., Inc., 107 N.M. 208, 755 P.2d 52 (1988).
24. *Id.*
25. Amoco Prod. Co. v. Action Well Serv., Inc., 107 N.M. at 209, 755 P.2d at 53.
26. *Id.* at 211, 755 P.2d at 55.
27. *Id.* at 212, 755 P.2d at 56.
28. "Therefore, we conclude that subparagraph (4) applies to insurance purchased by the indemnitor to protect *its* interests, and not the interests of the indemnitee." *Id.* at 211, 755 P.2d at 55.
29. *Id.*
30. *Id.*

III. DISCUSSION AND ANALYSIS

A. Historical Background

In industries that use independent contractors and subcontractors, contracts frequently contain provisions obligating the independent contractor to indemnify and hold the project owner harmless as to loss, liability, injuries, or damages arising from the independent contractor's performance under the contract.[31] At common law, New Mexico upheld these contracts as not against public policy.[32] The New Mexico Supreme Court recognized, however, that assuming liability for another's negligence put an extra financial obligation upon the indemnitor.[33] Therefore, the court required that the indemnitor's intention to be so obligated be clear and unequivocal.[34]

Many states have imposed statutory limitations on indemnity agreements that protect one party from liability for its own negligence.[35] These anti-indemnity statutes pertain to hazardous work such as general construction and work on mines for minerals or wells for oil and gas.[36] During the 1971 legislative session, New Mexico passed two separate statutes limiting a party's ability to contract for indemnification.[37] The construction anti-indemnity statute voids agreements to indemnify a party, in whole or in part, for its own negligence

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31. Annotation, *Indemnity—Contractor's Liability*, 27 A.L.R.3d 663, 675 (1969).

32. Metropolitan Paving Co. v. Gordon Herkenhoff and Assoc., 66 N.M. at 43, 341 P.2d at 462 (upholding an indemnity agreement which provided that a road contractor would hold the city harmless from all suits brought against the city on account of construction, even if the suit arose out of the city's own negligence).

33. *Id.*

34. *Id.* at 46, 341 P.2d at 463. Many states require express provision for the indemnitor's added assumption of risk where one party agrees to indemnify the other for the other's negligence. *Id.* The *Metropolitan Paving Co.* court considered, but rejected, this higher standard, preferring instead the "clear and unequivocal" standard. *Id.* at 43, 341 P.2d at 461; Eichel v. Goode, 101 N.M. 246, 250, 680 P.2d 627, 631 (Ct. App. 1984).

35. More than half the states have enacted either a construction work anti-indemnity statute or an oil, gas, and mineral work anti-indemnity statute. *See, e.g.*, ALASKA STAT.] § 45.45.900 (1986); ARIZ. REV. STAT. ANN. § 34-226 (Cum. Supp. 1988); CAL. CIV. CODE § 2782 (West 1974); IDAHO CODE § 29-114 (1980); MD. CTS. & JUD. PROC. CODE ANN. § 5-305 (1984); MASS. GEN. LAWS ANN. ch. 149, § 29(C) (West Cum. Supp. 1989); N.H. REV. STAT. ANN. § 338-A:1 (Repl. Pamp. 1984); N.J. STAT. ANN. § 2A:40A-1 (West Repl. Pamp. 1989); S.D. CODIFIED LAWS ANN. § 56-3-18 (1988); UTAH CODE ANN. § 13-8-1 (Repl. Pamp. 1986).

36. *Id.*

37. Although the two anti-indemnity statutes are codified one after the other, the two bills were introduced by different legislators and passed at different times. Senator Ray L. Atchison introduced the anti-indemnity statute concerning construction of real property as Senate Bill 189, and the bill became law on March 1, 1971. S.B. 189, 30th Leg., 1st Sess. (1971 N.M.). Representative Robert Moran introduced the anti-indemnity statute concerning wells and mines from the House Judiciary Committee as House Bill 361, and the bill became law on April 2, 1971. H.B.J. 361, 30th Leg., 1st Sess. (1971 N.M.).

in construction work on or under real property.[38] The well and mine anti-indemnity statute voids agreements to indemnify a party for its sole or concurrent negligence in the operation of wells for oil, gas, or water and in mines for minerals.[39]

A New Mexico court first interpreted the well and mine anti-indemnity statute in *Guitard v. Gulf Oil Co.*[40] In *Guitard*, an employee of Harrison Western was injured on a mining project run by Gulf.[41] Harrison Western was a contractor for Gulf.[42] The employee sued Gulf for failure to inspect and maintain equipment and failure to warn of defects.[43] Gulf filed a third-party complaint against Harrison Western for indemnification under a construction and development contract. That contract included an indemnity clause hold-

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38. Section 56-7-1 provides:

Indemnity Agreements

56-7-1. [Real property; negligence, acts or omissions of indemnitee; certain agreements void.]

Any provision, contained in any agreement relating to the construction, installation, alteration, modification, repair, maintenance, servicing, demolition, excavation, drilling, reworking, grading, paving, clearing, site preparation or development, of any real property or any improvement of any kind whether on, above or under real property, including without limitation, buildings, shafts, wells and structures, by which any party to the agreement agrees to indemnify the indemnitee, or the agents and employees of the indemnitee, against liability, claims, damages, losses or expenses, including attorney fees, arising out of bodily injury to persons or damage to property caused by, or resulting from, in whole or in part, the negligence, act or omission of the indemnitee or the agents or employees of the indemnitee, or any legal entity for whose negligence, acts or omissions any of them may be liable, is against public policy and is void and unenforceable, unless such provision shall provide that the agreement to indemnify shall not extend to liability, claims, damages, losses or expenses, including attorney fees, arising out of:

A. the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications by the indemnitee, or the agents or employees of the indemnitee; or

B. the giving of or the failure to give directions or instructions by the indemnitee, or the agents or employees of the indemnitee, where such giving or failure to give directions or instructions is the primary cause of bodily injury to persons or damage to property.

The word "indemnify" as used in this section includes, without limitation, an agreement to remedy damage or loss caused in whole or in part by the negligence, act or omission of the indemnitee, the agents or employees of the indemnitee, or any legal entity for whose negligence, acts or omissions any of the foregoing may be liable.

39. *See supra* note 2. The original language in section 56-7-2 was identical to section 56-7-1 with the exception of parts A and B. *See supra* note 38. The final form of section 56-7-2 which passed into law, "Substitute House Bill" 361, is a near duplicate of the Wyoming anti-indemnity statute, WYO. STAT. § 30-28.3 (Cum. Supp. 1975). *See* Legislative Council Service file for N.M. STAT. ANN. § 56-7-2(A) (Repl. Pamp. 1986), opened by Robert Moran, the introducing Representative.

40. 100 N.M. 358, 670 P.2d 969 (Ct. App.), *cert. denied*, 100 N.M. 327, 670 P.2d 581 (1983), *followed in* Tipton v. Texaco, Inc., 103 N.M. 689, 696, 712 P.2d 1351, 1358 (1985).

41. *Id.* at 359, 670 P.2d at 970.

42. *Id.*

43. *Id.*

ing Gulf harmless for all losses except those resulting from Gulf's sole negligence.[44]

The trial court granted Harrison Western's motion for summary judgment on the grounds that under the well and mine anti-indemnity statute the indemnity agreement was entirely void even if Gulf's negligence contributed to the harm only in part.[45] The New Mexico Court of Appeals considered whether the statutory language "arising from the . . . concurrent negligence of the indemnitee" voided an indemnity agreement where both contracting parties shared in the fault.[46]

Harrison Western argued that by using the words "concurrent negligence," the statute voided the entire indemnity agreement if Gulf were negligent to any degree.[47] Gulf contended, on the other hand, that the statutory language, "arising from . . . the concurrent negligence of the indemnitee,"[48] meant only "that the indemnitee cannot contract away liability for his own percentage of negligence."[49] The Court of Appeals agreed with Gulf, upholding the indemnity contract insofar as it did not require Harrison Western to indemnify Gulf for Gulf's negligence, and reversed the lower court's summary judgment for Harrison Western.[50] Thus Harrison Western, though it would not be liable under the indemnity agreement for Gulf's percentage of negligence, would apparently be liable for other losses sustained by Gulf as a result of Gulf's relationship with Harrison Western.[51]

The court explained that the public policy underlying the well and mine anti-indemnity statute was to promote safety in the dangerous working conditions associated with mines and wells.[52] Requiring each party to bear responsibility for its own percentage of negligence

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44. *Id.* The contract included the following clause: "Contractor shall not be liable for any loss, damage or claims which are determined to be due to the sole negligence of Owner." *Id.* at 362, 670 P.2d at 973.

45. *Id.* at 359, 670 P.2d at 970.

46. *Id.* at 360, 670 P.2d at 971. The legislature passed section 56-7-2(A) before New Mexico adopted pure comparative negligence in Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981), and abolished joint and several liability in Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982). The statutory language "sole or concurrent negligence" may have reflected the law of contribution current at that time. Under joint and several liability a concurrent tortfeasor could be held liable for the entire amount of damages. *Id.* at 154, 646 P.2d at 581. Thus, the only way to prevent a party's indemnification for its own negligence would be for the legislature to void contracts that provided indemnification for not only the party's entire fault, but also its partial fault.

47. *Guitard*, 100 N.M. at 360, 670 P.2d at 971.

48. N.M. STAT. ANN. § 56-7-2(A)(4) (Repl. Pamp. 1986).

49. *Guitard*, 100 N.M. at 360, 670 P.2d at 971. In reaching this conclusion *Guitard* followed the interpretation of a similar Wyoming statute construed in Mountain Fuel Supply Co. v. Emerson, 578 P.2d 1351 (Wyo. 1978). *See supra* note 39.

50. *Guitard*, 100 N.M. at 362, 670 P.2d at 973.

51. *Id.*

52. *Id.*

would give all parties incentives to monitor the safety of the operations.[53] As a result, a negligent party should not be able to insulate itself from liability by inserting into its contracts an indemnity provision covering its negligence. The court found its interpretation of the statute's language to be consistent with the ruling in *Bartlett v. New Mexico Welding Supply, Inc.*[54] that concurrent tortfeasors are not liable for the entire amount of damage.[55] Thus *Guitard* aligned the pre-*Bartlett* statute with the doctrine of comparative negligence.[56]

The court in *Guitard* suggested three situations where an indemnity agreement would be permissible in a contract pertaining to a well or mine. In the first example the court posited Gulf's negligence at 1% and Harrison Western's at 99%.[57] Without explanation, the court stated that Gulf might be held 100% liable in such a case.[58] The court, however, was aware of *Bartlett* because it cited the case.[59] Because the result in the court's example would be almost impossible under a negligence theory, given New Mexico's comparative negligence rule,[60] the example may have been intended to represent the situation where a vicariously liable master's claim for indemnification from the primary tortfeasor is barred because the master was partially at fault.[61] Historically, any fault of the master barred its indemnification by the servant.[62] Apparently the court was suggesting that where a party was held liable under a theory of vicarious or secondary liability, it could be indemnified under an indemnity contract.[63]

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53. *Id.*

54. 98 N.M. 152, 646 P.2d 579 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982). In 1987 the legislature passed the Several Liability Act, N.M. STAT. ANN. § 41-3A-1 (Repl. Pamp. 1989), which codifies judicially created several liability in cases where comparative negligence applies. The statute enumerates in subsection C the circumstances under which joint and several liability will continue to apply:

> C. The doctrine imposing joint and several liability shall apply:
> (1) to any person or persons who acted with the intention of inflicting injury or damage;
> (2) to any persons whose relationship to each other would make one person vicariously liable for the acts of the other, but only to that portion of the total liability attributed to those persons;
> (3) to any persons strictly liable for the manufacture and sale of a defective product, but only to that portion of the total liability attributed to those persons; or
> (4) to situations not covered by any of the foregoing and having a sound basis in public policy.

See Schultz and Occhialino, *Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History*, 18 N.M. L. REV. 483 (1988).

55. *Guitard*, 100 N.M. at 362, 670 P.2d at 973.

56. *Id.*

57. *Id.* at 361, 670 P.2d at 972.

58. *Id.*

59. *Id.* at 362, 670 P.2d at 973.

60. *Id.* at 361, 670 P.2d at 972.

61. *See infra* note 156.

62. *Id.*

63. For Wyoming's rule see Heckart v. Viking Exploration, Inc., 673 F.2d 309, 314 (10th

The second example of a valid indemnity agreement cited by *Guitard* came from *City of Artesia v. Carter*.[64] The city settled a wrongful death action with the widow of an employee of one of the city's contractors.[65] The contractor had paid workmen's compensation benefits which relieved the contractor of any common law liability to the widow of the deceased employee.[66] Furthermore, the public policy behind workmen's compensation barred indemnification of the city by the contractor for liability arising out of the contractor's negligence if the city's claim were based on an implied right of indemnification at common law.[67] The city therefore sued the contractor under a contractual right based on an indemnity agreement that required the contractor to reimburse the city for the contractor's negligence. The contractor attempted to avoid its obligation under shelter of the workmen's compensation public policy limiting employer liability, but the court upheld the indemnity agreement.[68] Although a negligent employer would no longer be liable at common law for indemnifying a vicariously liable third party, the employer would be liable if it had expressly contracted to indemnify the third party.[69]

Finally, the *Guitard* court noted that on remand Harrison Western might also be held liable for court costs as agreed in the indemnity contract.[70] After *Guitard* the only indemnity agreements prohibited by the well and mine anti-indemnity statute are those in which one party assumes liability for the other party's negligence.[71]

Cir. 1982). The Tenth Circuit, relying on Mountain Fuel Supply Co. v. Emerson, 578 P.2d 1351 (Wyo. 1978), *see supra* note 49, held that a party could not be indemnified if its negligence were of the secondary variety—failure to inspect or failure to prevent, but where the party to be indemnified was not negligent and only liable under a theory of respondeat superior, it would be entitled to indemnity. *Heckart*, 673 F.2d at 314.

64. 94 N.M. 311, 610 P.2d 198 (Ct. App.), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980).

65. *Id.* at 312, 610 P.2d at 199.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 312-13, 610 P.2d at 199-200.

70. 100 N.M. at 363, 670 P.2d at 974. For Louisiana's rule see, e.g. Waller v. Chevron, USA, Inc., 630 F.Supp. 313 (M.D. La. 1986) (defense costs are not barred by oil and gas anti-indemnity statute if the indemnitee is free of fault).

71. In Sierra v. Garcia, 106 N.M. 573, 746 P.2d 1105 (1987), the court came to the opposite conclusion when asked to construe similar language in the sister statute, section 56-7-1. *See supra* note 38. In *Sierra* the personal representative of an employee who died from injuries sustained while working on a construction project brought suit against the general contractor. *Sierra*, 106 N.M. at 574, 746 P.2d at 1106. Pursuant to an indemnity agreement, the general contractor filed a third-party complaint against the subcontractor who had hired the deceased worker. *Id.* The subcontractor moved for dismissal on the grounds that section 56-7-1 rendered the indemnity agreement void. *Id.* The lower court dismissed the complaint, and the supreme court affirmed. *Id.* Thus, *Sierra* voided the entire indemnity contract, unlike *Guitard* which voided the contract only insofar as it required indemnification by one for the other's negligence.

In reaching the decision that indemnity contracts falling under section 56-7-1 are void in

The New Mexico Supreme Court followed *Guitard* in *Tipton v. Texaco, Inc.*.[72] In *Tipton*, an employee injured on a Texaco well site sued Texaco for negligence.[73] Texaco's independent contractor, X-Pert, was the employer of the injured worker.[74] Texaco filed a third-party complaint against X-Pert, claiming a contractual right of indemnification as a result of an indemnity provision in a work agreement between Texaco and X-Pert.[75] The trial court dismissed X-Pert from the lawsuit, holding the indemnity provision void under section 56-7-2(A).[76] Citing *Guitard*, the New Mexico Supreme Court reversed.[77] It approved the language in *Guitard* that " 'arising from the concurrent negligence of the indemnitee' means only that the indemnitee cannot contract away liability for his percentage of negligence."[78] As a result Texaco could enforce the indemnity contract except insofar as it might require X-Pert to indemnify Texaco for Texaco's own negligence.[79] Neither the court in *Guitard* nor *Tipton* had occasion to interpret the insurance clause in section 56-7-2(A).

Until *Action Well Service* the insurance clause of New Mexico's oil and gas anti-indemnity statute had been discussed only by federal courts.[80] In *Brashar v. Mobil Oil Corp.*,[81] the federal district court in New Mexico determined that where Texas law was applied to a Texas contract in a New Mexico forum under a conflict of law principle,[82] the court could prohibit enforcement of a judgment in New Mexico on a cause of action created in another state if the judgment were against strong New Mexico public policy.[83] Under

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their entirety if they purport to indemnify the indemnitee for any loss arising in whole or in part from the indemnitee's negligence, the court distinguished *Guitard* on the basis of the different language in the two statutes. *Id.* Section 56-7-1 includes two subsections, *see supra* note 38, which create exceptions to the statute's proscriptions.

In a vigorous dissent, Justice Ransom argued that the court's voiding of all indemnity agreements under section 56-7-1 not meeting exceptions A or B is contrary to the rule established in *Bartlett* that each negligent party be liable for its own percentage of fault. *Id.* (Ransom, J., dissenting). Justice Walters joined in Justice Ransom's dissent and noted that the "sole or concurrent" language of section 56-7-2 is synonymous with the "in whole or in part" language of section 56-7-1. *Id.* (Walters, J., dissenting).

72. 103 N.M. 689, 696, 712 P.2d 1351, 1358 (1985).

73. *Id.* at 690, 712 P.2d at 1352 (1985).

74. *Id.*

75. *Id.* at 690, 712 P.2d at 1352. The indemnity agreement provided that X-Pert would hold Texaco harmless for losses arising out of the work except "such as may result solely from Texaco's negligence." *Id.* at 696, 712 P.2d at 1358.

76. *Id.*

77. *Id.*

78. *Id.* (citing *Guitard*, 100 N.M. at 361, 670 P.2d at 972).

79. *Id.* at 696, 670 P.2d at 1358.

80. Brashar v. Mobil Oil Corp., 626 F. Supp. 434 (D.N.M. 1984); Herrera v. Amoco Prod. Co., 623 F. Supp. 378 (D.N.M. 1985), *aff'd*, 843 F.2d 1394 (10th Cir. 1988), *order withdrawn on reh'g*, 854 F.2d 1323 (10th Cir. 1988). Damages were adjudicated in Herrera v. Amoco Production Co., 629 F. Supp. 474 (D.N.M. 1986), *rev'd*, 843 F.2d 1394 (10th Cir. 1988), *order withdrawn on reh'g*, 854 F.2d 323 (10th Cir. 1988).

81. 626 F. Supp. 434 (D.N.M. 1984).

82. *Id.* at 436 (citing RESTATEMENT OF THE LAW OF CONFLICTS OF LAW § 612 (1934)).

83. *Id.*

the Texas statute, indemnity agreements in which one contracting party agrees to insure against both parties' liability are expressly permitted. Section 127.005(a) of the Texas statute provides:

> [This prohibition of indemnity agreements for a party's own negligence does not apply] . . . if the parties agree in writing that the indemnity obligation will be supported by available liability insurance coverage to be furnished by the indemnitor.[84]

The court in *Brashar*, citing *Guitard*, noted that New Mexico's statute prevents a party from contracting away its own liability for negligence.[85] However, the court did not refer in its analysis to the underlying public policy elaborated by *Guitard*.[86] The court simply stated that application of Texas' anti-indemnity statute permitting indemnity agreements up to allowable limits of insurance would not be so far outside New Mexico public policy as to make the Texas contract unenforceable by a New Mexico forum.[87] In dicta the court went further and proposed that the statute permitted a party to provide for indemnification by insurance for the negligence of both parties.[88] The court enforced the Texas indemnity contract because Texas law permits an indemnity contract for a party's own negligence if covered by insurance.[89]

In *Herrera v. Amoco Production Co.*,[90] the federal district court considered whether New Mexico law permitted an indemnity agreement for a party's own negligence if insured. An employee of Aztec Well Servicing Company who was injured on the job brought suit against Amoco.[91] Amoco filed a third-party complaint against Aztec Well Servicing Company for indemnification under an indemnity contract.[92] Without mention of *Guitard*, the only New Mexico case interpreting the statute, the district court relied on the dicta in *Brashar* to hold that Amoco had a right to impose on Aztec Well Servicing Company an obligation to purchase liability insurance protecting Amoco from liability for Amoco's own negligence.[93] On appeal the Tenth Circuit disregarded *Guitard* because *Guitard* did not involve a claim under the insurance clause of the well and mine

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84. TEXAS CIV. PRAC. & REM. CODE ANN., § 127.005 (Vernon 1986). *See infra* note 114.
85. 626 F. Supp. at 436-37.
86. 100 N.M. at 362, 670 P.2d at 973.
87. *Brashar*, 626 F. Supp. at 437; *see also* Amicus Curiae Brief for Aztec Well Servicing, Inc., Amoco Prod. Co. v. Action Well Serv., Inc., 107 N.M 208, 755 P.2d 52 (1988).
88. *Brashar*, 626 F. Supp. at 437.
89. *Id.*
90. 623 F. Supp. 378 (D.N.M. 1985), *aff'd*, 843 F.2d 1394 (10th Cir. 1988), *order withdrawn on reh'g*, 854 F.2d 1323 (10th Cir. 1988).
91. *Id.* at 379.
92. *Id.*
93. *Id.* at 379-80.

anti-indemnity statute.[94] The Tenth Circuit affirmed the district court, again without considering the public policy underlying the statute. The Tenth Circuit held that the New Mexico anti-indemnity statute, through the insurance clause, permitted an agreement indemnifying a party for its negligence if the agreement were covered by insurance purchased by the indemnitor.[95]

A New Mexico court for the first time interpreted the insurance clause in *Amoco Production Co. v. Action Well Service*.[96] In *Action Well Service*, the New Mexico Supreme Court declared the federal court's interpretation in *Herrera* of the statute's insurance clause to be incorrect.[97] The court looked to the public policy behind the statute in support of safety in the oil field.[98] The *Action Well Service* court held that the public policy underlying the statute would not permit the use of liability insurance purchased by one party to protect an indemnity agreement covering the other party's negligence.[99] The public policy promoting workplace safety required each party to remain liable for its own negligence.[100] The court stated that the insurance clause protects a party's right to insure its own interests, not the interests of the indemnitee.[101]

B. The Court's Reasoning in Action Well Service

The New Mexico Supreme Court in *Action Well Service* had to determine if the well and mine anti-indemnity statute voided only an *uninsured* agreement to indemnify a party for its liability resulting from its own negligence.[102] The relevant sentence of the statute reads:

> This provision shall not affect the validity of any insurance contract or any benefit conferred by the Workmen's Compensation Act.[103]

The question arising from the statutory language is whether the legislature intended to except from the prohibition of the statute those indemnity provisions that were covered by insurance purchased to support the contractually assumed liability.[104] Amoco maintained that an indemnity agreement between two parties, neither an insurance company, would be enforceable if the indemnitor purchased

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94. *Id.* On rehearing after the decision of New Mexico's Supreme Court in *Action Well Service*, the Tenth Circuit withdrew its order and reversed the district court. 843 F.2d 1323 (10th Cir. 1988).
95. *Herrera*, 843 F.2d 1394.
96. 107 N.M. 208, 755 P.2d 52 (1988).
97. *Id.* at 211, 755 P.2d at 55.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. N.M. STAT. ANN. § 56-7-2(A) (Repl. Pamp. 1986).
104. 107 N.M. at 211, 755 P.2d at 55.

a valid insurance contract to cover the indemnity agreement.[105] Amoco argued that prohibiting its reimbursement under Action Well Service's liability insurance contract amounted to affecting the validity of the insurance contract, a result expressly proscribed by the insurance clause.[106]

Action Well Service, on the other hand, maintained that the legislature intended the words "insurance contract," to denote nothing more than a standard liability policy purchased by a party from an insurance company to cover the party's own negligence.[107] Under Action Well Service's interpretation, the legislature's purpose in including the clause was to make clear that the legislature did not contemplate eliminating a party's right to recoup losses arising from its own negligence through "indemnification" by an insurance contract.[108]

The New Mexico Supreme Court was unsatisfied with the *Brashar* court's flat assertion that the New Mexico insurance clause permitted insured indemnity agreements.[109] The court noted that the Texas anti-indemnity statute[110] applied in *Brashar* was different from the New

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105. *Id.* at 210, 755 P.2d at 54.
106. *Id.*
107. *Id.*
108. *Id.*
109. 107 N.M. at 211, 755 P.2d at 55.
110. The statute reads in relevant part:

> Chapter 127. INDEMNITY PROVISIONS IN CERTAIN MINERAL AGREEMENTS
>
> 127.002. Finding; Agreements Against Public Policy
>
> (a) The legislature finds that an inequity is fostered on certain contractors by the indemnity provisions in some agreements pertaining to wells for oil, gas, or water or to mines for other minerals.
>
> (b) Certain agreements that provide for indemnification of a negligent indemnitee are against the public policy of this state.
>
> 127.003. Agreement Void and Unenforceable
>
> (a) Except as otherwise provided by this chapter, a covenant, promise, agreement, or understanding contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral is void if it purports to indemnify a person against loss or liability for damage that:
>
> (1) is caused by or results from the sole or concurrent negligence of the indemnitee, his agent or employee, or an individual contractor directly responsible to the indemnitee; and
>
> (2) arises from:
>
> (A) personal injury or death;
>
> (B) property injury; or
>
> (C) any other loss, damage, or expense that arises from personal injury, death, or property injury.
>
> . . . .
>
> 127.005. Insurance Coverage
>
> (a) This chapter does not apply to an agreement that provides for indemnity with respect to claims for personal injury or death to the indemnitor's employees or agents or to the employees or agents of the indemnitor's subcontractors if the parties agree in writing that the indemnity obligation will be supported by available liability insurance coverage to be furnished

Mexico anti-indemnity statute.[111] Whereas the New Mexico statute contains only one reference to insurance,[112] the Texas anti-indemnity statute[113] contains two separate insurance clauses. One of the Texas clauses is worded similarly to New Mexico's single insurance clause.[114] The other Texas insurance clause uses express language permitting indemnity agreements covered by insurance.[115] The *Action Well Service* court concluded that without additional language explaining the New Mexico insurance clause, the *Brashar* court could not have interpreted it simply by means of the plain language.[116] A court could only correctly interpret the insurance clause by looking to the

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by the indemnitor.

(b) The indemnity obligation is limited to the extent of the coverage and dollar limits of insurance the indemnitor has agreed to furnish.

(c) The amount of insurance required may not exceed 12 times the state's basic limits for personal injury, as approved by the State Board of Insurance in accordance with Article 5.15, insurance Code.

127.006. Insurance Contract; Worker's Compensation

This chapter does not affect:

(1) the validity of an insurance contract; or

(2) a benefit conferred by the workers' compensation statutes of this state.

TEXAS CIV. PRAC. & REM. CODE ANN., §§ 127.002 to 127.006 (Vernon 1986).

111. Amoco Prod. Co. v. Action Well Serv., 107 N.M. at 211, 755 P.2d at 55; N.M. STAT. ANN. § 56-7-2(A) (Repl. Pamp. 1986).

112. N.M. STAT. ANN. § 56-7-2(A) (Repl. Pamp. 1986).

113. TEXAS CIV. PRAC. & REM. CODE ANN., §§ 127.001 to 127.008 (Vernon 1986).

114. *Compare* N.M. STAT. ANN. § 56-7-2(A) (Repl. Pamp. 1986) ("This provision shall not affect the validity of any insurance contract.") *with* TEXAS CIV. PRAC. & REM. CODE ANN. § 127.006 (Vernon 1986) ("This chapter does not affect the validity of an insurance contract.").

115. The statute reads in relevant part:

(a) This chapter does not apply to an agreement that provides for indemnity with respect to claims for personal injury or death to the indemnitor's employees or agents or to the employees or agents of the indemnitor's subcontractors if the parties agree in writing that the indemnity obligation will be supported by available liability insurance coverage to be furnished by the indemnitor.

TEXAS CIV. PRAC. & REM. CODE ANN. § 127.005 (Vernon 1986).

116. Amoco Prod. Co. v. Action Well Serv., 107 N.M. at 211, 755 P.2d at 55. *See* Tade, *The Texas and Louisiana Anti-Indemnity Statutes As Applied to Oil and Gas Industry Offshore Contracts*, 24 HOUS. L. REV. 665 (1987). The anti-indemnity statutes of Texas and Louisiana each have a clause worded similarly to New Mexico's insurance clause. The statutes all provide that they shall not "affect the validity of an insurance contract." The Texas and Louisiana statutes avoid the ambiguity found in the New Mexico statute, however, because both add a further statement either permitting or prohibiting indemnity agreements supported by available liability insurance coverage furnished by the indemnitor. Texas allows such agreements. TEX. CIV. PRAC. & REM. CODE ANN § 127.005 (Vernon 1986). Louisiana forbids such agreements. LA. REV. STAT. ANN. § 9:2780 (West 1987). Since one statute permits and one disallows indemnity agreements covered by liability insurance, it seems likely that both statutes mean something different from indemnity agreements covered by indemnitor insurance when they both purport not to "affect the validity of an insurance contract." Crosby v. General Tire & Rubber Co., 543 F.2d 1128, 1131 (5th Cir. 1976). Interpreting the insurance clause of Mississippi's anti-indemnity statute the Fifth Circuit observed, "The drafters of the statute, we conclude, did not mean to abrogate [traditional] insurance agreements and, perhaps out of an abundance of caution, they added [the insurance clause]." *Id.*

intent of the New Mexico legislature in passing the statute, a task not undertaken by the *Brashar* court.[117]

The *Action Well Service* court also found the *Herrera* decision, which relied on *Brashar*, to be incorrect because neither the district court nor the court of appeals properly examined the public policy embodied in the statute.[118] The *Action Well Service* court noted that the court in *Herrera* should have relied on the holding in *Guitard* for its explanation of the legislature's intent in making certain indemnity agreements void.[119]

To determine if the contract was void under the well and mine anti-indemnity statute, the *Action Well Service* court looked to the public policy behind the statute. The court found *Guitard*'s examination of the public policy underlying the statute crucial to an interpretation of the insurance clause:[120]

> First, the public policy behind § 56-7-2(A) is to promote safety. The indemnitee, usually the operator of the well or mine, will not be allowed to delegate to subcontractors his duty to see that the well or mine is safe. Our interpretation furthers the public policy behind the statute, which is to promote safety. Both the operator and the subcontractor will have incentive to monitor the safety of the operation knowing that they will be responsible for their respective percentage of negligence.[121]

Where the well operator and contractor each remains responsible for its portion of the damages, each will be encouraged to protect workers and others from personal injury.[122]

The *Action Well Service* court apparently considered insured indemnity agreements protecting one party from its negligence to be a means for the indemnified party to side-step responsibility for its own culpability. Thus, such an agreement would create in the protected party a lesser incentive to monitor workplace safety.[123] Therefore, the court held that the public policy underlying the statute rendered such agreements void. The court concluded that, given the

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117. Amoco Prod. Co. v. Action Well Serv., 107 N.M. at 211, 755 P.2d at 55.

118. *Id. See supra* notes 80 to 93 and accompanying text.

119. *Id.*

120. *Id.* (citing Guitard v. Mobil Oil Corp., 100 N.M. at 361-62, 670 P.2d at 972-73).

121. *Guitard*, 100 N.M. at 361-62, 670 P.2d at 972-73. Here Texas and New Mexico diverge because their policies identify different purposes. Texas notes an inequity fostered upon contractors. TEXAS CIV. PRAC. & REM. CODE ANN. § 127.002(a). New Mexico is concerned about safety in the workplace. *Guitard*, 100 N.M. at 358, 670 P.2d at 969. *Cf.* WASH. REV. CODE ANN. § 4.24.115 (1986) (anti-indemnity statute for construction industry). "The purpose of this chapter is to enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance." Bailie, *Indemnification Agreements*, 23 WILLAMETTE L. REV. 305, 310 (1987) (citing WASH. REV. CODE ANN. § 4.24.115 (1986)).

122. *Guitard*, 100 N.M. 358, 670 P.2d 969 (Ct. App.), *cert. denied*, 100 N.M. 327, 670 P.2d 581 (1983).

123. Amoco Prod. Co. v. Action Well Serv., 107 N.M. at 211, 755 P.2d at 55.

public policy aimed at safety, the insurance clause could not have been intended as an exception to the statute and could therefore only represent the legislature's intention to preserve contracts of insurance between an individual party and its insurers for the party's own negligence.[124]

The court refused to go beyond *Guitard*'s flat prohibition of indemnity agreements that hold the indemnitee harmless for its own negligence.[125] The court stated that New Mexico would not apply the insurance clause as it had been applied in *Brashar* and *Herrera*.[126] It explained that the clause was intended to protect a party's ability to insure its own interests, not the interests of the indemnitee.[127]

C. Implications of Action Well Service

The application of the statute poses problems, even with the interpretation by *Guitard*[128] and *Action Well Service*.[129] After *Action Well Service* the questions remain whether oil and gas companies and their independent contractors can find other ways to avoid liability for the companies' negligence and whether an oil company may insure indemnity contracts that are not prohibited by the well and mine anti-indemnity statute. Unless the legislature chooses to clarify the New Mexico statute as some other state legislatures have done,[130] potential for further litigation remains.

Action Well Service succeeded in sharply curtailing a company's ability to shift liability for its negligence to the independent contractor. An oil company that settles a negligence claim against it cannot recover the amount of its settlement under an indemnity contract even if the contractually assumed liability is covered by insurance.[131]

An insured indemnity agreement, however, is not the only means by which oil companies shift responsibility for company negligence to the independent contractor. Oil companies often draft the master service contract to include a provision requiring the independent contractor to maintain insurance for itself and name the oil company as an additional insured.[132] Designating an oil company an additional insured on the contractor's liability insurance brings the company within the general coverage of the policy, although sometimes with

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124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. 100 N.M. at 360, 670 P.2d at 971.
129. 107 N.M. at 210, 755 P.2d at 54.
130. *See infra* note 134.
131. Amoco Prod. Co. v. Action Well Serv., 107 N.M. at 211, 755 P.2d at 55.
132. *See, e.g.*, Brashar v. Mobil Oil Corp., 626 F. Supp. 434 (D.N.M. 1984); Babineaux v. McBroom Rig Bldg. Serv., Inc., 806 F.2d 1282, *held in abeyance by* 811 F.2d 852, *issuance of mandate ordered* 817 F.2d 1126 (5th Cir. 1987).

limitations regarding the extent of coverage.[133] Such an agreement does not appear to be prohibited by the language of the anti-indemnity statute. No New Mexico case has dealt with whether companies may be included as additional named insureds on the independent contractor's liability insurance, and section 56-7-2(A) contains no specific language concerning the issue.

The New Mexico anti-indemnity statute does not specifically bar this practice.[134] Using the statute to disallow recovery of a company's claim under an additional named insured endorsement would be problematic. No indemnity agreement exists to bring the claim under the well and mine anti-indemnity statute. Thus, to bring the claim under the statute, the court would have to construe the parties' agreement regarding the additional named insured endorsement as an agreement sufficiently similar to an indemnity agreement to invoke the statutory prohibition.

Requiring additional named insured endorsements is not expressly prohibited by the language of the well and mine anti-indemnity statute or by the holding in *Action Well Service*; however, oil companies need to be aware of two areas where the practice may be vulnerable to attack. First, the *Action Well Service* court based its holding on public policy.[135] An additional named insured endorsement may well be contrary to the underlying public policy that all parties involved in oil field work monitor the safety of the operation.[136] Including an oil company as an additional insured on the contractor's policy produces virtually the same result as the indemnity agreements proscribed by the statute: the contractor accepts responsibility for the company's negligence by paying the cost of including an additional insured on the policy. The practice of adding the company to the contractor's insurance effectively frees the company from the consequences of its own negligence.

Second, the *Action Well Service* court framed its conclusion in language that may reach more broadly than the result in the case. The court stated that a party may insure to protect its own interests, not the interests of the other party.[137] In future cases the court might

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133. *See, e.g.*, 7 AM.JUR. 2D *Automobile Insurance-Persons Covered* § 246 (1980).

134. N.M. STAT. ANN. § 56-7-2(A) (Repl. Pamp. 1986). For a statute which specifically prohibits this practice see LA. REV. STAT. ANN § 9:2780(G) (West 1987):

> G. Any provision in any agreement arising out of the operations, services, or activities listed in Subsection C of this Section of the Louisiana Revised Statutes of 1950 which requires waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the prohibitions of this Section, shall be null and void and of no force and effect.

See Babineaux v. McBroom Rig Bldg. Serv., Inc., 806 F.2d 1282 (5th Cir. 1987) (subsection G expressly invalidates agreements requiring "additional named insured endorsements.")

135. Amoco Prod. Co. v. Action Well Serv., 107 N.M. at 211, 755 P.2d at 55.

136. *Id.*

137. *Id.*

decide that requiring an additional named insured endorsement amounts to impermissibly requiring the independent contractor to insure another's interest.

The broad language of the *Action Well Service* holding[138] raises another question. The court does not explain exactly what the indemnitor's "interests" include.[139] By expressly rejecting the holding of *Herrera*, the court is obviously voiding insured indemnity agreements for a party's own negligence.[140] However, a party's insurable interests are conceivably greater than simply the liability stemming from its own negligence.[141] If the *Action Well Service* language "not the interests of the indemnitee"[142] precludes insuring any indemnity agreement at all in the well or gas setting, companies would be unable to require the additional security of contractual liability insurance. Thus, it is not absolutely clear that under the broad language of *Action Well Service* a court would permit a company to insure the sort of indemnity contract declared allowable in *Guitard*.[143] However, such a reading would be over-inclusive because the rationales in both *Guitard* and *Action Well Service* look to the public policy behind the well and mine anti-indemnity statute to find that workplace safety is enhanced by holding each party responsible for its own negligence. Preventing insurance for agreements covering liability arising other than from a party's own negligence might increase the company's commitment to safety, but would thereby decrease the commitment of the independent contractor. The responsibility for safety should be evenly distributed for maximum effect.[144]

Insurable indemnity contracts under *Guitard* would include those that indemnify an oil company for its vicarious liability arising from the independent contractor's negligence.[145] Companies working in the oil and gas industry typically work through independent contractors to avoid the master-servant relationship and its consequent respondeat superior liability. Despite their attempts to avoid responsibility for the independent contractor's negligence, companies may, in certain circumstances, have vicarious liability imposed upon them by law.[146]

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138. *Id.*
139. *Id.*
140. *Id.*
141. 43 AM.JUR. 2D *Insurance-Liability Insurance* § 1002 (1982). "[Insurable interest-] whether [insured] may be charged at law or in equity with the liability against which the insurance is taken out."
142. Amoco Prod. Co. v. Action Well Serv., 107 N.M. at 211, 755 P.2d at 55.
143. *See supra* notes 40 to 62 and accompanying text.
144. *Guitard*, 100 N.M. 358, 670 P.2d 969.
145. *Id.*
146. *See* RESTATEMENT (SECOND) OF TORTS, §§ 416-429 Introductory Note (1965):
> The rules stated in the following [sections] . . . do not rest upon any personal negligence of the employer. They are rules of vicarious liability, making the employer liable for the negligence of the independent contractor, irrespective

Under New Mexico law, when the specific activity is deemed inherently dangerous, the company cannot avoid liability for the independent contractor's negligence.[147] After *Guitard* such liability apparently could still be covered by an indemnity agreement.[148] An allowable agreement would require the independent contractor to indemnify the company where the company had paid a judgment under a respondeat superior theory for the negligence of the independent contractor.

Such an indemnity contract would be beneficial to an oil company for two reasons. Making a claim for indemnity under a contractual right is more advantageous for a company than making a claim for indemnity under a common law right. Historically, if a company were held vicariously liable, any negligence on the company's part eliminated its common law right of indemnification by the independent contractor.[149] However, *Guitard*'s interpretation of the statute as voiding only indemnity agreements for a party's own negligence would presumably allow contractual indemnification of a concurrently negligent company for any part of a judgment that held the company vicariously liable for the independent contractor's negligence.[150]

Additionally, an indemnity agreement may allow an oil company to recover attorney's fees in some instances. Although a company cannot recover fees under a common law claim for indemnification,[151]

> of whether the employer has himself been at fault. They arise in situations in which, for reasons of policy, the employer is not permitted to shift the responsibility for the proper conduct of the work to the contractor. The liability imposed is closely analogous to that of a master for the negligence of his servant.

147. Pendergrass v. Lovelace, 57 N.M. 661, 663, 262 P.2d 231, 232 (1953) ("It is a general rule that an employer is not liable for the negligence of an independent contractor; however, there are certain exceptions to the rule. Work that is intrinsically and inherently dangerous in performance is not delegable so as to escape liability. . . .") *See* RESTATEMENT (SECOND) OF TORTS § 427 (1965). For limitation of section 427 in New Mexico see New Mexico Elec. Serv. Co. v. Montanez, 89 N.M. 278, 281, 551 P.2d 634, 637 (1976) (employer of contractor not liable to injured employee of contractor).

148. *Guitard*, 100 N.M. 358, 670 P.2d 969 (Ct. App.), *cert. denied*, 100 N.M. 327, 670 P.2d 581 (1983).

149. Employers' Fire Ins. Co. v. Welch, 78 N.M. 494, 495, 433 P.2d 79, 80 (1967) ("[A] tortfeasor's employer who has been held liable on the theory of respondeat superior may recover indemnification from the tortfeasor only where the employer's liability is based *solely* upon that doctrine and where there is no actual or active negligence on the part of the employer."). *See* Trujillo v. Berry, 106 N.M. 86, 88, 738 P.2d 1331, 1333 (Ct. App.), *cert. denied*, 106 N.M. 24, 738 P.2d 518 (1987) ("Notwithstanding the adoption of the comparative negligence doctrine, we believe New Mexico still adheres to traditional indemnity principles in some circumstances."). *See* Several Liability Act, N.M. STAT. ANN. § 41-3A-1(C)(2) (1987).

150. *See Guitard*, 100 N.M. 358, 670 P.2d 969 (Ct. App.), *cert. denied*, 100 N.M. 327, 670 P.2d 581 (1983).

151. Gregg v. Gardner, 73 N.M. 347, 360, 388 P.2d 68, 77 (1963) (the general rule in New Mexico is that attorney's fees are not an item of damages). *See* Annotation, *Indemnity-Liability of Subcontractor* 68 A.L.R.3d 7, 64 (1976) ("The costs of prosecuting indemnity clauses is generally denied in the absence of an express agreement.").

a company can recover certain attorney's fees if provided for in an indemnity contract.[152]

A company cannot require the contractor to indemnify it for attorney's fees incurred in the company's defense against its own negligence because the language of the statute prohibits indemnification for "any loss arising . . . from the negligence of the indemnitee."[153] However, the attorney's fees incurred in defending against vicarious liability and in successfully prosecuting the indemnity claim are presumably allowable under *Guitard* and insurable under *Action Well Service.*

Indemnity agreements may retain their usefulness to oil companies despite the oil companies' practice of requiring additional insured endorsements. Therefore, the added security of contractual liability insurance supporting the agreements also remains important. It is almost certain that the *Action Well Service* decision does not eliminate a company's right to insure allowable indemnity contracts in the oil and gas industries. If the indemnity contract is permitted, it should be insurable.

IV. CONCLUSION

The well and mine anti-indemnity statute voids any indemnity provision in an agreement concerning oil, gas, and water wells or an agreement concerning mines for minerals when the agreement holds a party harmless for its own negligence. The statute also states that it will not affect the validity of insurance contracts. The New Mexico Supreme Court in *Amoco Production Co. v. Action Well Service, Inc.* refused to read the insurance clause as an exception to the statute that would allow a party to contract away liability for its own negligence by requiring the indemnitor to cover the indemnity agreement with contractual liability insurance. As a result, oil and gas companies can no longer avoid their liability for negligence through the means of an indemnity agreement covered by insurance. Two questions of interest to oil and gas companies remain unresolved. *Action Well Service* does not address whether the court will limit oil and gas companies' practice of requiring independent contractors to add the company to the independent contractor's liability insurance as an additional named insured. Nor is it clear whether *Action Well Service* invalidates contractual liability insurance coverage of indemnity agreements addressing liability other than the indemnitee's own negligence.

LINDA M. RAMSEY

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152. Annotation, *Indemnity-Liability of Subcontractor* 68 A.L.R.3d 7, 64 (1976).
153. *See supra* note 2.