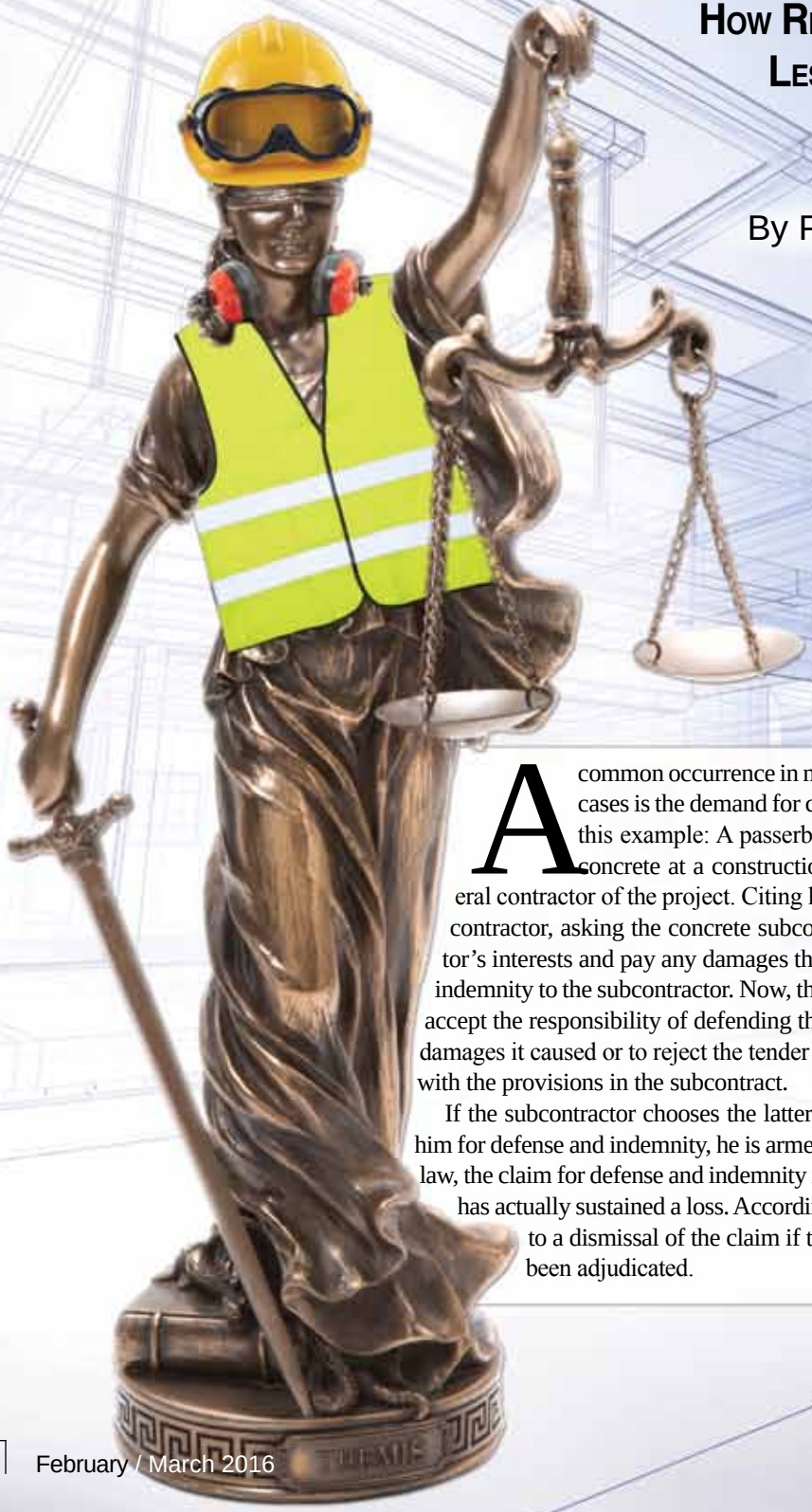
The Prematurity Defense to Contractual Indemnity Claims in Louisiana:

How Recent Decisions Have Lessened Its Effectiveness — For Better or Worse

By Philip G. Watson



A common occurrence in many construction and premises liability cases is the demand for contractual defense and indemnity. Take this example: A passerby injures her foot on a jagged piece of concrete at a construction site and brings suit against the general contractor of the project. Citing language in the subcontract, the general contractor, asking the concrete subcontractor to defend the general contractor's interests and pay any damages that it might owe, tenders its defense and indemnity to the subcontractor. Now, the subcontractor must decide whether to accept the responsibility of defending the general contractor and of paying any damages it caused or to reject the tender and risk a lawsuit for failing to comply with the provisions in the subcontract.

If the subcontractor chooses the latter option and the general contractor sues him for defense and indemnity, he is armed with a solid defense. Under Louisiana law, the claim for defense and indemnity is premature until the general contractor has actually sustained a loss. Accordingly, the subcontractor could be entitled to a dismissal of the claim if the general contractor's fault has not yet been adjudicated.

However, a recent appellate decision rejected that defense, holding that the mere claim for defense and indemnity is not premature. This decision underscores a potential conflict between Louisiana Supreme Court jurisprudence and more recent appellate court rulings and between the basic principles of expediency and ripeness. Clarity in the form of a Supreme Court ruling could have far-reaching implications for contractual indemnity claims in Louisiana; in the meantime, however, the absence of clarity leaves litigants and their lawyers with tough choices to make in terms of defending these claims.

Meloy, *Suire* and the "well-settled" principle that a claim for defense and indemnity is premature because the indemnitee has not sustained any compensable loss.

As the Louisiana Supreme Court has long recognized, an indemnity agreement is a specialized type of contract, one that does not hold the indemnitor liable until the indemnitee actually makes a payment or sustains a loss. *Meloy v. Conoco, Inc.*, 504 So.2d 833, 839 (La. 1987); *see, Alwell v. Meadowcrest Hosp., Inc.*, 07-376 (La. App. 5 Cir. 10/30/07), 971 So.2d 411, 414 n. 2. "Therefore, a cause of action for indemnification for cost of defense does not arise until the lawsuit is concluded and defense costs are paid." *Meloy*, 504 So.2d at 839.

A decade ago, the Supreme Court handed down an important decision in this area of the law, *Suire v. Lafayette City-Parish Consol. Gov't*, 04-1459 (La. 4/12/05), 907 So.2d 37. In *Suire*, the city of Lafayette reached an agreement with plaintiff Suire to dredge and improve a channel that ran through Suire's land. *Id.* at 42. The city hired Dubroc Engineers to design the project and hired Boh Brothers to perform the work. *Id.* Suire later sued the city, Dubroc and Boh Brothers for cracks and damage to his house that were caused by the dredging project. *Id.* at 43.

Following the commencement of Suire's suit, the city and Dubroc filed a cross-claim against Boh Brothers for defense and indemnification under the contract between the city and Boh Brothers. *Id.* at 43. The city and Dubroc followed this cross-claim with a motion for summary judgment seeking defense and indemnity, which the trial court granted and the Louisiana 3rd Circuit Court of Appeal affirmed. *Id.* at 44, 47.

The Louisiana Supreme Court reversed the ruling, holding that, under well-settled law, the claim for defense and indemnity was premature because neither the city nor Dubroc had sustained any compensable loss. *Id.* at 51. The Court found that the lawsuit was still pending and that no determination of liability had been made; thus, it was error to hold that Boh Brothers owed a duty to defend or pay for defense costs at that stage. *Id.* As the Court saw it, "a cause of action for indemnification for cost of defense does not arise until the lawsuit is concluded and defense costs are paid." *Id.*

Having reinforced the *Meloy* holding, *Suire* set the stage for many litigants to argue that a claim for defense and indemnity was premature if the indemnitee had not sustained a loss of some kind. Numerous appellate courts followed the Supreme Court's lead and held that defense and indemnity claims were premature unless a loss had been sustained. *See, e.g., Bates v. Alexandria Mall I, L.L.C.*, 09-361 (La. App. 3 Cir. 10/7/09), 20 So.3d 1207; *Gently v. West Jefferson Medical Center*, 05-687 (La. App. 5 Cir. 2/27/06), 925 So.2d 661.

Post-*Suire*, the distinction is drawn between the right to claim defense and indemnity and the right to collect it.

The holding of *Suire* and *Meloy* laid the groundwork for an effective impediment to defense and indemnity claims — the dilatory exception of prematurity. *See*, La. C.C.P. art. 926. By utilizing such an exception, the putative indemnitor could obtain a dismissal of the claim before any monies were incurred defending and/or indemnifying the indemnitee.

In the wake of these decisions, however, a central question has emerged — is the actual *claim* for defense and indemnity premature or only the litigant's ability to *collect* defense costs and indemnification? In other words, can an indemnitee file a timely lawsuit for defense and indemnity, with the understanding that collection of these costs could not occur until the indemnitee sustains a loss of some kind?

The jurisprudence has offered conflicting answers to this question. *Suire* itself holds that a "claim" for defense and indemnity is premature if the indemnitee has not sustained any compensable loss. 907 So.2d at 51. Moreover, the *Suire* court held that a cause of action does not even arise until defense costs are paid and the lawsuit is concluded. *Id.* Given that the highest court in the state has held that a claim for defense and indemnity is premature and has specifically held that such a cause of action does not arise until the lawsuit is concluded, the effect of the decision should bar any claims for defense and indemnity unless a loss has been sustained.

However, subsequent appellate court decisions and Supreme Court concurrences have reached the opposite conclusion. These opinions are rooted in the Louisiana Code of Civil Procedure, which specifically allows a main defendant to file a third-party demand against one who is *or may be* liable to the defendant for all or a portion of the main demand. La. C.C.P. art. 1111. The very purpose of this procedural mechanism is to permit a defendant to bring a claim against a third-party defendant for defense and indemnity; as the Supreme Court has acknowledged, "[T]he third party demand is a device principally used for making claims of contribution or indemnity in the event that defendant is cast in judgment on the principal demand." *Union Service & Maintenance Co. v. Powell*, 393 So.2d 94, 95 (La. 1980).

Furthermore, the failure to bring such a third-party demand could have serious consequences for the putative indemnitee — if he brings no such demand, the indemnitor could argue that the indemnitee has forfeited his cause of action by failing to assert a means of defeating the action that the indemnitor possessed. La. C.C.P. art. 1113.

Based on these code articles, several reported cases have drawn a distinction between the timeliness of a claim for defense and indemnity and the actual collection of such. *See, Burns v. McDermott, Inc.*, 95-0195 (La. App. 1 Cir. 11/9/95), 665 So.2d 76, 79 (holding that although ultimate responsibility for defense costs in indemnity agreements is governed by whether the indemnitee sustains a loss, there is no prohibition against asserting the claim for defense costs in a third party demand); *Dean v. Entergy Louisiana, L.L.C.*,, 10-887 (La. App. 5 Cir. 10/19/10), 2010 WL 9447498, *4 ("*Meloy* and *Suire* . . . do not stand for the proposition that there

is a prohibition from asserting the claim for indemnification in a third party demand.").

Perhaps the most notable of these decisions is one of the most recent — *Pizani v. St. Bernard Parish*, 12-1084 (La. App. 4 Cir. 9/26/13), 125 So.3d 546. *Pizani* is notable because it relies upon post-*Suire* pronouncements from Supreme Court justices to reach the conclusion that, while collection of defense and indemnity cannot occur until the indemnitee sustains a loss, the mere claim is not premature. *See id.* at 553. In *Pizani*, the Louisiana 4th Circuit Court of Appeal seized upon language in two concurrences — one from Justice Weimer in a 2008 Supreme Court decision, *Reggio v. E.T.I.*;[1] and the second from Justice Victory in a 2011 decision, *Moreno v. Entergy Corp.*[2] The thrust of those concurrences was: "[T]here is a distinction between the right to claim indemnity and the right to collect indemnity." *Pizani*, 125 So.3d at 553 (citing *Reggio*, 15 So.3d at 960 (Weimer, J., concurring)). The *Pizani* court also seized on Justice Victory's reasoning that third-party procedure was vital because it allowed a third party to participate in the trial on the principal demand, thereby potentially warding off a large judgment the third party would have to indemnify in the future. *Id.* (citing *Moreno*, 64 So.3d at 765-66 (Victory, J., concurring)).

Pizani gives a clear picture of how the Supreme Court might ultimately address this central issue of a premature claim or merely of a premature right to collect. While *Suire* spoke in terms of the prematurity of a "claim," the Court was not analyzing the specific distinction brought into focus by *Pizani*. Furthermore, *Suire* reviewed the lower court's grant of a summary judgment in favor of the indemnitees, the city of Lafayette and the engineer Dubroc. This summary judgment awarded the city and Dubroc defense and indemnity despite the fact that the main demand against them was still pending and neither had sustained any loss. Would *Suire* have reached a different conclusion if Boh Brothers, the would-be indemnitor, had only filed an exception of prematurity that asked for the dismissal of the claim for defense and indemnity? Under that scenario, would *Suire* have permitted the claim itself to survive? *Pizani* suggests that the answer to both questions is yes and its use of two Supreme Court concurrences gives it an imprimatur.

Litigants must choose the best path but, because the issue creates a conflict between basic issues of economy and ripeness, the Supreme Court should issue a definitive ruling.

The current state of the law on this issue leaves litigants and practitioners with an important decision to make when faced with a defense and indemnity demand — to seek dismissal of the claim based on prematurity grounds, or to forego the exception and participate in the lawsuit. Prevailing on an exception of prematurity would result in dismissal, certainly, and could save the indemnitor needless fees and expenses. But it would not preclude an action for defense and indemnity once the indemnitee has actually sustained his loss. Also, as Justice Victory pointed out, third-party practice actually allows putative indemnitors to play a vital role in the main demand when they otherwise could have been excluded from the process. *See, Moreno*, 64 So.3d at 765-66 (Victory, J., concurring). By participating, the third party can influence the presentation of evidence, the witness testimony and all other facets of the litigation. As Justice Victory observed, this could allow the third party to avert a large damage award that it could have been forced to indemnify if not for its involvement in the case. Therefore, a third party has a valid reason to participate in the defense of a third-party demand rather than seek its dismissal on prematurity grounds.

In addition to helping resolve the difficulties inherent in making this choice, there is good reason why clarity from the Supreme Court is preferable in this situation. What *Pizani* and similar decisions seemingly ignore is the concept that no matter how expedient third-party practice may be, the process casts aside the basic justiciability requirement of ripeness. As the 4th Circuit held, little more than a month before it decided *Pizani*: "An action that is brought before the right to enforce it has accrued is deemed premature." *Burandt v. Pendleton Memorial Methodist Hosp.*, 13-0049 (La. App. 4 Cir. 8/7/13), 123 So.3d 236, 240. This should mean that an indemnitee's claim for defense and indemnity, which does not accrue until the indemnitee sustains a loss, is premature and not ripe for adjudication. *See, Lexington Ins. Co. v. St. Bernard Parish Gov't*, 548 F. App'x 176, 180 (5 Cir. 2013) ("Accordingly, Louisiana law generally provides that the issue of indemnity is premature and *non-justiciable* until the underlying issue of liability is resolved and the defendant is cast in judgment.") (emphasis added).

Yet, *Pizani* and other authorities hold that the claim is nevertheless viable, apparently under the auspices of judicial expediency and the benefit to the parties. This presents a slippery slope — it might be expedient and beneficial to allow a non-injured motorist to file a placeholder claim the day after his vehicle collision in the event he later experiences pain, or it may behoove all involved parties to allow a patient just out of surgery to file a malpractice claim if he later finds out that his physician erred on the operating table. But such lawsuits would be dismissed out of hand for lack of any cognizable damages. Here, however, *Pizani* and similar decisions would allow that very thing to occur. Therefore, the Supreme Court may, and probably should, be called upon to determine whether the worthy goals of expediency and economy should prevail over the fundamental requirement of ripeness.

In the meantime, those involved in civil litigation must weigh the costs and benefits of the various methods of handling defense and indemnity claims. The choices are ample. Of course, the individual facts of the lawsuit — as is so often the case — will be the determinative factors in deciding the best approach.

FOOTNOTES

1. 07-1433 (La. 12/12/08), 15 So.3d 951.
2. 10-2268 (La. 2/18/11), 64 So.3d 761.

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