BakerHostetler

Texas Oilfield Indemnity Handbook



I. INTRODUCTION 1
II. INDEMNITY 2
A. Generally 2
1. Three Types of Indemnity 2
2. Knock-for-Knock Indemnity 2
B. Enforceability 3
1. The Texas Oilfield Anti-Indemnity Act ("TOAIA") 3
a. History of TOAIA 3
b. The Current TOAIA 4
c. TOAIA Exclusions 7
d. The Insurance Coverage Exception ("Safe Harbor Provision") 8
2. Fair Notice Requirements 10
a. Conspicuousness 10
b. Express Negligence Doctrine 11
C. Process for Evaluating Indemnity Obligations 12
D. Indemnity in Practice 19
1. What Party Should Do Upon Learning of Claim or Lawsuit 19
2. Exemplar Correspondence Making Demand for Defense and Indemnity 21
3. What a Party Should Do Upon Receiving a Tender for Defense and Indemnity 22
4. Exemplar Response to Tender for Defense and Indemnity 23
E. Additional Indemnity Issues 24
1. Obtaining Pass-Through Indemnity 24
2. What if a Party Fails to Obtain the Insurance it Contractually Agreed to Obtain? 29
3. Can Parties Agree to Indemnify for Gross Negligence? 29
4. Can Parties Contractually Carve out Exceptions to Mutual Indemnity Clauses? 30
5. Duty to Defend vs. Duty to Indemnify 32
6. Indemnity Agreements are Interpreted in Favor of the Indemnitor 33
III. INSURANCE 33

A. Self-Insured Retention ("SIR") vs. Primary Insurance vs. Fronting Policy 34
B. Duties of the Insured 34
1. Duty to Notify the Carrier 35
2. Duty to Cooperate 35
C. Duties of the Insurer 36
D. Evaluating the Indemnitor's Insurance Coverage 36
1. What is the Deductible? Is it a SIR? Is it a Fronting Policy? 37
2. What are the Limits of the Commercial General Liability Policy? 37
3. Have the Parties Contractually Agreed to Name Each Other as "Additional Insured" under the Relevant Insurance Policies? 38
E. Coverage for an Additional Insured 38
F. A Self-Insured Retention (SIR) can be Satisfied by Other Parties 42
G. Other Insurance Issues that May Arise 42
1. Did the Insured Contractually Agree to Obtain an Insurance Policy that Waives a Right to Subrogation? Was the Right Waived? 42
2. Is a Company Entitled to Insurance Coverage for Punitive Damages if the Policy is Silent on Punitive Damages? 43
3. Can an Insured Stop its Insurer from Settling a Case or Bring Suit Against its Insurer for Negligence in Handling a Claim? 43
IV. CHOICE OF LAW 46
A. Onshore: Contractual Choice of Law 47
B. Offshore: Navigating OCSLA and Maritime Law 48
1. What Law Applies in State Territorial Waters: The Submerged Lands Act 48
2. What Law Applies on the OCS: Outer Continental Shelf Lands Act ("OCSLA") 49
a. Maritime v. State Law under OCSLA 50
b. Determining the "adjacent state" under OCSLA 54
V. OTHER STATES WITH ANTI-INDEMNITY ACTS 55
A. Louisiana Oilfield Anti-Indemnity Act 56
1. Summary and Highlights 56
2. The Statute 56
3. History and Intent 59

4. Prominent Cases 59
B. New Mexico Oilfield Anti-Indemnity Act 60
1. Summary and Highlights 60
2. The Statute 61
3. History and Intent 62
4. Prominent Cases 62
C. Wyoming Oilfield Anti-Indemnity Act 63
1. Summary and Highlights 63
2. The Statute 63
3. History and Intent 64
4. Prominent Cases 65
VI. DRAFTING TIPS 66
A. Indemnity 66
B. Insurance 69

About the Author



Thomas A. Donaho
811 Main Street, Suite 1100
Houston, TX 77002
T +1.713.276.1668
M +1.713.412.4221
tdonaho@bakerlaw.com

Tom Donaho focuses his practice on complex commercial and business litigation. He has experience representing energy clients in a wide range of contract matters, business torts and real estate disputes. Tom regularly works with energy companies to develop contracts that serve risk allocation needs through indemnity and insurance protections. He has substantial experience representing companies in connection with indemnity disputes, insurance disputes, and contract claims.

BakerHostetler's Energy Team

Members of BakerHostetler's Energy team, recognized as Energy Group of the Year by *Law360*, have extensive experience working with clients to craft comprehensive contracts that incorporate all aspects of an effective risk allocation program, including indemnity and insurance protections. The BakerHostetler Energy Team regularly drafts and reviews all manner of energy-related agreements, including master service agreements, farmout agreements, onshore and offshore drilling contracts, construction agreements, and other oilfield service contracts. To that end, BakerHostetler attorneys have a wealth of experience navigating oilfield anti-indemnity statutes across the country, including the Texas Oilfield Anti-Indemnity Act. Energy production is a process with unlimited challenges and legal disputes. BakerHostetler can help you resolve litigation arising from contractual disputes involving oil and gas leases, joint operating agreements, joint development agreements, exploration and development agreements, drilling contracts, licensing agreements, service contracts, patent infringement, offshore environmental compliance and oil spill issues. Our attorneys have extensive experience representing clients in connection with indemnity and insurance disputes arising from disputes in the oilfield.

BakerHostetler's Oilfield Indemnification Team



Thomas A. Donaho
Associate
tdonaho@bakerlaw.com



W. Ray Whitman
Partner
rwhitman@bakerlaw.com



Eric W. Kristiansen
Partner
ekristiansen@bakerlaw.com



James C. Winton
Partner
jwinton@bakerlaw.com



W. John English Jr.
Partner
jenglish@bakerlaw.com



Gary M. Alletag
Partner
galletag@bakerlaw.com



Mark L. Jones
Partner
mjones@bakerlaw.com



Mark S. Barron
Partner
mbarron@bakerlaw.com



Douglas D. D'Arche
Partner
ddarche@bakerlaw.com



Emily B. Thomas
Counsel
ethomas@bakerlaw.com



Shanisha Y. Smith
Associate
sysmith@bakerlaw.com

I. INTRODUCTION

In Texas, natural gas exploration and production is often a multi-party endeavor. Oilfield operators enter into form drilling contracts (i.e. IADC onshore drilling contracts) or Master Service Agreements ("MSA") with contractors under which the contractors agree to provide services and materials for the operators. Owners of mineral leases enter into farmout agreements that provide for the provision of services in exchange for a percentage ownership in the lease. Parties with mineral lease interests enter into joint exploration and development agreements. All of these agreements can include indemnity provisions that dramatically shift the risks and liabilities of the parties.

Such indemnity agreements are common in the industry. In fact, four states have enacted anti-indemnity statutes to specifically address the oilfield services industry—Texas, New Mexico, Louisiana, and Wyoming. Each state's oilfield anti-indemnity statute was enacted to promote fairness and prevent owners and/or operators of oil and gas wells from shifting potential liabilities to well service contractors with minimal bargaining power.

Oilfield indemnity agreements in Texas must be specially tailored to satisfy Texas' anti-indemnity statute, and to achieve the drafting parties' risk-shifting objectives. This can be a complicated undertaking. The purpose of this handbook is to give an overview of numerous issues that must be given consideration in preparing a valid oilfield indemnity provision, and to advise practitioners on how to navigate such provisions once an incident in the oilfield occurs. In addition to reviewing Texas law on oilfield indemnity issues, this handbook will also address assorted insurance and choice-of-law issues likely to confront parties to any such indemnity agreements.

II. INDEMNITY

A. Generally

The Texas Supreme Court succinctly describes an indemnity agreement as "a promise to safeguard or hold the indemnitee harmless against either existing and/or future loss liability."[1] Oil and gas companies frequently enter into contracts that allocate risk with some form of contractual indemnity because the oilfield is a workplace that presents uncommonly high risk of bodily injury or property loss. All parties in the Texas oilfield—from the operator, to the drilling contractor, to the equipment manufacturers—have a distinct financial interest in protecting themselves from substantial liability with a well-considered risk allocation program that includes some form of indemnity protection supported by appropriate liability insurance.

1. Three Types of Indemnity

Indemnity agreements can come in many forms. However, there are three basic forms of indemnity common throughout the industry.

Narrow Form Indemnity: This form of indemnity only requires the indemnitor to indemnify the indemnitee where the indemnitor is at fault or has caused or contributed to the indemnitee's damages. Any negligence by the indemnitee will bar indemnification.

Intermediate Form Indemnity: This form of indemnity allows indemnification for loss caused, in part, by the indemnitee in connection with the subject matter of the contract. However, there is no indemnification for damages or loss caused by the indemnitee's sole negligence.

Broad Form Indemnity: This form of indemnity often requires that the indemnitor indemnify the indemnitee for all losses, regardless of fault, including losses caused by the sole or concurrent negligence of the indemnitee.

2. Knock-for-Knock Indemnity

Many typical oilfield operations contracts (e.g. drilling contract or "Master Service Agreement") will contain a mutual, or reciprocal, broad form indemnity provision that is commonly known as "knock-for-knock" indemnity. A knock-for-knock indemnity scheme makes each party responsible for the death or injury of its own employees and/or for loss or damage to its own property, regardless of the cause, negligence, or fault of any party to the contract.

[1] Dresser Indus., Inc. v. Page Petrol., Inc., 853 S.W.2d 505, 508 (Tex. 1993).

B. Enforceability

An oilfield indemnity agreement will not be treated as valid unless it satisfies both the Texas Oilfield Anti-Indemnity Act and certain fair notice requirements established by the Texas courts.

1. The Texas Oilfield Anti-Indemnity Act ("TOAIA")

a. History of TOAIA

The Texas Oilfield Anti-Indemnity Act was promulgated in 1973 and later codified as Chapter 127 of the Texas Civil Practice and Remedies Code.[2] The Legislature passed the law because there was "an inequity fostered on contractors by the indemnity provisions in certain agreements pertaining to wells for oil, gas, or water or to mines for other minerals."[3]

Prior to the enactment of TOAIA, many oil companies and oil well operators had "hold harmless" agreements with oil well drilling and service contractors.[4] These agreements generally required the contractors to indemnify the operators for losses caused by the negligence of the contractor, and often for the negligence of the operator and third parties as well.[5] Many believed that such agreements placed an undue financial burden on those perceived to be small contractors with less bargaining power.[6] These contractors had agreed to indemnify operators, but they were unable to obtain insurance at a reasonable cost to cover liability that might arise from such indemnity obligations.[7] Therefore, contractors were subjected to significant liability with no feasible means of insuring against those obligations.[8]

The 1973 version of TOAIA stated that the Legislature found "certain agreements where there is negligence attributed to the indemnitee to be against the public policy of the State."[9] However, not all indemnity agreements in the industry were void because, under the first version of TOAIA, there was an exemption if the parties had agreed in writing that the indemnity obligation would be supported by available liability coverage not to exceed certain dollar limits.[10] The dollar limits would be calculated with reference to the state's

---

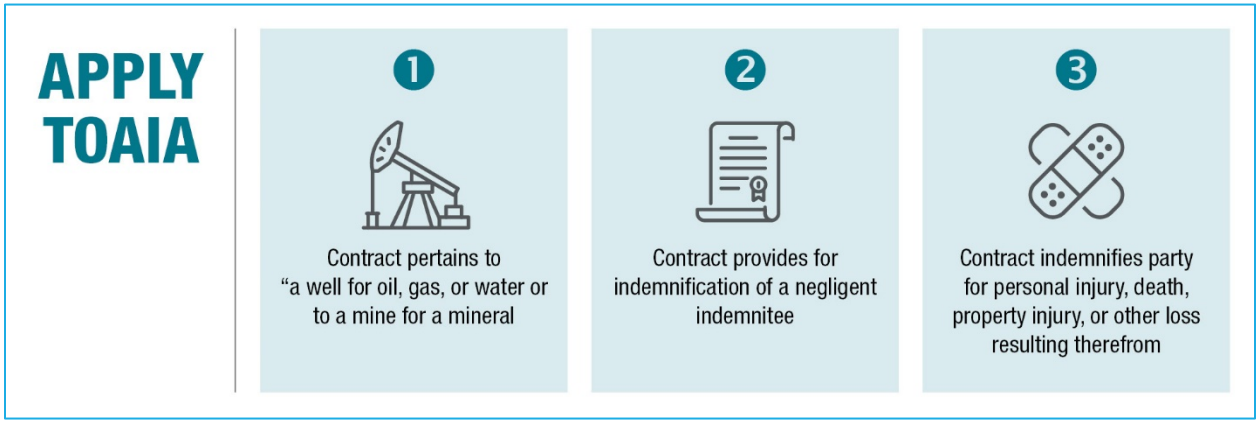
[2] *See* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3319–20 (amended 1989, 1991, 1995, 1999) (current version at TEX. CIV. PRAC. & REM. CODE §§ 127.001–007).
[3] Act of May 19, 1973, 63rd Leg. R.S., ch. 646 § 1, 1973 Tex. Gn. Laws 1767 (amended 1985, 1991).
[4] Getty Oil Co. v. Ins. Co. of N. Am., 845 S.W.2d 794, 803 (Tex. 1992).
[5] *Id*.
[6] *Id*.
[7] *See* Ken Petrol. Corp. v. Questor Drilling Corp., 24 S.W.3d 344, 348 (Tex. 2000); *see also Ranger Ins. Co*., 78 S.W.3d at 659, 661 (Tex. App.—Houston [1st Dist.] no pet.).
[8] *Ken Petrol. Corp*., 24 S.W.3d at 348.
[9] Act of May 19, 1973, 63rd Leg., R.S., ch. 646, § 1, 1973 Tex. Gen. Laws 1767 (amended 1985, 1991); *see also Ken Petrol. Corp*., 24 S.W.3d at 348.
[10] *Ken Petrol. Corp*., 24 S.W.3d at 349.

basic limits for personal injury established by the former State Board of Insurance under the Insurance Code.[11]

In 1989, the Legislature amended TOAIA in response to requests by contractors and operators alike.[12] Liability insurance had become readily available to contractors to support contractual indemnity agreements, so the amendments were intended to make the act less restrictive. The amendments differentiated between mutual and unilateral indemnity agreements and placed no cap on the amount of insurance that could be required by mutual indemnity obligations.[13] The amendments also increased the monetary cap on the amount of insurance that could be required by a unilateral indemnity agreement to $500,000.[14] The 1991 and 1995 amendments to the act did not make substantial changes.

In 1999, the Legislature again amended TOAIA to change the extent of coverage and dollar limits of insurance, or qualified self-insurance, each party as indemnitor is required to obtain. Instead of requiring each party to provide insurance "in equal amounts" to the other party as indemnitee, as previously promulgated, the Legislature required that each party simply agree to obtain insurance "for the benefit of" the other party as indemnitee.[15]

b. The Current TOAIA



The most recent iteration of TOAIA is provided in the Texas Civil Practice & Remedies Code at §§ 127.001–007.[16] In its current form, TOAIA provides that agreements pertaining to a well for oil, gas, or water, or to a mine for a mineral, are void as a matter

[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] Act of August 30, 1999, 67th Leg. R.S., ch. 1006 (H.B. 2853).
[16] The Texas Supreme Court has counseled that TOAIA is to be strictly construed to permit parties to contract freely with regard to agreements not covered by the statute's language. *Getty Oil Co*., 845 S.W.2d at 805.

of public policy if they purport to indemnify an entity against liability for its own negligence.[17] The statute states in full:

> (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.[18]

The Act defines the term "**agreement**:"

> (1) "Agreement pertaining to a well for oil, gas, or water or to a mine for a mineral":
>
> > (A) means:
> >
> > > (i) a written or oral agreement or understanding concerning the rendering of **well or mine services**; or
> > >
> > > (ii) an agreement to perform a part of those services or an act collateral to those services, including furnishing or renting equipment, incidental transportation, or other goods and services furnished in connection with the services; ...[19]

The statute further defines "**well or mine service**:"

> (4) "Well or mine service:"
>
> > (A) includes:
> >
> > > (i) drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, purchasing, gathering, storing, or transporting oil, brine water, fresh water, produced water, condensate, petroleum products, or other liquid

[17] TEX. CIV. PRAC. & REM. CODE ANN. § 127.003 (West 2016).
[18] *Id*.
[19] *Id*. § 127.001(1).

commodities, or otherwise rendering services in connection with a well drilled to produce or dispose of oil, gas, other minerals or water; and

(ii) designing, excavating, constructing, improving, or otherwise rendering services in connection with a mine shaft, drift, or other structure intended for use in exploring for or producing a mineral; but

(B) does not include:

(i) purchasing, selling, gathering, storing, or transporting gas or natural gas liquids by pipeline or fixed associated facilities; or

(ii) construction, maintenance, or repair of oil, natural gas liquids, or gas pipeline or fixed associated facilities.[20]

i. <u>What Qualifies as an "Agreement" that "Pertains to" a Well for Oil, Gas, or Water</u>

The Legislature has listed no less than fifteen (15) specific activities that fall within the definition of well or mine services. These activities range from general maintenance tasks ("repairing" or "improving") to completion tasks ("drilling") to post-completion work ("deepening" and "reworking").[21] In addition to these enumerated activities, the Legislature has included in the definition of "well or mine service" a "catch-all" provision that broadly defines the term to include "otherwise rendering services in connection with a well drilled to produce oil, gas, other minerals, or water."[22] In the Fifth Circuit case *In re Complaint of John E. Graham & Sons*, the court interpreted this "catch-all" provision as an indicator of the Legislature's "intent to expand the scope of activity constituting well or mine service to other types of work falling within the same general class or category as the activities specifically listed in the definition."[23] In that case, the Fifth Circuit adopted the basic rule that "a contractor is 'otherwise rendering services in connection with a well'… if the services called for by the contract bear a close nexus to a well and are directed toward the goal of obtaining or maintaining production from a well."[24]

Texas Courts have periodically provided guidance on whether TOAIA applies to an agreement or not. In *Coastal Transport Co. v. Crown Central Petroleum Corp.*, the Houston Fourteenth Court of Appeals found that claims arising from injuries or losses at a petroleum loading terminal did not "involve the drilling or servicing of a well" and

[20] *Id*. § 127.001(4).
[21] *Id.*
[22] *Id.*
[23] *In re* Complaint of John E. Graham & Sons, 210 F.3d 333, 343 (5th Cir. 2000).
[24] *Id.*; *see also* Phillips Petrol. Co. v. Brad & Sons Constr. Inc., 841 F. Supp. 791, 795–96 (S.D. Tex. 1993) ("The Act obviously applies to those contracts for services involved in the drilling or servicing of wells. While there is no doubt that the coverage of the Act is broad, it is broad to the extent that it covers well services and activities relating to well drilling or servicing.").

therefore did not invoke the provisions of the TOAIA.[25] In *Transworld Drilling v. Levingston Shipbuilding Co.*, the Beaumont Court of Appeals found that a contract for the repair of an off-shore drilling rig in a shipyard did not pertain to the drilling of a well, and therefore did not apply TOAIA.[26] In *Catlin Specialty Insurance Co. v. L.A. Contractors, Ltd.*, the United States District Court for the Southern District of Texas found that a contract for the supply and transportation of materials for construction of a well pad and private roads did not pertain to the drilling of a well, and therefore also did not apply TOAIA.[27]

c. TOAIA Exclusions

There are certain injuries and contracts to which TOAIA does not apply. These exclusions are each set out in the body of the statute.

i. Joint Operating Agreement Provisions

Section 127.002(c) of the statute states that "joint operating agreement provisions for the sharing of costs or losses arising from joint activities, including costs or losses attributable to the negligent acts or omissions of any party conducting the joint activity," are not against the public policy of the state and are enforceable, "unless those costs or losses are expressly excluded by written agreement."[28]

ii. Radioactivity

TOAIA does not apply to loss or liability for damages or an expense arising from "personal injury, death, or property injury that results from radioactivity."[29]

iii. Pollution

TOAIA does not apply to loss or liability for damages or an expense arising from "property injury that results from pollution, including cleanup and control of the pollutant."[30]

iv. Reservoir or Underground Damage

TOAIA does not apply to loss or liability for damages or an expense arising from "property injury that results from reservoir or underground damage, including loss of oil, gas, other mineral substance, or water or the well bore itself."[31]

---

[25] Coastal Transp.t Co. v. Crown Cent. Petrol. Corp., 20 S.W.3d 119, 127–28 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).
[26] Transworld Drilling v. Levingston Shipbuilding Co., 693 S.W.2d 19, 23 (Tex. App.—Beaumont 1985, no writ).
[27] Catlin Specialty Ins., Co. v. L.A. Contractors, Ltd., No. CV H-14-261, 2016 WL 4276131, at *7 (S.D. Tex. July 25, 2016), *report and recommendation adopted*, No. CV-H-14-0261, 2016 WL 4747689 (S.D. Tex. Aug. 15, 2016).
[28] TEX. CIV. PRAC. & REM. CODE ANN. § 127.002(C).
[29] *Id.* § 127.004(1).
[30] *Id.* § 127.004(2).
[31] *Id.* § 127.004(3).

v. Well Control—Personal Injury and Property Damage

TOAIA does not apply to loss or liability for damages or an expense arising from "personal injury, death, or property injury that results from the performance of services to control a wild well to protect the safety of the general public or to prevent depletion of vital natural resources …."[32]

vi. Well Control—Costs

TOAIA does not apply to loss or liability for damages or an expense arising from "cost of control of a wild well, underground or above the surface."[33]

vii. Insurance Contracts and Workers' Compensation Benefits

TOAIA does not affect "the validity of an insurance contract" or "a benefit conferred by the workers' compensation statutes of [Texas]."[34]

viii. Owner of Surface Estate

TOAIA "does not deprive an owner of the surface estate of the right to secure indemnity from a lessee, an operator, a contractor, or other person conducting operations for the exploration or production of minerals of the owner's land."[35]

d. The Insurance Coverage Exception ("Safe Harbor Provision")

TOAIA explicitly does not void agreements that purport to indemnify parties against liability for their own negligence if:

> (a) [T]he parties agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the indemnitor subject to the limitations specified in Subsection (b) or (c).
>
> (b) With respect to a mutual indemnity obligation, the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party as indemnitor has agreed to obtain for the benefit of the other party as indemnitee.
>
> (c) With respect to a unilateral indemnity obligation, the amount of insurance required may not exceed $500,000.[36]

Where parties have entered into a mutual indemnity obligation, that obligation is capped at the "dollar limits" of the insurance the parties contractually agree to provide in support

[32] *Id.* § 127.004(4).
[33] *Id.* § 127.004(5).
[34] *Id.* § 127.006.
[35] *Id.* § 127.007.
[36] *Id.* § 127.005.

of their indemnity obligations.[37] Where only one party has agreed to indemnify the other, that indemnity obligation may be capped at $500,000.[38]

i. Identifying the Form of Indemnity Obligation

The terms "mutual indemnity obligation" and "unilateral indemnity obligation" are defined under the statute at TEX. CIV. PRAC. & REM. CODE § 127.001(3) and (6) as stated below:

> "**Mutual indemnity obligation**" means an indemnity obligation in an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral in which the parties agree to indemnify each other and each other's contractors and their employees against loss, liability, or damages arising in connection with bodily injury, death, and damage to property of the respective employees, contractors or their employees, and invitees of each party arising out of or resulting from performance of the agreement.
>
> "**Unilateral indemnity obligation**" means an indemnity obligation in an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral in which one of the parties as indemnitor agrees to indemnify the other party as indemnitee with respect to claims for personal injury or death to the indemnitor's employees or agents or to the employees of agents of the indemnitor's contractors but in which the indemnitee does not make a reciprocal indemnity to the indemnitor.

NOTE: The statutory definition for "unilateral indemnity obligation" does NOT include reference to "damage to property." As such, a unilateral contractual obligation to indemnify a party with respect to claims for damages arising from damage to property may not be subject to the limitations set forth in TEX. CIV. PRAC. & REM. CODE § 127.005(b).

At least one Texas court has held that the Texas Legislature intended the "definitions of a 'mutual indemnity obligation' and a 'unilateral indemnity obligation' to encompass the entire field of indemnity obligations."[39] In *Oryx*, the Court considered an indemnity scheme in which the parties agreed to indemnify each other, but did not agree to indemnify each other's contractors or employees.[40] Oryx, the contractual indemnitee and additional insured, sought to minimize its exposure by arguing that § 127.005(b) and (c) did not operate to limit the indemnitor's obligation under 127.005(a).[41] The Court described Oryx's argument thusly:

> Oryx argues that subsection (b) does not apply because the indemnity does not meet all of the elements of the definition

[37] *Id.* § 127.005(b).
[38] *Id.* § 127.005(c).
[39] Certain Underwriters at Lloyds, London v. Oryx Energy Co., 957 F. Supp. 930, 938 (S.D. Tex. 1997), *rev'd sub nom.* Certain Underwriters at Lloyd's London v. Oryx Energy Co., 142 F.3d 255 (5th Cir. 1998).
[40] *Id*. at n.8.
[41] *Id.*

> of a "mutual indemnity obligation" in § 127.001(3). Specifically, the parties did not agree to indemnify each other's contractors or their employees. Oryx also concludes that subsection (c) does not apply because the parties gave each other mirror indemnities; therefore, the indemnity does not meet the definition of a "unilateral indemnity obligation" as defined in § 127.001(6).[42]

However, this argument was rejected as contrary to the "intent of the statute."[43] Specifically, the Court stated that the Texas Legislature intended for subsection (a) to be read in conjunction with either subsection (b) or (c), and for the definitions in the statute ("mutual indemnity obligation" and "unilateral indemnity obligation") to encompass the entire field of indemnity obligations.[44]

ii. Insurance Must be in Support of Indemnity

TOAIA's insurance "safe harbor" provision only applies to the extent the parties explicitly agree to obtain insurance in support of their indemnity obligations. In *Getty Oil Company v. Insurance Company of North America*, the Court held that an insurance provision was not subject to TOAIA because it did not "directly support" the indemnity provision.[45] General statements that the parties will carry liability insurance in support of all their contractual obligations may be found insufficient for purposes of applying TOAIA's "safe harbor" provision.

2. Fair Notice Requirements

In addition to complying with TOAIA, indemnity agreements must also meet certain "fair notice" requirements developed by the Texas Supreme Court to be deemed enforceable.[46] "Fair notice" has two necessary elements—the questioned provision must satisfy: (1) the conspicuousness requirement and (2) the express negligence doctrine.

a. Conspicuousness

The conspicuousness requirement means "that something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it."[47] Texas Courts have adopted the standard for conspicuousness expressed in the Uniform Commercial Code section 1.201(10).[48] That section provides:

---

[42] *Id.*
[43] *Id.* at 938.
[44] *Id.*
[45] *Getty Oil Co.,* 845 S.W.2d at 805.
[46] *Dresser Indus., Inc.*, 853 S.W.2d at 507–509; Storage & Processors, Inc. v. Reyes, 134 S.W.3d 190, 192 (Tex. 2004).
[47] *Dresser,* 853 S.W.2d at 508 (citing Ling & Co. v. Trinity Sav. & Loan Ass'n, 482 S.W.2d 841, 843 (Tex. 1972)).
[48] *Id.* at 510.

> (10) "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:
>
> > (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
> >
> > (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.[49]

Language may satisfy the conspicuousness requirement by appearing in larger type, contrasting colors, or otherwise calling attention to itself.[50] The purpose of the conspicuousness requirement is to protect the buyer from surprise and an unknowing waiver of his or her rights.[51] For this reason, the requirement of conspicuousness is inapplicable where the indemnitor has actual knowledge of the indemnity agreement.[52]

PRACTICE TIPS

- Include indemnity language in an appropriately labeled section of the MSA that alerts the reader to the presence of indemnity language (e.g. "**INDEMNITY**").
- Use bold font for the section heading that contains indemnity language.
- Use all caps font for the indemnity language.

b. Express Negligence Doctrine

The express negligence doctrine requires that a party seeking indemnity for the consequences of its own negligence must express such intent in specific terms within the four corners of the document.[53] Absent language stating a clear intent to indemnify, there is no obligation to do so.[54]

However, note that several courts have stated that the express-negligence doctrine does not apply when an indemnitee does not seek indemnity for its own negligence.[55]

---

[49] TEX BUS. & COMM. CODE ANN. § 1.201(b)(10) (West 2009).
[50] *Storage & Processors, Inc.,* 134 S.W.3d at 192.
[51] *Littlefield v. Schaefer,* 955 S.W.2d 272, 275 (Tex. 1997).
[52] *Dresser*, 853 S.W.2d at 508, n. 2.
[53] *See id.* at 508; *see also* Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 707–08 (Tex. 1987).
[54] *Ethyl,* 725 S.W.2d at 708.
[55] *See Paragon Gen. Contractors, Inc. v. Larco Constr., Inc.,* 227 S.W.3d 876, 889 (Tex. App. —Dallas 2007, no pet.) (citing *MAN GHH Logistics GMBH v. Emscor, Inc.,* 858 S.W.2d 41, 43 (Tex. App.—

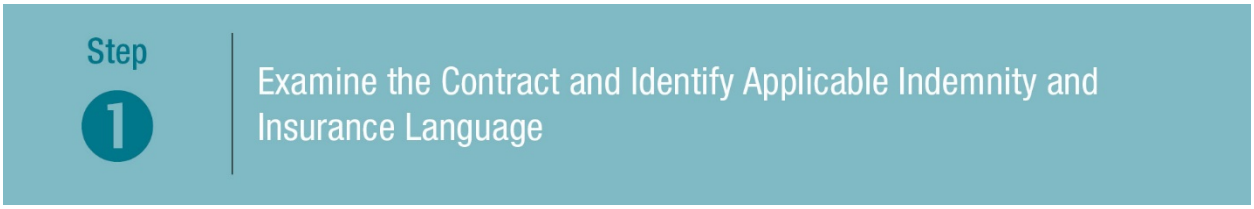
In order to satisfy the express negligence test, an indemnity agreement must achieve a certain level of specificity. For example, in Gilbane Building *Co. v. Keystone Structural Concrete Co*., the Court held that the contractual language, "regardless of whether caused in part by a party indemnified hereunder," did not satisfy the express negligence test because it did not "expressly provide" that the indemnitor would indemnify the indemnitee for its own negligence.[56] Parties that seek indemnity for losses resulting from their own negligence should endeavor to use language that leaves no doubt as to such intent.

EXAMPLE

CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY AND HOLD HARMLESS OPERATOR FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LIABILITIES, LOSSES, DAMAGES, PROCEEDINGS, CAUSES OF ACTION AND EXPENSES (INCLUDING COURT COSTS, ATTORNEY'S FEES AND OTHER LITIGATION COSTS), SUFFERED WITH RESPECT TO PERSONAL INJURY OF MEMBERS OF THE CONTRACTOR GROUP … **THE PARTIES INTEND THIS INDEMNITY TO APPLY TO ALL SUCH CLAIMS AND LOSSES BASED ON ANY THEORY OF LIABILITY, INCLUDING BUT NOT LIMITED TO, NEGLIGENCE, GROSS NEGLIGENCE, NEGLIGENCE PER SE….**

C. Process for Evaluating Indemnity Obligations

In order to ensure all indemnity obligations are identified, and the extent of those obligations, it is important to follow a set process. The below steps will guide you through your analysis and help you determine the indemnity obligations at play.



1. Locate all provisions in the contract documents that afford indemnity protection, contractual defense, and/or release of liability.
    a. Is the indemnity protection mutual ("knock-for-knock") or unilateral?
2. Locate all provisions in the contract that relate to liability insurance.
    a. Did the parties agree to obtain liability insurance "in support of" their indemnity obligations?

Houston [14th Dist.] 1993, no writ)); *see also Transcon. Gas Pipeline Corp. v. Texaco, Inc.,* 35 S.W.3d 658, 669 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

[56] 263 S.W.3d 291, 296–97 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

b. Who are the additional insureds?

c. Did the parties agree to require that their underwriters waive the right to subrogation?

d. How much insurance did the parties agree to obtain in support of their indemnity obligations?

Step 2 — Examine Terms and Conditions Accompanying Purchase Orders/ Work Orders and Identify Potentially Conflicting Indemnity Language

1. Does the contract conflict with the purchase/work order terms and conditions?

2. Does the contract expressly supersede the purchase/work order terms and conditions?

3. To what extent does the contract incorporate terms and conditions contained in purchase/work orders?

Step 3 — Is the Indemnity Agreement Valid under the TOAIA?

Evaluating whether or not an agreement is valid under TOAIA requires a multi-step analysis. TOAIA operates to void certain contracts relating to the oilfield. If the act does not apply, then the indemnity agreement may very well be valid and enforceable. If the act does apply, the contract will be void unless certain statutory exceptions apply.

1 Subject Matter of Contract

Does the contract pertain to "a well for oil, gas, or water or to a mine for a mineral"?

TOAIA defines a contract pertaining to "a well for oil, gas, or water or to a mine for a mineral" to include any written or oral agreemanet concerting the rendering of "well or mine services."

"Well or mine services" is defined to encompass a wide reande of activities pertaining to oil, water or other petroleum products, including:



- Acidizing
- Conditioning
- Deepening
- Drilling
- Gathering
- Improving
- Logging
- Perforating
- Purchasing
- Repairing
- Reworking
- Storing
- Testing
- Transporting
- Treating

Injuries and Contracts to which TOAIA does not apply:

- Joint Operating Agreement Provisions
- Radioactivity
- Property Injury from Pollution
- Reservoir or Underground Damage
- Well Control- Injury to Person or Property
- Well Control- Costs
- Insurance Contracts
- Benefit from Worker's Comp. Statute

 **PROCEED TO THE NEXT STEP**

 **TOAIA DOES NOT APPLY**

2 Negligence of Indemnitee

Does the contract provide for indemnification of a negligent indemitee?



EXAMPLE: *Contractor shall protect, defend, indemnify, and hold harmless Operator from and against any and all claims, demands, liabilities, losses, damages, proceedings, causes of action and expenses of every kind and character, without limit, and without regard to causes thereof or the negligence of any party or parties, arising in connection with personal injury to members of the Contractor Group...*

 **PROCEED TO THE NEXT STEP**

 **TOAIA DOES NOT APPLY**

3 Type of Injury

Does the contract provide for indemnification of a negligent indemnitee for ANY of the below damages?



Personal Injury

Does the contract purport to indemify a person against loss or liability for damage that arises from personal injury?



Death

Does the contract purport to indemnify a person against loss or liability for damage that arises from death?



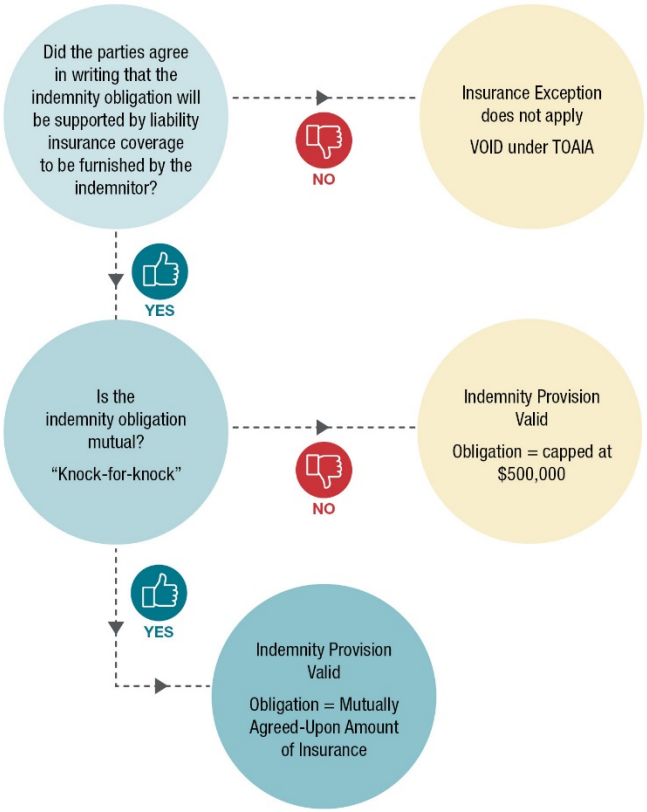
Property Damage

Does the contract purport to indemnify a person against loss or liability for damage that arises from damage to property?

INDEMNITY AGREEMENT VOID UNDER TOAIA UNLESS A STATUTORY EXCEPTION APPLIES

TOAIA DOES NOT APPLY

Insurance Exception



Step 4 — Does the Indemnity Agreement Meet Fair Notice Requirements?

1. Is the indemnity language "conspicuous" on the face of the contract?

2. Do the parties seeking indemnity for the consequences of their own negligence express such intent in specific terms within the four corners of the document?

Step 5 — Determine Which Parties are Owed Indemnity

1. Do the parties only agree to indemnify each other, or do they agree to indemnify a broader class of persons and entities that includes the parties' contractors and/or subcontractors (e.g. "Company Group" or "Contractor Group"?

2. Look at any contractual definitions for the named parties and named indemnitees, such as "Company" or "Contractor" or "Operator" or "Operator Group" or "Contractor Group" or "Company Group."

3. Do the claims asserted fall under the scope of the indemnity provision?

Step 6 — Determine the Extent of the Indemnity Obligation Under the Contract

Where two parties enter into a mutual indemnity obligation, that obligation is capped at the "dollar limits" of insurance the parties contractually agree to provide in support of their indemnity obligation.[57]

What if the parties agree to obtain different levels of insurance in support of their indemnity obligation?

> Example: *"In support of its indemnity obligations contained herein, Party X agrees to obtain insurance coverage in an amount equal to $5,000,000," and "In support of its indemnity obligations contained herein, Party Y agrees to obtain insurance coverage in an amount equal to $3,000,000."*
>
> Answer: When parties agree to provide differing amounts of coverage, the mutual indemnity obligations are limited to the lower amount of insurance.[58] Here, the parties' indemnity obligations would be capped at $3,000,000.

What if the parties don't agree to obtain any specific amounts of insurance in support of their indemnity obligations?

[57] TEX. CIV. PRAC. & REM. CODE ANN. § 127.005(b).
[58] *Ken Petrol. Corp.*, 24 S.W.3d at 351; *Ranger Ins. Co.*, 78 S.W.3d at 663. (holding that an indemnity obligation is limited to the "lowest common denominator of coverage.").

Example: *"In support of its indemnity obligations contained herein, Party X agrees to obtain adequate insurance as required by law in this jurisdiction."*

Answer: Where the express provisions of a contract do not limit a party's insurance obligation to a set dollar amount, that party's indemnity obligation may be capped at the amount of liability insurance actually "carried."[59] However, note that the Texas Supreme Court has generally stated that, where the express provisions of a contract do not limit a party's insurance obligation to a set dollar amount, that party has contractually agreed to fully insure or self-insure its indemnity obligation.[60]

What if the parties agree to obtain "minimum" amounts of insurance in support of their indemnity obligations?

Example: *"In support of its indemnity obligations contained herein, Party X shall carry and maintain for the benefit of the other party, the following minimum insurance coverages…."*

Answer: Texas courts have yet to explicitly rule on the significance of such language and its impact on a parties' indemnity obligation under TOAIA. However, there is a colorable argument that the inclusion of language indicating an obligation to obtain "minimum" amounts of insurance is akin to a failure to limit a party's insurance obligation to a set amount. When the express provisions of a contract do not limit a party's insurance obligation to a set dollar amount, that party has contractually agreed to fully insure or self-insure its indemnity obligation.[61] Alternatively, recent Texas case law indicates that Texas courts may cap the parties' indemnity obligations at the lesser amount of insurance actually "carried" by the parties in support of the parties' indemnity obligations.[62]

Potential Scenarios

In order to determine the extent of all indemnity obligations, one must specifically look at the limits of insurance both parties agreed to obtain under the terms of their contract. The below illustrated framework provides analysis for a breadth of potential scenarios:

[59] In *Liberty Mutual Fire Insurance Co. v. Axis Surplus Insurance Co.*, a United States District Court in Austin, Texas held that where parties simply agreed to "carry adequate insurance limits […] in support" of their mutual indemnity agreement, the parties' indemnity obligations were capped under TOAIA to the lesser amount of insurance actually "carried" in support of the indemnity obligation. 2017 WL 6420920, at *4–5 (W.D. Tex. Dec. 14, 2017).
[60] *Ken Petrol. Corp.*, 24 S.W.3d at 352–53.
[61] *Id.*
[62] *Liberty Mutual,* 2017 WL 6420920 at *4–5.

Scenario 1:

Both parties agree to obtain the same amount of insurance and the amount is explicitly stated in the contract.

Example: Party A agrees to obtain $1,000,000 of insurance in support of its indemnity obligation. Party B agrees to obtain $1,000,000 of insurance in support of its indemnity obligation.

Result: The indemnity obligation of both parties is the amount explicitly agreed to (Ex: $1,000,000).

Scenario 2:

One party agrees to obtain more insurance than the other, and those amounts are explicitly stated in the contract.

Example: Party A agrees to obtain $2,000,000 of insurance in support of its indemnity obligation. Party B agrees to obtain $1,000,000 of insurance in support of its indemnity obligation.

Result: The indemnity obligation of both parties is limited to the lesser of two amounts (Ex: $1,000,000).

Scenario 3:

Both parties agree to obtain insurance in support of their indemnity obligation, but no amount is explicitly stated in the contract.

Example: Party A and Party B agree to "maintain adequate insurance coverage" in support of their indemnity obligations

Result: Unclear. Recent Texas case law indicates that indemnity may be capped at the lesser amount of insurance actually carried by the parties.

Scenario 4:

One party agrees to obtain an amount of insurance explicitly stated in the contract while the other party simply agrees to obtain insurance in support of its indemnity obligation.

Example: Party A agrees to obtain $1,000,000 of insurance in support of its indemnity obligation. Party B agrees to obtain an unspecified amount of insurance in support of its indemnity obligation.

Result: The indemnity obligation of both parties is limited to the lesser of two amounts ($1,000,000).

Scenario 5:

Both parties agree to obtain "minimum" amounts of insurance explicitly stated in the contract.

Example: Party A agrees to obtain a "minimum" of $1,000,000 of insurance in support of its indemnity obligation. Party B agrees to obtain a "minimum" of $1,000,000 of insurance in support of its indemnity obligation.

Result: Unclear. However, there is an argument based on the Texas Supreme Court's ruling in Ken Petroleum, that both parties have agreed to indemnify the other to the full extent of any liability.

D. Indemnity in Practice

1. What Party Should Do Upon Learning of Claim or Lawsuit



A written communication tendering defense and indemnity serves several functions. First and foremost, the correspondence informs the indemnitor of its obligations under any and all applicable contract(s). Second, the correspondence serves as a foundation for any future claim for failure to indemnify. When drafting, the author of the correspondence should treat the document as a future exhibit in a lawsuit against the indemnitor for breach of contract and/or declaratory judgment. It is the written demand from the prospective indemnitee that triggers the legal obligation and creates leverage.

WHAT TO INCLUDE IN THE TENDER

A correspondence tendering defense and indemnity should contain at least the following:

- Citations to applicable indemnity language
- An explicit written demand for defense and indemnity
- Request for response in writing within 10-14 days
- Request that recipient of tender put carrier on notice

WHO SHOULD SEND THE TENDER

A demand for defense and indemnity can come from either the party making demand or its outside counsel. However, the demanding party should first consider whether there are any business issues at play that might require the demand come straight from the party and not counsel. Oftentimes the party making the demand wishes to maintain a strong relationship with the prospective indemnitor and would rather a demand for substantial sums of money come directly from a business person that has a pre-existing relationship with the indemnitor.

2. Exemplar Correspondence Making Demand for Defense and Indemnity

James P. Moneybags
Indemnitor, Inc.
1345 Liability Dr.
Houston, TX 77002

Re: Cause No. 19-24-7569; Plaintiff v. Indemnitee, Inc., et al.; in the 109th Judicial District Court, in Oilrange, TX

Mr. Moneybags:

At [*date and time*], an incident occurred at [*location of oil and gas well site*] in Oilrange, TX. We understand that the incident occurred when [*general description of the facts*].

Indemnitee, Inc. believes this matter is subject to Indemnitor, Inc.'s defense and indemnification obligations under the Master Service Agreement executed by the parties effective [*effective date of MSA*] ("the MSA"). A copy of the MSA is enclosed for your reference. Indemnitee, Inc. hereby requests that Indemnitor, Inc. assume the defense of Indemnitee, Inc. and agree to indemnify Indemnitee, Inc. for any liability that may result from the incident that occurred at [*the well site*], specifically including, but not limited to, any claims asserted by or on behalf of [*parties making claims or that may potentially make a claim*].

Under the MSA, Indemnitor, Inc. agreed to:

> *[Include full text of indemnity language in the MSA]*

[*Company/Contractor/ Personnel/ Party/ etc…*] is specifically defined to include [*contractual definition that includes Indemnitee, Inc. as a party entitled to protection under the agreement*].

Within 10 business days of your receipt of this letter, please notify the undersigned, in writing, about whether Indemnitor, Inc. will assume and conduct the defense of this matter and indemnify Indemnitee, Inc. for any liability that may result.

Coverage for this claim may be available under Indemnitor, Inc.'s general liability insurance, property insurance, and/or umbrella excess liability insurance policies. *See* [*cite to provision in MSA requiring insurance coverage in support of indemnity obligation*]. Therefore, Indemnitee, Inc. requests that you put your insurance carrier on notice of this claim as soon as possible, if you have not done so already.

If you have any questions or concerns, please don't hesitate to contact me.

Sincerely,

Saul Isitor

3. What a Party Should Do Upon Receiving a Tender for Defense and Indemnity



PRACTICE TIPS

- The party in receipt of a tender for defense and indemnity should conduct an independent analysis of the tendering party's right to defense and indemnity under the contract and not leave the analytical work up to the insurance company. It may very well be that the party making demand is entitled to indemnity under the terms of the applicable MSA, but that the receiving party's insurance carrier denies coverage for any number of reasons. In such situations, it may be in the best interest of the party in receipt of a valid tender to accept the tender and settle its coverage issue with its insuree separately.

- If the party in receipt of a tender for defense and indemnity intends to accept the tender, it should do so subject to a reservation of rights under the contract and under Texas law.

- If the insured intends to reject the tender, it should be prepared to be brought into the lawsuit under claims such as breach of contract, contribution, and/or declaratory judgment.

4. Exemplar Response to Tender for Defense and Indemnity

Saul Isitor
Justice, Leverage & Fee, LLC
2467 Main, St.
Houston, TX 77002

Re: Cause No. 19-24-7569; Plaintiff v. Indemnitee, Inc., et al.; in the 109th Judicial District Court, in Oilrange, TX

Mr. Isitor.

This correspondence is sent to you in your capacity as counsel for Indemnitee, Inc. In your letter dated [*date*], demand was made for Indemnitor, Inc. to defend and indemnify Indemnitee, Inc. in the above-referenced lawsuit pursuant to the Master Service Agreement between Indemnitee, Inc. and Indemnitor, Inc. dated [*effective date of MSA*].

Although Indemnitor, Inc. denies that it or Indemnitee, Inc. are liable to the plaintiff for any damages, Indemnitor, Inc. hereby agrees to defend Indemnitee, Inc. in the above-referenced lawsuit, and to indemnify Indemnitee, Inc. for damages awarded in favor of the plaintiff in that lawsuit, subject to: (1) the provisions and reservations set forth in the Master Service Agreement; (2) all terms and conditions incorporated by reference to the Master Service Agreement; and (3) applicable Texas law. Importantly, Indemnitor, Inc.'s agreement to defend and indemnify Indemnitee, Inc. is subject to the limits of the parties' insurance obligations. Moreover, Indemnitor, Inc. will not indemnify Indemnitee, Inc. for any award or payment of punitive or exemplary damages.

[*Name of Counsel*] of [*law firm*] will contact you regarding representation for Indemnitee, Inc. in the above-referenced lawsuit.

Sincerely,

James P. Moneybags

E. Additional Indemnity Issues

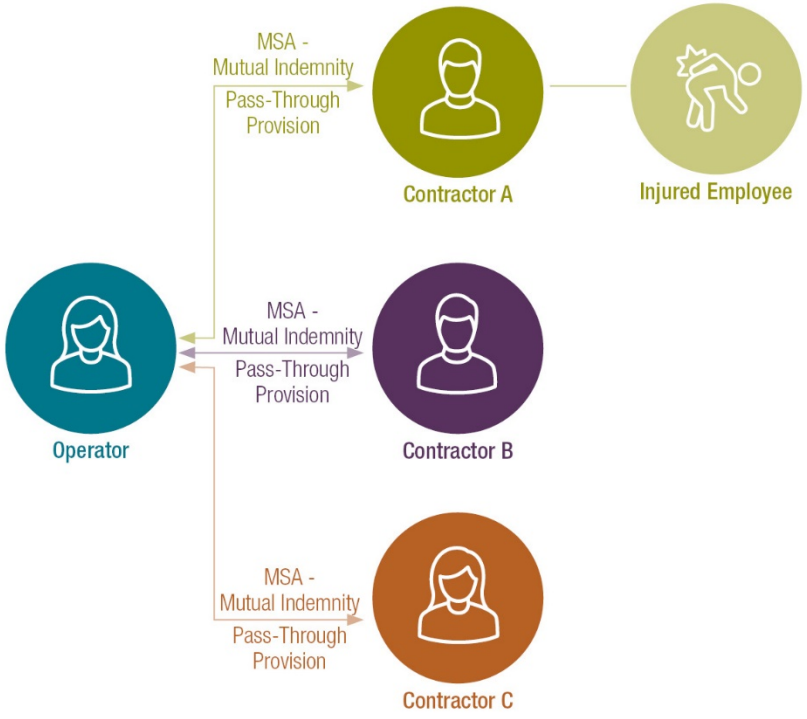
1. Obtaining Pass-Through Indemnity

Where an operator and its contractors enter into agreements containing broad-form mutual indemnity obligations, it may be important for all parties to limit their exposure by including indemnity protection for third parties. Indemnity provisions that extend protection to third parties are called "pass-through" indemnity provisions. Put simply, a "pass-through" indemnity provision allows a party to pass on the indemnity it has received under a contract to other parties as a matter of contract. Consider the following two scenarios for illustrative purposes:

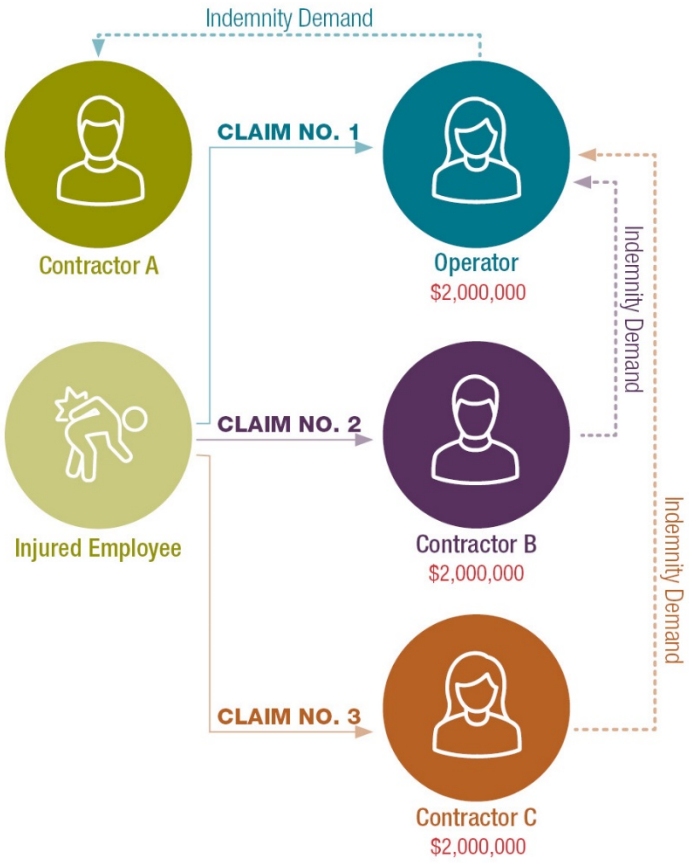
SCENARIO 1

Pass-Through Indemnity for All Parties

An operator enters into MSAs with three contractors (Contractor A, Contractor B, and Contractor C) for the performance of work at a well site. All three MSAs include broad form mutual indemnity provisions with pass-through protection. More specifically, the MSAs contain language stating that the indemnitor will agree to indemnify the INDEMNITEE, as well as its EMPLOYEES, CONTRACTORS, and SUBCONTRACTORS, for all losses, regardless of fault, resulting from personal injury to the indemnitor's employees, contractors, or subcontractors.



One day, during the drilling process, an employee of Contractor A is injured. The employee sues the Operator, Contractor B, and Contractor C. Pursuant to the terms of their agreements with the Operator, Contractor A and Contractor B tender defense and indemnity to the Operator. Pursuant to the terms of the Operator's agreement with Contractor A, Operator tenders defense and indemnity to Contractor A, which includes a pass-through of tenders from Contractor B and Contractor C. All three Defendants have approximately $2,000,000 in liability.



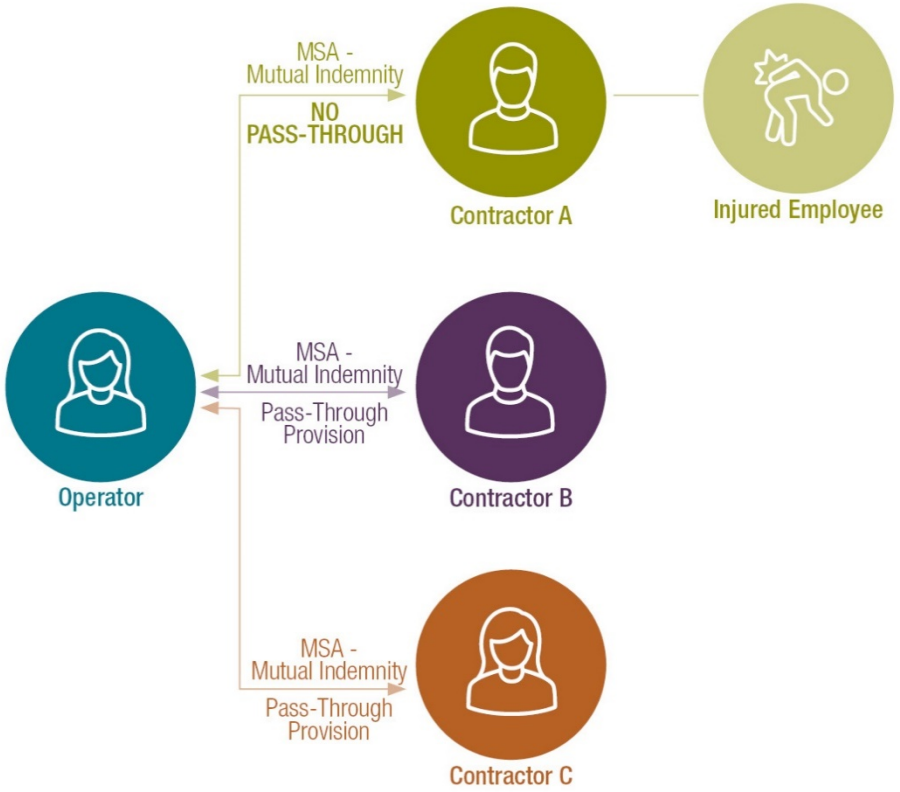
Under this scenario, Contractor A (employer of the Plaintiff) becomes responsible for the full $6,000,000.



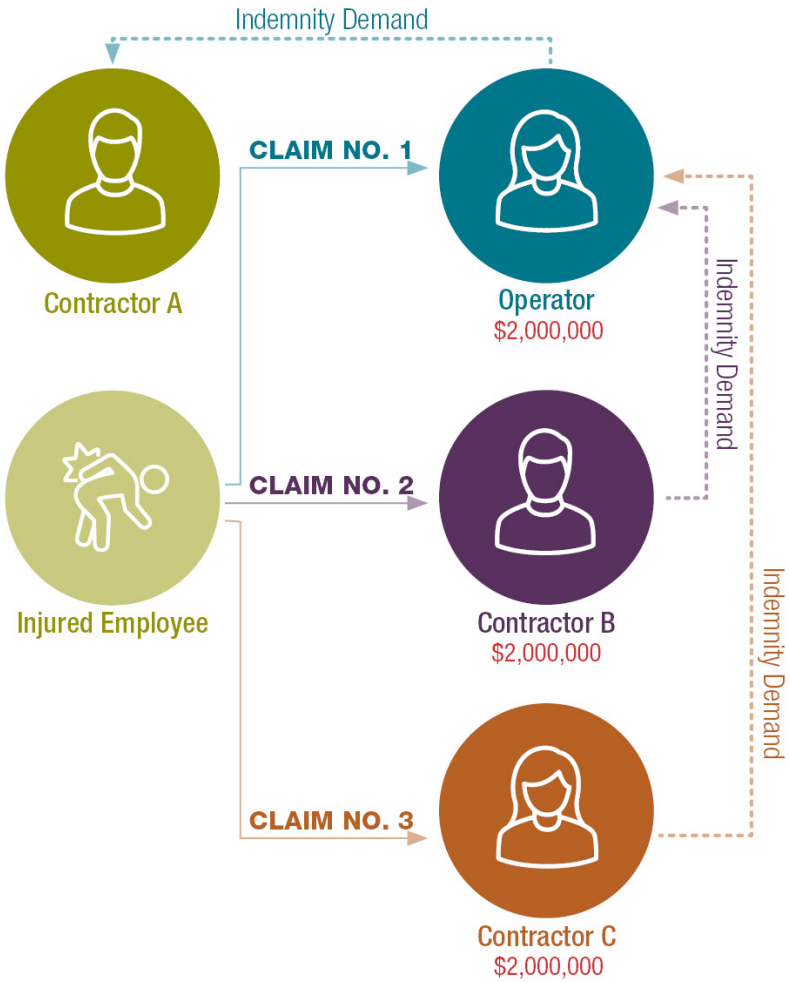
SCENARIO 2

Pass-Through Indemnity Provision Omitted

Under this second scenario, the operator similarly enters into MSAs with three contractors (Contractor A, Contractor B, and Contractor C) for the performance of work at a well site. All three MSAs include broad form mutual indemnity provisions. However, the operator has neglected to secure pass-through indemnity language in its MSA with Contractor A. More specifically, the indemnity provision contained in the MSA simply states that the indemnitor will agree to indemnify the INDEMNITEE for all losses, regardless of fault, resulting from personal injury to the indemnitor's employees, contractors, or subcontractors.

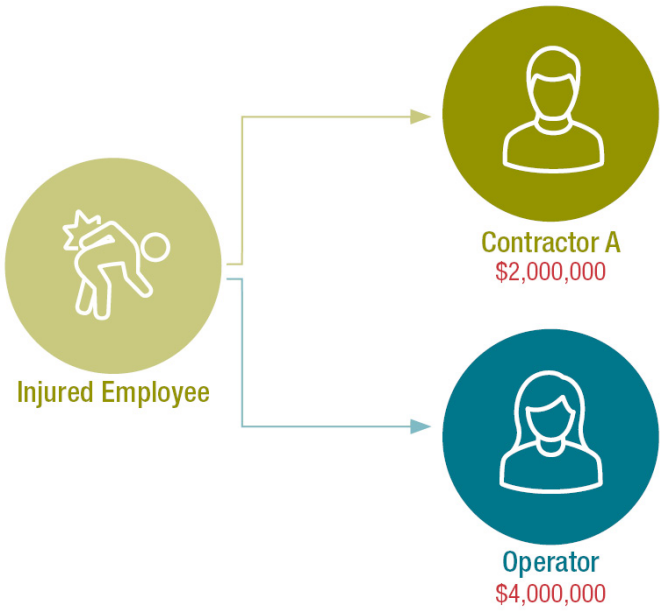


Again, an employee of Contractor A is injured. The employee sues the Operator, Contractor B, and Contractor C. Pursuant to the terms of their agreements with the Operator, Contractor B and Contractor C tender defense and indemnity to the Operator. Pursuant to the terms of the Operator's agreement with Contractor A, Operator tenders defense and indemnity to Contractor A. However, in this scenario, Operator's failure to obtain pass-through protection for third parties means that it will be left holding the bag for any liability assigned to Contractor B and Contractor C.



Thus, in this scenario, Contractor A (employer of the Plaintiff) is responsible only for the $2,000,000 in liability assigned to Operator. Unable to pass through the tenders of Contractor B and Contractor C, Operator will be liable for the $4,000,000 assigned to Contractor B and Contractor C.[63]

[63] Similar scenarios have previously played out in the courts. For example, in *Foreman v. Exxon Corp.,* an oil company was obligated to indemnify a drilling contractor for the drilling contractor's proportionate fault, but unable to pass the indemnity obligation through to the Plaintiff's employer because the Oil Company's contract with the Plaintiff's employer did not have sufficient pass-through language. 770 F.2d 490, 495 (5th Cir. 1985).



How to Obtain Pass-Through Protection

There are several ways to obtain pass-through protection in an oilfield contract.[64]

Method No. 1: Indemnitor agrees to indemnify the indemnitee from any contractual liability.[65]

Method No. 2: Specify the indemnity obligation is owed to both the indemnitee and anyone to whom the indemnity owes contractual indemnity.[66]

Method No. 3: Expand the category of persons or companies entitled to indemnity protection to include the indemnitee's contractors and subcontractors.[67]

[64] Nabors Drilling USA, L.P. v. Encana Oil & Gas (USA) Inc., No. 02-12-00166-CV, 2013 WL 3488152, at *5 n.5 (Tex. App.—Fort Worth July 11, 2013, pet. denied) (mem. op.) (citing William W. Pugh, *A Strategic Look at the Bigger Picture—Risk Allocation in Oil and Gas Operational Agreements*, 45 ROCKY MTN. MIN. L. FOUND. J. 349, 354 (2008)).
[65] *Id.*
[66] *Id.*
[67] *Id.*

2. What if a Party Fails to Obtain the Insurance it Contractually Agreed to Obtain?

TOAIA requires only that there be a written agreement that insurance coverage will be provided and does not void an indemnity provision if no such insurance coverage is obtained by one of the parties.[68]

In a Houston Fourteenth Court of Appeals case, *Nabors Corporate Services, Inc. v. Northfield Ins. Co.*, the Court refused to void or alter a party's indemnity obligation under TOAIA where one of the parties to a mutual indemnity obligation was unable to provide the insurance coverage it had contractually agreed to provide due to its insurer declaring bankruptcy.[69] The Court held that TOAIA does not alter a party's indemnity obligations just because that party fails to obtain/provide the underlying insurance it has agreed to obtain under the mutual indemnity provisions of a contract.[70]

Once parties agree in writing to support their indemnity obligations with insurance, the safe harbor provisions of TEXAS CIVIL PRACTICE & REMEDIES CODE § 127.005 are met and the agreement cannot be voided retroactively by subsequent conditions or events, such as the insolvency of an insurer.[71]

3. Can Parties Agree to Indemnify for Gross Negligence?

Texas courts are split on whether indemnity for one's own gross negligence is violative of public policy. Some appellate courts have held that the enforcement of indemnity provisions covering gross negligence does not offend public policy when the parties are sophisticated entities bargaining from positions of substantially equal strength.[72] Meanwhile, numerous courts have determined that pre-injury releases of gross negligence violate public policy and are void.[73]

---

[68] Nabors Corporate Corp. Services., Inc. v. Northfield Ins. Co., 132 S.W.3d 90, 96–97 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("The words in the statute 'will be supported' and 'to be furnished' suggest the Legislature did not intend the TOAIA govern *all* aspects of the underlying insurance or void indemnity agreements should the underlying insurance fail."); Maxus Exploration Co. v. Moran Bros., 773 S.W.2d 358, 361 n. 3 (Tex. App.—Dallas 1989), *aff'd in part, rev'd in part,* 817 S.W.2d 50 (Tex. 1991) (holding that a million dollar deductible status as self-insurance or no insurance was immaterial since the statute requires only that there be a written agreement that insurance coverage *will be* provided. The statute does not serve to void an indemnity provision if the coverage does not, in fact, exist); *Ken Petrol.,* 24 S.W.3d at 351 (finding that §127.005 only requires a writing to memorialize that each party has agreed to provide insurance to support the indemnity obligations).

[69] *Nabors Corp. Servs., Inc.,* 132 S.W.3d at 99.

[70] *Id.*

[71] *Id.*

[72] *Valero Energy Corp.,* 866 S.W.2d 252, 256 (Tex. App.—Corpus Christi 1993, writ denied); Webb v. Lawson-Avila Constr., Inc.,911 S.W.2d 457, 461–62 (Tex. App.—San Antonio 1995, writ dism'd).

[73] *See* Tex. Moto–Plex, Inc. v. Phelps, No. 11–03–00336–CV, 2006 WL 246520, at *2 (Tex. App.—Eastland Feb. 2, 2006, no pet.) (mem. op.); Rosen v. Nat'l Hot Rod Assoc., No. 14–94–00775–CV, 1995 WL 755712, at *7 n. 1. (Tex. App.—Houston [14th Dist.] Dec. 21, 1995, no writ); Smith v. Golden Triangle Raceway, 708 S.W.2d 574, 576 (Tex. App.—Beaumont 1986, no writ); cf. Akin v. Bally Total Fitness Corp., No. 10–05–00280–CV, 2007 WL 475406, at *3 n. 1 (Tex. App.—Waco Feb. 14, 2007, pet. denied)

In fact, the Texas Supreme Court has specifically declined to rule on this point.[74] The closest the Texas Supreme Court has come to addressing this particular issue was in 2008, when it assessed whether Texas public policy prohibited a liability insurance provider from indemnifying an award for punitive damages against its insured based on gross negligence.[75] Limiting its decision to the workers' compensation context, the court concluded Texas public policy does not prohibit insurance coverage of exemplary damages for gross negligence.[76] While the Court limited its holding, Justice Hecht acknowledged in his concurring opinion that the Texas Supreme Court previously, in a case "[o]utside the insurance context," "suggested that a person's pre-injury waiver of another's liability for gross negligence is against public policy…"[77] Justice Hecht noted, however, that one Court of Appeals had held an agreement to indemnify a person for his own gross negligence was not against public policy and it was "an issue on which [the Supreme Court] has expressed no opinion."[78]

At least one appellate court has held that, where an indemnity agreement does not "specifically express an obligation to indemnify" for punitive damages, the court will not read in such an obligation.[79] However, in a subsequent case, a different appellate court held that, where a party contracts to receive indemnification for its own "negligence," that party is entitled to indemnification for "all shades and degrees" of its own negligence, including gross negligence.[80]

4. Can Parties Contractually Carve out Exceptions to Mutual Indemnity Clauses?

At least one case has held that parties to an oilfield operations contract can carve out exceptions to a mutual indemnity scheme. In *Sonerra Resources Corp. v. Helmerich & Payne Int'l Drilling Co.*, Sonerra Resources Corp. ("Sonerra"), an oil well operator, retained Helmerich & Payne Int'l Drilling Co. ("H&M"), a drilling contractor, to drill and work on a well in Nacogdoches County, Texas.[81] During H&P's work at the well, an H&P employee was injured when hot gas released from the well after a stripping rubber inside a rotating-control device ("RCD") failed.[82] The employee sued Sonerra, who had furnished the RCD and stripping rubber.[83] Sonerra then demanded that H&P defend and indemnify it pursuant to the International Association of Drilling Contractors Drilling Bid Proposal and the Daywork Drilling Contract (the "Contract") between the parties.[84]

(stating most courts hold that pre-injury waivers of gross negligence are void and listing cases; concludes that pre-injury waiver of negligence did not preclude proof of gross negligence).

[74] *Atl. Richfield Co. v. Petrol. Pers., Inc.,* 768 S.W.2d 724, 726, at n. 2. (Tex. 1989).

[75] *See generally Fairfield Ins. Co. v. Stephens Martin Paving, LP,* 246 S.W.3d 653 (Tex. 2008).

[76] *Id.* at 670.

[77] *Id.* at 687 (Hecht, J., concurring) (citing Mem'l Med. Ctr. of E. Tex. v. Keszler, 943 S.W.2d 433, 435 (Tex. 1997)).

[78] *Id.* at 687–88 (citing *Atl. Richfield,* 768 S.W.2d at 726 n. 2).

[79] Crown Cent. Petrol. Corp, v. Jennings, Tex. App.—Houston [1st Dist.] 1987, no writ.).

[80] *Webb,,* 911 S.W.2d at 461–62.

[81] No.01-11-00459-CV, 2012 WL 3776428, at *1 (Tex. App.—Houston [1st Dist.] Aug. 30, 2012).

[82] *Id.*

[83] *Id.*

[84] *Id.*

Specifically, Sonerra sought defense and indemnity pursuant to Section 14.8 of the Contract, which provided:

> **14.8** Contractor's Indemnification of Operator: *Contractor shall release Operator of any liability for and shall protect, defend and indemnify Operator from and against all claims, demands, and causes of action of every kind and character, without limit and without regard to the cause or causes thereof or the negligence of any party or parties, arising in connection herewith in favor of Contractor's employees or Contractor's subcontractors of any tier (inclusive of any agent or consultant engaged by Contractor) or their employees, or Contractor's invitees, on account of bodily injury, death, or damage to property.* Contractor's indemnity under this Paragraph shall be without regard to and without any right to contribution from any insurance maintained by Operator pursuant to Paragraph 13. If it is judicially determined that the monetary limits of insurance required hereunder or of the indemnities voluntarily assumed under Subparagraph 14.8 (which Contractor and Operator hereby agree will be supported either by available liability insurance, under which the insurer has no right of subrogation against the indemnities, or voluntarily self insured, in part or whole) exceed the maximum limits permitted under applicable law, it is agreed that said insurance requirements or indemnities shall automatically be amended to conform to the maximum monetary limits permitted under such law.[85]

H&P refused Sonerra's tender of defense and indemnity, contending that an indemnity provision in Section 14.7 of the Contract required that Sonerra indemnify and release H&P for any liability arising from use of materials provided by Sonerra, such as the RCD and stripping rubber.[86] Section 14.7 provides as follows:

> **14.7** Inspection of Materials Furnished by Operator: Contractor agrees to visually inspect all materials furnished by Operator before using same and to notify Operator of any apparent defects therein. *Contractor shall not be liable for any loss or damage resulting from the use of materials furnished by Operator, and Operator shall release Contractor from, and shall protect, defend and indemnify Contractor from and against, any such liability*.[87]

Sonerra filed a third-party petition for breach of contract, alleging that H&P breached the Contract by failing to provide defense and indemnity, but H&P prevailed on summary judgment and the matter was appealed.[88] On appeal, Sonerra first argued that the RCD and stripper rubbers were "equipment" rather than the "materials" referred to in Section 14.7 of the Contract.[89] However, the Court stated, "[a]lthough the term "materials" is not expressly defined in the drilling contract, it is a term that is used throughout the contract

---

[85] *Id.*
[86] *Id.* at *3.
[87] *Id.* at *1.
[88] *Id.* at *3.
[89] *Id.*

in conjunction with other similar terms, including 'equipment.'"[90] As a result, the Court rejected this argument.[91]

Sonerra also argued: (1) the phrase "loss or damage" used in Section 14.7 limited Sonerra's indemnity obligation to "property damage and economic loss," and (2) when construing the Contract as a whole and seeking to harmonize the indemnity provisions contained therein, Sonerra was entitled to indemnity under Section 14.8.[92] However, the Court disagreed and stated:

> In sum, to limit article 14.7 so as not to include within it an indemnity by Sonerra in favor of H & P for any claims brought by H & P employees for bodily injury caused by materials furnished by Sonerra, we would have to insert additional language into the drilling contract. Article 14.8 does not modify the indemnity and release language of article 14.7. If the parties had intended for the indemnity provision in article 14.7 to be so limited, the parties could have included language limiting the class of losses or damages to which it applied or excepting employee claims for losses or damages that would otherwise fall within article 14.8. **When properly harmonized, and when considered in light of the entire agreement, article 14.7 of the drilling contract unambiguously precludes Sonerra's indemnity claims against H & P.**[93]

Consequently, the trial court's decision was upheld and Sonerra was denied the defense and indemnity it sought.[94]

5. Duty to Defend vs. Duty to Indemnify

Courts readily distinguish the *duty to defend and the duty to indemnify* and often find the duty to defend even where there is no finding of liability or duty to indemnify.[95] The duty to defend is determined solely by the precise language in the contract and the factual allegations in the pleadings.[96] If the underlying pleadings do not allege facts within the scope of the agreement containing an indemnity agreement, the indemnitor is not

---

[90] *Id.* at *5.
[91] *Id.*
[92] *Id.* at *6–7.
[93] *Id.* at *9 (emphasis added).
[94] *Id.*
[95] *See, e.g., Farmers Tex. Cty.,* 955 S.W.2d at 82 (holding as distinct the insurer's duties to defend and indemnify); *Collier v. Allstate Cty. Mut. Ins. Co.,* 64 S.W.3d 54, 62 (Tex. App.—Fort Worth 2001, no pet.) ("In contrast to the duty to defend, the duty to indemnify only arises after an insured has been adjudicated ... to be legally responsible for damages in a lawsuit."); *Reser v. State Farm Fire & Cas. Co.,* 981 S.W.2d 260, 263 (Tex. App.—San Antonio 1998, no pet.) (using similar language and explaining that the duty to defend "is unaffected by facts ascertained before suit, developed in trial, or by the ultimate outcome of the case."); *E & L Chipping Co., Inc. v. Hanover Ins. Co.,* 962 S.W.2d 272, 274–75 (Tex. App.—Beaumont 1998, no pet.) (holding that the **duty** to defend is **broader** than the duty to indemnify).
[96] English v. BGP Intern., Inc., 174 S.W.3d 366, 372 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (holding that plain language of seismic exploration contract required indemnitor to defend and indemnify indemnitee); *see also* Tesoro Petrol. Corp. v. Nabors Drilling USA, Inc., 106 S.W.3d 118, 125 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

required to defend a suit against its indemnitee.[97] To determine if there is a duty to defend, the Court must focus its inquiry on the facts alleged and not on the legal theories alleged.[98] Underscoring the distinction between the two duties, Texas Courts have held that an indemnitor may have a duty to defend but, eventually, no duty to indemnify.[99]

Generally speaking, the duty to indemnify includes the duty to pay defense costs and expenses incurred by the indemnitee.[100] If a party is entitled to indemnity, it is entitled to costs and expenses associated with defending the underlying lawsuit; if a party is not entitled to indemnity, it is not entitled to costs and expenses associated with defending the underlying lawsuit.[101]

PRACTICE TIP: If a party wishes to avoid a duty to defend, the word "defend" must be eliminated from the subject indemnity agreement.

PRACTICE TIP: In order to cap an indemnitee's total costs for contractual defense and indemnity at the limits of insurance set forth in the parties' agreement, include language in the agreement that explicitly states:

> *Except as expressly provided herein, all releases, indemnity obligations, and assumptions of liability shall include the duty to pay reasonable attorneys' fees and costs of litigation.*

By including same or similar language, the parties can be assured that their indemnity obligation upon final judgment will be eroded by attorney's fees expended through trial.

6. Indemnity Agreements are Interpreted in Favor of the Indemnitor

When an ambiguity as to the terms of an indemnity agreement arises, the Court will interpret the agreement's language. As a general rule, indemnity agreements are strictly construed in favor of the indemnitors.[102]

III. INSURANCE

Once the parties' indemnity obligations are evaluated, counsel must turn to the question of insurance coverage. Except for those circumstances where the parties are self-insured, or hold a fronting policy, a third-party insurer is likely to take a prominent role in any litigation where indemnity obligations are implicated. What follows is a brief overview of

---

[97] *English,* 174 S.W.3d at 373.
[98] *Id.*
[99] *Id.* at 372.
[100] *Id.* at 371.
[101] *Id; see also* Fisk Electric. Co. v. Constructors & Assocs., Inc*.,* 888 S.W.2d 813, 815 (Tex. 1994) ("Absent a duty to indemnify there is no obligation to pay attorney's fees").
[102] Safeco Ins. v. Gaubert, 829 S.W.2d 274, 281 (Tex. App. —Dallas 1992, writ denied).

insurance issues that may confront the practitioner in evaluating and enforcing oilfield indemnity obligations.

A. Self-Insured Retention ("SIR") vs. Primary Insurance vs. Fronting Policy

Although some oil and gas companies support their indemnity obligations with a general commercial liability policy procured from a third-party insurer, many companies choose to retain liability for initial levels of coverage and then purchase excess insurance over those levels. An insured's retention of risk can take several forms, including self-insured retentions ("SIR") and fronting policies.

Self-Insured Retention (SIR)

A SIR is a dollar amount that must be paid by the insured before an insurance policy will respond to a loss. Thus, under a policy written with a self-insured retention provision, the insured (rather than the insurer) would pay defense and/or indemnity costs associated with a claim until the self-insured retention limit is reached. A SIR differs from a basic deductible in that a SIR is an amount that an insured retains and covers before insurance coverage begins to apply, whereas a deductible is an amount that an insurer subtracts from policy limits. Additional differences are provided below:

	Deductible	**SIR**
Does the insurer have responsibilities in the event of a loss?	Yes	No
Are costs of defense included in the policy limit?	Likely	No
Can additional insureds seek coverage?	Likely	No
Must the party divulge the extent of its financial commitment on the certificate of insurance?	No	Yes

Fronting Policies

A fronting policy is fundamentally a deductible that matches the policy's limit of liability. In a fronting policy, the insured essentially rents an insurance company's licensing and filing capabilities, but the insurance company does not actually pay any claims. Fronting policies permit insureds to conduct business without meeting the formal requirements of qualifying as a self-insured entity.

B. Duties of the Insured

Insurance policies often contain a number of provisions that establish certain obligations for the insured in the event of an occurrence. Two of the most significant obligations are the duty of the insured to notify the carrier of an occurrence and the duty to cooperate with the insurer.

1. Duty to Notify the Carrier

Almost all general commercial liability policies issued by insurance companies require that the insurer be notified in the event of an occurrence that falls within the purview of the policy. Therefore, when an oil and gas company's employee or property is injured in the oilfield, there often exists a contractual duty to notify the company's insurance carrier.

EXAMPLE

2. Duties In The Event Of An Act, Error Or Omission, Or "Claim Or "Suit"

a. You must see to it that we are notified as soon as practicable of an act, error or omission which may result in a "claim".

To the extent possible, notice should include:

(1) What the act, error or omission was and when it occurred; and

(2) The names and addresses of anyone who may suffer damages as a result of the act, error or omission.

b. If a "claim" is made or "suit" is brought against any insured, you must:

(1) Immediatly record the specifics of the "claim" or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the "claim" or "suit" as soon as practicable.

The contractual duty to notify may differ depending on the type of policy and triggering event. For example, environmental insurance policies written on a claims-made and reported coverage basis require that the insured notify the carrier within the policy period or within a specific time after a loss. The specific time allowed for notice of such a loss may be as little as 48-72 hours.

2. Duty to Cooperate

Once the insured has notified its insurer of an occurrence or lawsuit, and the insurer has agreed to indemnify the insured under the terms of the policy, yet another duty is often implicated—the duty to cooperate. The duty of an insured to cooperate and assist in the defense of claims against its insurer is customarily memorialized in an insurance policy through the use of a clause or provision.[103] Generally, these provisions are titled the "Cooperation Clause" or "Duties of Insured" clause. By and large, they contain language providing that the insured is required to cooperate in the defense by providing relevant information or obtaining witnesses.

[103] *See, e.g.,* Cay Divers, Inc. v. Do-It-Fluid Watersports, Inc., 812 F.2d 866, 870 (3d Cir. 1987); Grupo Protexa, S.A. v. All Am. Marine Slip, 954 F.2d 130, 139–40 (3d Cir. 1992).

EXAMPLE

f. The Indemnitee:
(1) Agrees in writing to:
(a) Cooperate with us in the investigation, settlement or defense of the "suit";
(b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";
(c) Notify any other insurer whose coverage is available to the indemnitee; and
(d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

C. Duties of the Insurer

The duties of an insurer concerning coverage include the following:

> When an insurer first receives notice of a claim or suit against its insured, the insurer must promptly take one of the following actions:
>
> > (i) acknowledge receipt of the notice and advise the insured that it will provide coverage;
> >
> > (ii) advise the insured that it will defend the insured subject to a reservation of its right to deny coverage on one or more specified grounds;
> >
> > (iii) deny coverage on the grounds that the claim is either not covered under the policy or that the insured has breached a policy condition; or
> >
> > (iv) rescind the policy if it appears that the policy was procured through fraud, mutual mistake of fact, or the insured's misrepresentation or concealment of material facts in the application.[104]

Insurers have a duty to timely investigate claims submitted by their insured.[105] A cause of action for the breach of the duty of good faith and fair dealing is stated when an insured alleges there is no reasonable basis for the insurer's denial of a claim, there is a delay in payment by the insurer, or there is a failure on the part of the insurer to investigate.[106]

D. Evaluating the Indemnitor's Insurance Coverage

When a party becomes aware of an occurrence or act that might result in litigation and/or result in a demand for defense and indemnity (employee injured, blowout on property, etc.), the party should immediately determine whether the occurrence is one that will

[104] Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 861 (Tex. 1994) (citing BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 2.01 at 38 (6th ed. 1993)).
[105] *See* Republic Ins. Co. v. Stoker, 903 S.W.2d 338, 341 (Tex. 1995).
[106] *See generally* Arnold v. Nat'l Cty. Mut. Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987).

implicate coverage under an insurance policy and review all relevant policy terms. In reviewing the pertinent policies, counsel should make the following inquiries:

1. What is the Deductible? Is it a SIR? Is it a Fronting Policy?

The amount that a company/insured may be required to contribute to the settlement of a lawsuit, or satisfaction of a judgment, will largely depend on the types and levels of coverage procured. The first inquiry to be made is what coverage exists and what is the exposure associated with each coverage.

2. What are the Limits of the Commercial General Liability Policy?

If the company/insured has a Commercial General Liability Policy, the most important item of information contained in the policy will be the policy limits. Policy limits must be considered by the insured indemnitor in calculating its potential exposure. Further, policy limits will often be considered by Plaintiff's counsel in making a demand for settlement of claims asserted.

After determining what the relevant policy limits are, the next inquiry will be whether the insured obtained general liability insurance in support of its indemnity obligations, with the limits identified in the contract containing said indemnity obligations. The answer to this question will also have a significant impact on the calculation of potential exposure to the insured in litigation.

Answer No. 1: Yes, the master service contract required that the insured obtain $5,000,000 in general liability insurance and the insured's Commercial General Liability Policy is for $5,000,000.

Consequences: The insured need not pay more towards settlement of the lawsuit than its deductible.

Answer No. 2: No, the master service contract required that the insured obtain $5,000,000 in general liability insurance and the insured's Commercial General Liability Policy is for $3,000,000.

Consequences: The insured's indemnity responsibility extends up to $5,000,000 even though it only obtained $3,000,000 in coverage. The insured will be solely responsible for paying to Plaintiff all amounts owed in excess of $3,000,000 (whether the amount owed is determined by judgment or in settlement). Additionally, the insured has breached its master service contract and/or indemnity agreement.

Answer No. 3: No, the master service contract required that the insured obtain $5,000,000 in general liability insurance and the insured's Commercial General Liability Policy is for $7,000,000.

Consequences: The insured need not pay more towards settlement of the lawsuit than its deductible. The insured's duty to indemnify is limited to the amount of insurance it contractually agreed to obtain in support of its indemnity obligations and does not extend to the amount of insurance actually obtained.

It is also important that the insured review any umbrella policies and determine the limits of those policies. In certain circumstances, the insured may have obtained less general liability insurance coverage than it contracted to obtain, but enough excess coverage to bridge the difference.

3. Have the Parties Contractually Agreed to Name Each Other as "Additional Insured" under the Relevant Insurance Policies?

Often times contracts between companies in the oil field will provide that each party obtain insurance in support of their respective indemnity obligations explicitly naming the other party as an "additional insured."

EXAMPLE

> Contractor shall carry insurance of the types and in the minimum amounts as set forth below provided that all insurance obtained shall (a) be of an "occurrence" type policy and not a "claims made" type; (b) contain endorsements requiring thirty (30) days' notice to Company prior to any cancellation or material modification by any insurer or underwriter of such a policy or policies; (c) name Company Group (as defined in the Agreement) AS ADDITIONAL INSUREDS TO THE EXTENT OF CONTRACTOR'S LIABILITIES AND INDEMNITIES

If the tendering party is an additional insured under the policy, then that party may seek indemnity directly from the insurer. Further, the additional insured may bring suit against the insurer if its tender is wrongfully rejected.

If the tendering party is not named as an additional insured, then (1) it may have a claim for breach of contract against the insured, and (2) the tendering party will have a right to indemnity from the insured alone.

E. Coverage for an Additional Insured

In re Deepwater Horizon

The Texas Supreme Court has recently held that coverage for an additional insured on a policy is limited to the extent of contractual indemnity if the policy purports to cover the additional insured pursuant to an "insured contract."[107] However, where a party's status

[107] In re Deepwater Horizon, 470 S.W.3d 452 (Tex. 2015).

as additional insured is not limited by a contract or indemnity obligation, that party is entitled to seek indemnity from the insurance company for the full policy limits.[108]

The landmark Texas Supreme Court decision, *In re Deepwater Horizon*, specifically addressed the rights of parties claiming additional insured status in oilfield disputes. The case featured an insurance dispute between BP and Transocean in the wake of a well blowout.

Transocean and BP originally executed a drilling contract that governed operations at the Macondo Well in the Gulf of Mexico.[109] At the time of the April 2010 well blowout, Transocean owned the semisubmersible mobile offshore drilling unit known as "Deepwater Horizon." BP served as the operator of the exploration project.[110] After an explosion, the rig caught fire and fully submersed.[111] The incident killed eleven crew members and resulted in extensive environmental and economic damages stemming from the discharge of millions of gallons of oil into the Gulf of Mexico.[112]

The drilling contract between Transocean and BP contained standard knock-for-knock indemnity language, requiring each party to assume responsibilities for injuries to its own employees.[113] Additionally, the contract contained environmental indemnity provisions under which (1) Transocean agreed to indemnify BP for surface pollution damages originating on or above the surface of the land or water, from spills, leaks, or discharges, and (2) BP agreed to indemnify Transocean for any subsurface or other pollution damages (including most of the Macondo blowout damages).[114] The Drilling Contract further required Transocean to carry multiple forms of insurance at its own expense.[115] Among the required policies, Transocean was obliged to carry comprehensive general liability insurance, including contractual liability insurance for the indemnity agreement, of at least $10 million.[116] Critically, Transocean was also charged with naming BP, its affiliates, officers, employees, and a host of other related individuals and entities:

> [A]s additional insureds in each of [Transocean's] policies, except Workers' Compensation *for liabilities assumed by [Transocean] under the terms of [the Drilling] Contract.*[117]

To cover its global operations, including its obligations to BP under the subject drilling contract, Transocean carried a tower of insurance totaling roughly $750 million in coverage.[118] The tower consisted of a $5 million general liability policy with Ranger

---

[108] *Id.*
[109] *Id.* at 456 n.4.
[110] *Id.* at 456.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 457.
[116] *Id.*
[117] *Id.* (emphasis added).
[118] *Id.*

Insurance, Ltd. and four (4) excess liability policies providing the other $700 million in coverage layers.[119]

Shortly following the Macondo well blowout, BP and Transocean both made coverage demands under Transocean's policies.[120] The insurers responded by filing declaratory judgment actions.[121] More specifically, the insurance carriers sought a judicial declaration as to their rights and responsibilities with respect to BP, the additional insured under the policies.[122] Transocean became concerned that its pool of insurance might be completely consumed by BP, and so intervened on the side of the insurers.[123]

Transocean's insurance policies did not explicitly list BP as an additional insured. However, the policies conferred "insured" status on "[a]ny person or entity to whom the 'Insured' is obligated by oral or written 'Insured Contract'… to provide insurance such as is afforded by [the] Policy."[124] The policy definition of "Insured Contract" was broad enough to include the drilling contract between Transocean and BP.[125]

The parties all agreed that BP was an additional insured under the Transocean policies, but contested the breadth of coverage to which BP was entitled as an additional insured.[126] BP sought to exhaust Transocean's entire $750 million insurance tower through the claim.[127] Transocean and its insurers responded that the scope of coverage to which BP was entitled was limited to the scope of Transocean's contractual indemnity obligation to BP.[128] The Fifth Circuit initially found for BP before withdrawing the opinion and certifying the question to the Texas Supreme Court.

The Texas Supreme Court held that the insurance policy language conferring "Insured" status to parties "where required by written contract, bid or work order" was sufficient to incorporate the parties' external drilling contract.[129] In doing so, the Court ultimately concluded as follows:

> Because BP is not named as an insured in the Transocean policies or any certificates of insurance, the insurance policies direct us to the additional-insured provision in the Drilling Contract to determine the existence and scope of coverage. Applying the only reasonable construction of that provision, we conclude that, as it pertains to the damages at issue, BP is an

[119] *Id.*
[120] *Id.* at 456.
[121] *Id.* at 458.
[122] *Id.*
[123] *Id.*
[124] *Id.* at 470.
[125] *Id.*
[126] *Id.* at 458.
[127] *Id.* at 459.
[128] *Id.*
[129] *Id.* at 469.

> additional insured under the Transocean policies only to the extent of the liability Transocean assumed for above-surface pollution.[130]

Thus, a party claiming "additional insured" status under an omnibus clause pursuant to an "insured contract" provision in an insurance policy may see its coverage as an additional insured limited by the indemnity obligations contained in the insured contract at issue.

Ironshore Specialty Ins. Co. v. Aspen Underwriting, Ltd.

In 2015, the Fifth Circuit built on the Texas Supreme Court's *Deepwater Horizon* decision and further addressed coverage for additional insurance in *Ironshore Specialty Insurance Co. v. Aspen Underwriting Ltd. et al*.[131] In *Ironshore*, Endeavor Energy entered into a master service agreement with Basic Energy for the performance of certain well services.[132] The MSA required that Basic obtain $1,000,000 in CGL coverage and $4,000,000 in excess coverage.[133] It further required that Basic name Endeavor as an additional insured on its liability policies.[134]

A fire occurred and resulted in the death of two Basic employees.[135] Endeavor was named as a defendant in a subsequent lawsuit brought on behalf of the deceased.[136] Subsequently, a dispute arose as to the extent of coverage Endeavor was entitled to as additional insured on Basic's policies.[137] Basic, and its insurers, argued that Endeavor was entitled to $5,000,000 in indemnity and insurance, as provided under the parties' MSA, and not the full $51,000,000 in liability coverage available to Basic.[138] In support of this argument, Basic and its insurers specifically pointed to an "insured contract" endorsement with language that incorporated the MSA's limitation on insurance coverage.[139] Endeavor and its insurer, Ironshore Specialty, simply argued that Endeavor's status as additional insured entitled Endeavor to the full $51,000,000 tower of liability coverage.[140]

The Fifth Circuit noted that the Texas Supreme Court relied on two separate provisions in *Deepwater Horizon* to limit the additional insured's coverage, and that Basic's policy had just one analogous provision—the "Insured Contract" provision.[141] However, the Fifth Circuit ultimately concluded, via "Erie guess," that the "Insured Contract" provision alone

---

[130] *Id.*
[131] 788 F.3d 456 (5th Cir. 2015).
[132] *Id.* at 457.
[133] *Id.* at 457–58.
[134] *Id.* at 458.
[135] *Id.*
[136] *Id.*
[137] *Id.* at 458–59.
[138] *Id.*
[139] *Id.* at 460.
[140] *Id.* at 459–60.
[141] *Id.* at 462.

was sufficient to incorporate what the court determined to be the MSA's intended limitation of coverage to $5,000,000.[142]

F. A Self-Insured Retention (SIR) can be Satisfied by Other Parties

A self-insured retention limit can be reached even where the insured does not spend the money itself.[143] A SIR limit simply "represents the amount of the loss that the insured is responsible for before coverage is triggered."[144] "Accordingly, it should not make any difference whether the amount of the SIR is paid by the insured, another insurer, an unrelated third party, or no one."[145]

G. Other Insurance Issues that May Arise

1. Did the Insured Contractually Agree to Obtain an Insurance Policy that Waives a Right to Subrogation? Was the Right Waived?

Oftentimes contract between companies in the oil field will provide that each party obtain insurance in support of their respective indemnity obligations that waives the insurer's right of subrogation. For example:

> a. To the extent of the liabilities assumed by each Party herein, all of the above insurance shall be endorsed to provide that:
>
> (1) The Party's insurers waive their right of subrogation (equitable or by assignment, express or implied, loan receipt or otherwise) against Company Indemnitees or Contractor Indemnitees, whichever is applicable.

This inquiry is relevant for a number of reasons. First and foremost, if the insured did not obtain such a waiver, it may be liable for breach of contract. Second, a failure to obtain such a waiver can have considerable impact on settlement of a lawsuit. Take, for example, a case in which a blowout occurs at a well and an employee of the insured is injured. The insured may not be sued as a workers' compensation subscriber, but the insurance company that issued the company's Workers' Compensation and Employer Liability Policy will pay out significant funds to cover the employee's medical bills. If the insured obtained appropriate waivers, as it contracted to do, then there will be no right to subrogation for the insurance company that paid out on the Employer Policy. However, if

---

[142] *Id.* at 463.

[143] Cont'l Cas. Co. v. N. Am. Capacity Ins. Co., 683 F.3d 79, 90 (5th Cir. 2012) (holding that insured's self-retention limit was met on insured's behalf when other parties had spent millions in excess of limit towards the insured's defense); Vesta Ins. Co. v. Amoco Prod. Co., 986 F.2d 981, 987–88 (5th Cir. 1993) (stating that sums paid by indemnifying party had the effect of reducing $2,285,000 that insured would have otherwise paid towards self-insured retention limit).

[144] *Cont'l Cas. Co.,* 683 F.3d at 90 (citing 3 ALLAN D. WINDT, INS. CLAIMS & DISPUTES § 11:31, at 11–498 (5th ed. 2010)).

[145] 3 ALLAN D. WINDT, INS. CLAIMS & DISPUTES § 11:31.

the appropriate waivers were not included in the insured's policy, then the insurance company that paid the employee's medical bills may come in at the eleventh hour and demand recompense in subrogation as part of any settlement arrangement. If the subrogation claim is significant, then the demand for subrogation can materially affect the final settlement amount.

2. Is a Company Entitled to Insurance Coverage for Punitive Damages if the Policy is Silent on Punitive Damages?

To determine whether punitive damages for gross negligence are insurable, courts consider: (1) whether the plain language of the policies covers the punitive damages awarded in the underlying lawsuit; and (2) whether Texas public policy allows or prohibits coverage under the circumstances of the case.[146]

Step 1- Plain Language of the Policy

Generally, "[T]he language in a standard form liability policy providing for coverage for 'sums' or 'all sums' an insured becomes required to pay as a result of bodily injury or property damage covers punitive damages if not otherwise excluded."[147]

Step 2- Against Public Policy?

Texas courts are split on whether insurance for punitive damages are against public policy. Some Texas courts have found no public policy argument against allowing insurance coverage for punitive damages.[148] However, others have found such policies to be impermissible.[149]

3. Can an Insured Stop its Insurer from Settling a Case or Bring Suit Against its Insurer for Negligence in Handling a Claim?

Generally, the insured contracts away to the insurer its ability to dictate the terms of a settlement when it signs its insurance policy. Most policies provide that the insurer can handle a claim as it sees fit and settle any covered claims at its discretion. Additionally, there is no cause of action for negligent handling of claims that an insured can bring against its insurer.[150]

---

[146] *See Fairfield Ins. Co.,* 246 S.W.3d at 655.
[147] Westchester Fire Ins. Co. v. Admiral Ins. Co., 152 S.W.3d 172, 183 (Tex. App.—Fort Worth 2004, pet. denied); *see also* Am. Home Assur. Co. v. Safway Steel Products Co., Inc., 743 S.W.2d 693, 702 (Tex. App.—Austin 1987, writ denied)).
[148] *Am. Home Assur. Co.*,743 S.W.2d 693, 704–05 (Tex. App.—Austin 1987, writ denied); *Fairfield Ins. Co.,* 246 S.W.3d at 670.
[149] *Tesco Corp. (US)*, 2014 WL 4257737, at *9; *Milligan v. State Farm Mut. Auto. Ins. Co.,* 940 S.W.2d 228, 232 (Tex. App.—Houston [14th Dist.] 1997, writ denied); *State Farm Mut. Auto. Ins. Co. v. Shaffer,* 888 S.W.2d 146, 149 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Vanderlinden v. USAA Prop. & Cas. Ins. Co.,* 885 S.W.2d 239, 242 (Tex. App.—Texarkana 1994, writ denied).
[150] Wayne Duddlestein, Inc. v. Highland Ins. Co*.,* 110 S.W.3d 85, 97 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

In *Wayne Duddlestein, Inc. v. Highland Insurance Co*., an employer that obtained workers' compensation insurance brought action against its insurer under a variety of theories, alleging that the insurer inappropriately settled and paid several claims that had been asserted against the employer by its employees.[151] Under its breach of contract theory, the employer argued that the insurer breached provisions of the insurance policy that required the insurer to properly investigate and adjust the claims.[152] The insurer responded that there was no language in the policy that gave the employer the right to have specific input into the decision to settle, or override the insurer's right to settle.[153] The Court rejected the employer's argument and stated, "[t]here is no requirement in the policy that appellees obtain the consent of appellant when settling a claim or investigating the merits of a claim, and we are not permitted to write such a clause into the policy."[154]

The employer also argued that its insurer was negligent in handling the claims.[155] The appellate court aptly summarized the employer's position on its negligence cause of action as follows:

> Appellant is not alleging in this case a traditional *Stowers* claim in that appellees negligently failed to settle a claim where there was an offer of settlement within policy limits. (citation omitted). Rather, appellant is arguing that appellees negligently settled and paid invalid worker's compensation claims that had been asserted against appellant. Appellant contends that, because appellees would be reimbursed by appellant pursuant to the retrospective premium payment plan, appellees had less of an incentive to dispute invalid claims that were asserted, and were, in fact, negligent in settling several of the claims asserted against appellant.[156]

However, the Court rejected the employer's argument, agreeing with the insurer that no cause of action for negligent handling of claims exists under Texas law:

> We are not aware of any authority from the Texas Supreme Court that expressly permits plaintiffs to sue insurers, outside of the scope of *Stowers*, for the negligent handling of claims. In *Maryland Ins. Co. v. Head Indus. Coatings and Serv., Inc.* the Texas Supreme Court, when asked to recognize a duty of good faith and fair dealing between the insurance carrier and the insured, stated that "Texas law recognizes only one tort duty in this context, that being the duty stated in *Stowers*...." 938 S.W.2d 27, 28 (Tex. 1996) … We are unwilling to expand the scope of an insurer's duties to the insured without express language from the Texas Supreme Court authorizing us to do so.[157]

---

[151] *Id.* at 89.
[152] *Id.*
[153] *Id.*
[154] *Id.* at 90.
[155] *Id.* at 96-97.
[156] *Id.* at 97.
[157] *Id.*

The Houston First District Court of Appeals ultimately affirmed the trial court's judgment against the employer.[158]

In *Methodist Hospital. v. Zurich American Insurance Co*., a case out of Houston's Fourteenth District Court of Appeals, Methodist Hospital ("Methodist") sued its insurer, Zurich American Insurance Company ("Zurich"), asserting various causes of action based on Zurich's alleged improper handling and payment of workers' compensation claims.[159] Methodist had obtained from Zurich workers' compensation policies ("the Policy") for successive periods that were subject to a $1 million deductible per each accident.[160] The Policy included the following language:

> We have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits.[161]

When two Methodist employees filed workers' compensation claims, benefits were paid out by Zurich.[162] The total benefits paid for each claim were within the $1 million deductible.[163] After the benefits were paid out, Methodist sued Zurich, alleging that portions of the claims were not compensable and that Zurich failed to dispute compensability.[164] Zurich filed motions for summary judgment as to Methodist's causes of action—negligence, breach of contract, and breach of express warranty—which were granted.[165] On appeal, Methodist argued that Zurich breached the parties' contract by failing to timely contest compensability of employees' injuries and paying claims that were invalid because of pre-existing conditions.[166] More specifically, Methodist argued that the parties' relationship imposed a general contractual duty on Zurich to properly handle claims within the deductible.[167] However, the Court rejected this argument, stating that the extra-contractual duties Methodist sought to read into the Policy were contradictory to the Policy's own terms providing Zurich the discretion and authority to settle claims.[168] The Court was unmoved by arguments that it was Methodist's deductible money being expended, and not Zurich's.[169]

While *Duddlestein* and *Methodist* concern contested settlements for workers' compensation claims, at least one Texas court has addressed an insured's complaint that its general liability insurer improperly investigated and settled a suit for an amount that

---

[158] *Id.*
[159] Methodist Hosp. v. Zurich Am. Ins. Co., 329 S.W.3d 510, 513 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).
[160] *Id.*
[161] *Id* at 515–16.
[162] *Id.* at 513.
[163] *Id.* at 513-514.
[164] *Id.*
[165] *Id.* at 514.
[166] *Id.* at 515.
[167] *Id.*
[168] *Id.* at 526.
[169] *Id.*

invoked the insured's high deductible, despite the insured's explicit disapproval.[170] In affirming a directed verdict for the insurer on all causes of action, including breach of contract and negligence, the court of appeals relied on the policy provision unambiguously vesting the insurer with an absolute right to settle third-party claims based on its own discretion.[171] The court stated, "[b]y purchasing an insurance policy that did not give [the insured] the right to reject a settlement of third party claims, [it] gave up the right to complain that the settlement caused it damages" and the "*mere presence of the large deductible does not change the result.*"[172]

IV. CHOICE OF LAW

Determining what law applies for interpretation and enforcement of an indemnity agreement is of great importance. What may be a valid and enforceable indemnity agreement in one jurisdiction will be found void as a matter of public policy in another. Whereas Texas and Louisiana have anti-indemnity statutes that operate to void many indemnity agreements pertaining to work performed in the oilfield, Oklahoma does not. Whereas Texas indemnity agreements must satisfy certain "fair notice" requirements, indemnity agreements interpreted under maritime law need only state clearly and unequivocally that the parties' intend one party to indemnify the other. The differences from one jurisdiction to another can be significant.

	Texas	**Louisiana**	**Maritime**
Anti-Indemnity Act?	Yes	Yes	No
Indemnity for own negligence?	Must satisfy "fair notice" requirements	If indemnity language is "unequivocal"	If parties' intent is "clear and unequivocal."
Duty to Indemnify includes Duty to Defend?	No	Only if contract expressly says so	Yes
Indemnity for Gross Negligence permitted?	Unclear	Unclear, though no "release" for gross negligence permitted	Yes

[170] *See generally* Stevens Trans., Inc. v. Nat'l Cont'l Ins. Co., No. 05–98–00244–CV, 2000 WL 567225 (Tex. App.—Dallas 2000, no pet.).
[171] *Id.* at *3.
[172] *Id.* (emphasis added).

A. Onshore: Contractual Choice of Law

Parties to operational contracts will often agree that the laws of a designated state will govern the contract's interpretation and enforcement, including any pertinent indemnity provisions. In Texas, parties are generally free to contract for application of whatever jurisdiction's law they see fit.

Historically, Texas courts have looked to the Restatement (Second) of Conflict of Laws Section 187 to determine which state's law applies to the enforcement for contracts that contain choice-of-law clauses and to Section 188 for contracts without such a clause.[173] Under Section 187, the law of the state chosen by the parties governs any breach of contract dispute unless:

> (1) there is a state with a more significant relationship to the transaction (applying section 188); *and*
>
> (2) applying the chosen law would contravene a fundamental policy of that state; *and*
>
> (3) that state has a materially greater interest in the determination of the particular issue.[174]

Texas Courts must enforce the parties' choice of Texas law *unless all three* of these inquiries favor the application of another state's laws.[175]

Section 188 provides five factors for determining whether a state has a more significant relationship to the dispute and the parties, namely:

> (1) the place of contracting,
>
> (2) the place of negotiation...,
>
> (3) the place of performance,
>
> (4) the location of the subject matter..., and

---

[173] Sonat Expl. v. Cudd Pressure Control, 271 S.W.3d 228, 231 (Tex. 2008) (citing Maxus Expl. Co. v. Moran Bros., Inc., 817 S.W.2d 50, 53 (Tex. 1991) and RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 173 cmt. b (1971)).
[174] *See* Chesapeake Operating v. Nabors Drilling USA, 94 S.W.3d 163, 169–70 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (citing DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677–78 (Tex. 1990)).
[175] *See* N. Am. Tubular Servs., LLC v. BOPCO, L.P., No. 02-17-00352-CV, 2018 WL 4140635, at *7 (Tex. App.—Fort Worth, Aug. 30, 2018), *reh'g denied* (Oct. 25, 2018) (applying the Restatement Section 187 and concluding that Texas law, rather than New Mexico law, applied); *see also Branch Banking and Tr. Co. v. Seideman*, No. 05-17-00381-CV, 2018 WL 3062450, at *7 (Tex. App.—Dallas June 21, 2018, no pet. h.) (mem. op.).

(5) the domicile, residence, nationality, place of incorporation and place of business of the parties.[176]

In 2009, the Texas legislature codified Texas' contractual choice of law rules in sections 271.001–.011 of the Texas Business and Commerce Code. Chapter 271, entitled "Rights of Parties to Choose Law Applicable to Certain Transactions,"[177] specifically applies to "qualified transactions," defined under the statute as transactions where one of the parties pays or receives $1,000,000 or more.[178] Section 271.005 provides that the law of a particular jurisdiction governs an issue relating to a qualified transaction if:

> (1) the parties to the transaction agree in writing that the law of that jurisdiction governs the issue, including the validity or enforceability of an agreement relating to the transaction or a provision of the agreement; and
>
> (2) the transaction bears a reasonable relation to that jurisdiction.[179]

Importantly, the law of the particular jurisdiction agreed to by the parties will apply "regardless of whether the application of that law is contrary to a fundamental or public policy of [Texas] or of any other jurisdiction," so long as the transaction at issue bears a reasonable relation to the agreed jurisdiction.[180]

B. Offshore: Navigating OCSLA and Maritime Law

Questions concerning applicable law become appreciably more difficult when a dispute arises from conduct that occurs offshore. MSAs and drilling contracts pertaining to offshore oil and gas exploration often include provisions indemnifying one or more parties from claims that arise from their own negligent conduct. The choice-of-law analysis for an incident or contract related to offshore activities depends, in part, on whether the conduct at issue or scope of the contract in question contemplates operations in territorial state waters or on the Outer Continental Shelf (OCS). The choice-of-law analysis for claims arising within a state's waters will be controlled by that state's choice-of-law rules (or maritime law if it applies to the facts). The choice-of-law analysis for claims related to the OCS is controlled by the Outer Continental Shelf Lands Act (OCSLA).

1. What Law Applies in State Territorial Waters: The Submerged Lands Act

Navigable waters can be segmented into three categories: (1) state waters, (2) federal waters, and (3) high seas.

---

[176] RESTATEMENT (SECOND) CONFLICT OF LAWS § 188(2).
[177] TEX. BUS. & COM. CODE ANN. § 271 (West 2009).
[178] *Id.* § 271.001
[179] *Id.* § 271.005(A).
[180] *Id.* § 271.005(B).

Pursuant to the Submerged Lands Act of 1953 (SLA),[181] coastal state waters begin at the baseline, or the state's recognized shore, and extend outward by default one marine league, or three nautical miles.[182] However, this default may be extended to three marine leagues upon a state's showing that its boundary was provided for by the state's "constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."[183] Such is the case with Texas and the Gulf side of Florida, whose state waters stretch three marine leagues (or nine nautical miles) from their baseline.[184] Conversely, Louisiana waters stretch the default one marine league from the state's coast.

Under the SLA, coastal states have jurisdiction over and title to—as well as the right and power to develop resources from—submerged lands within their respective offshore boundaries.[185] Thus, a state's law governs claims arising from offshore oil and gas operations located within the offshore boundaries of that state, unless displaced by federal maritime law.

2. What Law Applies on the OCS: Outer Continental Shelf Lands Act ("OCSLA")

In the Gulf of Mexico, a great deal of oil and gas exploration occurs on the Outer Continental Shelf. In 1953, Congress passed the Outer Continental Shelf Lands Act ("OCSLA").[186] OCSLA encompasses all submerged lands of the OCS beneath U.S. federal navigable waters,[187] beginning where state waters end and stretching to the OCS of Mexico.

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State . . . .[188]

Thus, OCSLA specifically grants federal jurisdiction over "cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural

---

[181] 43 U.S.C. §§ 1301 *et seq*.
[182] *Id.* § 1301(b).
[183] *Id.* §§ 1312, 1301(b).
[184] *See, e.g.*, United States v. States of La., Tex., Miss., Ala. & Fla., 363 U.S. 1, 9 (1960).
[185] 43 U.S.C. § 1311 *et.seq.*
[186] *Id.*
[187] *See id.* § 1331(a).
[188] *Id.* § 1332(a)(1).

resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf . . . ."[189]

Furthermore, OCSLA contains a congressionally mandated choice-of-law provision, which can neither be waived by contract, nor by failure to raise the choice-of-law issue in litigation.[190] Under OCSLA, the substantive law of the "adjacent state"—to the extent it is not inconsistent with federal law,[191] and to the extent general maritime law does not apply of its own force—is adopted as surrogate federal law and thereby governs claims arising out of or in connection with such offshore oilfield activities described above conducted on a platform or artificial island on the OCS.[192] Under OCSLA, the adjacent state's law functions "to fill the substantial 'gaps' in the coverage of federal law."[193] Importantly, OCSLA's mandatory choice-of-law provision "supersede[s] the normal choice of law rules that the forum would apply."[194]

a. Maritime v. State Law under OCSLA

The Fifth Circuit established in *Union Texas Petroleum Corp. v. PLT Engineering, Inc.* a fundamental three-prong test for determining whether maritime law or, alternatively, state law applies as surrogate federal law under OCSLA to offshore contract disputes, such as disputes over contractual indemnity (PLT Test).[195] According to the court, state law applies as surrogate federal law if the following three conditions are satisfied:

1. The controversy must arise on a situs covered by OCSLA (i.e. the subsoil, seabed, or artificial structures permanently or temporarily attached thereto).

2. Federal maritime law must not apply of its own force.

3. The state law must not be inconsistent with non-maritime federal law.[196]

---

[189] *Id.* § 1333(b).
[190] Texaco Expl.n & Prod., Inc. v. AmClyde Engineered Prods. Co., Inc., 448 F.3d 760, 772 n. 8 (5th Cir. 2006); Petrobras Am., Inc. v. Vicinay Cadenas, S.A., 815 F.3d 211, 215 (5th Cir. 2016), *order clarified on reh'g*, 829 F.3d 770 (5th Cir. 2016).
[191] Importantly, the Fifth Circuit has repeatedly confirmed that the Louisiana and Texas anti-indemnity acts are not in conflict with non-maritime federal law. *See, e.g.,* Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 589 F.3d 778, 789 (5th Cir. 2009) (en banc); Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1126 (5th Cir. 1992).
[192] *See* 43 U.S.C. § 1333(a)(2)(A).
[193] Chevron Oil Co. v. Huson, 404 U.S. 97, 104-105 (1971); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 480 (1981); Cont'l Oil Co. v. London Steam-Ship Owners' Mut. Ins. Ass'n, 417 F.2d 1030, 1036 (5th Cir. 1969); Tetra Techs., Inc. v. Cont'l Ins. Co., 814 F.3d 733, 738 (5th Cir. 2016) (quoting *Rodrigue v. Aetna Casualty & Surety Co.,* 395 U.S. 352, 357, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969)).
however, note recent conflicting law arising from Newton v. Parker Drilling Management Svcs., Ltd, 881 F.3d 1078, 2018 A.M.C. 1030 (9th Cir. 2018) (holding that state law is not just applicable where necessary to fill in a gap in federal law, but instead applicable where it pertains to the subject matter at issue).
[194] *In re DEEPWATER HORIZON*, 745 F.3d 157, 166 (5th Cir. 2014) (citing Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. at 482 n. 8, 101 S.Ct. at 2877 n. 8).
[195] *Id.* at 1046–74.
[196] *Id.* at 1047 (original format altered).

i. PLT Prong 1: OCSLA Situs Standard

In an action to enforce a contractual indemnity obligation, the Court will first look at whether the "controversy" arose on a situs covered by OCSLA.[197] Notably, the Fifth Circuit has distinguished application of the situs prong for a breach of contract claim (such as an indemnity enforcement action) from application of the situs prong to the underlying tort claim.[198] With respect to a tort claim, the situs prong of the PLT test is determined by the situs of the tort.[199] However, with respect to a contract claim, the Court will focus on the contract and determine "if a majority of the performance called for under the contract is to be performed on stationary platforms or other OCSLA situses enumerated in 43 U.S.C. § 1333(a)(2)(A)."[200] This distinction is set forth in the landmark case *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC.*[201]

While the predisposition of *Grand Isle* is convoluted, the relevant facts pertain to an offshore project for which BP American Production Company (BP) hired two contractors to provide services in relation to BP's offshore activities.[202] BP contracted with Grand Isle to maintain and repair BP's fixed offshore platforms on the OCS.[203] BP separately contracted with Seacor Marine LLC (Seacor) to provide vessels and transportation for BP and its contractors in connection with BP's offshore operations.[204] Notably, both contracts contained essentially identical language intended to impose reciprocal indemnity and defense obligations between and among BP contractors.[205]

The subject dispute arose when a Grand Isle employee was injured aboard a Seacor vessel on navigable waters, which was transporting the employee between his working and residential platforms.[206] The Grand Isle employee filed suit against Seacor, which ultimately settled with the employee.[207] Seacor subsequently tendered its defense and indemnity to Grand Isle under the indemnity provision in the BP-Grand Isle contract, upon which Grand Isle initiated a separate declaratory judgment action based on its denial that it owed Seacor defense and indemnity.[208]

In an *en banc* opinion, the Fifth Circuit sought to streamline the procedure for determining what law governs a contractual claim when the triggering event underlying the claim occurs on navigable waters, but the contract at issue involves the performance of work on the OCS.[209] The court asserted that the crux of determining what law applied to the dispute in *Grand Isle* hinged on the first prong of the *PLT* test: determining the "situs" of

---

[197] *Id;* 43 U.S.C. § 1349(b).
[198] *Grand Isle*, 589 F.3d at 785-86.
[199] *Id.*
[200] *Id.* at 787.
[201] *Id. at 786.*
[202] *Id.* at 781.
[203] *Id.*
[204] *Id.*
[205] *Id.* at 782.
[206] *Id.* at 781.
[207] *Id.* at 781, 791.
[208] *Id.* at 781.
[209] *Id.*

the subject controversy.[210] The court expressed that it was particularly distraught with the manner in which courts had conducted the OCSLA situs analysis in the years following *PLT*.

> Later cases ostensibly applying PLT to contractual indemnity claims have ignored the situs of the contract and looked instead to the situs of the underlying tort. Those cases essentially hold that the location of the underlying tort determines the "situs of the controversy" without regard to where the majority of the work under the contract was to be performed.[211]

According to the majority in *Grand Isle*, numerous post-*PLT* courts had inappropriately applied tort principles—i.e., focused on where an underlying tort occurred—in determining OCSLA situs in contract actions.[212] However, contractual claims for indemnity are distinct from tortious incidents underlying such claims.[213] Because a claim for indemnity is contractual in nature, the *Grand Isle* court desired to ensure that future determinations of OCSLA situs, in the context on contract disputes, would be based on the application of contract principles alone.[214]

Thus, the court held that a "**focus-of-the-contract**" test is the appropriate standard for applying the first prong of the *PLT* framework in contract cases: "[A] contractual indemnity claim (or any other contractual dispute) arises on an OCSLA situs if a **majority of the performance called for under the contract** is to be performed on stationary platforms or other OCSLA situses enumerated in 43 U.S.C. § 1333(a)(2)(A)."[215] Applying the focus-of-the-contract test, the court determined the majority, if not all, of the work under the BP-Grand Isle contract—which contained the relevant indemnity provision—pertained to work performed on BP's stationary platforms on the OCS.[216] Finding that the second and third prongs of the *PLT* test were also satisfied, the court further held that Louisiana state law applied to the contractual claim as surrogate federal law under OCSLA, making the subject indemnity provision unenforceable.[217]

ii. PLT Prong 2: Defining a Maritime Contract

"For disputes arising out of contracts—including indemnity contracts for offshore drilling—the courts of [the Fifth Circuit] have held that if the contract is a maritime contract, federal maritime law applies of its own force, and state law does not apply."[218] Since 1990, courts had weighed the precedential six factors, set forth in *Davis & Sons, Inc. v. Gulf Oil Corp.*, when evaluating whether an offshore contract was maritime and, in turn, in determining

---

[210] *Id.* at 783–84.
[211] *Id.* at 785–86.
[212] *Id.* at 786–87.
[213] *Id.* at 786.
[214] *Id.* at 787.
[215] *Id.* (emphasis added).
[216] *Id.* at 789.
[217] *Id.*
[218] Baloney v. Ensco Offshore Co., 570 F. App'x 423, 426 (5th Cir. 2014) (quoting *Demette v. Falcon Drilling Co., Inc.,*280 F.3d 492, 497 (5th Cir.2002), *overruled on other grounds by Grand Isle,*589 F.3d 778.

whether state law under OCSLA or maritime law governed such contracts.[219] The *Davis* test—concerned with the nature of a contract, and requiring an analysis of a subject contract's historical treatment in jurisprudence in addition to a fact-specific inquiry—posed the following questions:

1. What does the specific work order in effect at the time of the injury provide?
2. What work did the crew assigned under the work order actually do?
3. Was the crew assigned to work aboard a vessel in navigable waters?
4. To what extent did the work being done relate to the mission of that vessel?
5. What was the principal work of the injured worker?
6. What work was the injured worker actually doing at the time of injury?[220]

However, in early 2018, the Fifth Circuit sought to simplify further the *PLT* framework in the case *In re Larry Doiron, Inc.*[221] On rehearing *en banc*, the court focused on modifying the criteria for analyzing the second prong of the *PLT* test: whether maritime law applies of its own force, i.e., whether the dispute arises out of a maritime contract.[222]

In *Doiron*, the Fifth Circuit stated that, "[f]or a variety of reasons, most of the prongs of the *Davis & Sons* test [were] unnecessary and unduly complicate[d] the determination of whether a contract is maritime."[223] Thus, the court turned to the United States Supreme Court's decision in *Norfolk Southern Railway Co. v. Kirby* for guidance in devising a more straightforward standard for analyzing the second prong of the *PLT* framework.[224] Ultimately, the court trimmed the Davis test, and adopted an abridged two-part test for purposes of analyzing the second prong of the *PLT* framework, hence determining whether a contract is maritime.[225] The new test functions as follows:

> **Step 1**: Does the subject contract provide services to facilitate the drilling or production of oil and gas on navigable waters? If no, then maritime law does not apply in its own force. If yes, proceed to Step 2.[226]
>
> **Step 2**: Does the subject contract either provide, or do the parties otherwise anticipate, that a vessel will perform a substantial role in the execution of the contract? If no, then maritime law does not apply in its own force. If yes, however, the contract is maritime in nature, and maritime law applies.[227]

---

[219] In re Larry Doiron, 879 F.3d 568, 571 (5th Cir. 2017) (citing *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990)).
[220] *Id.* at 572 (quoting *Davis*, 919 F.2d at 316) (original format altered).
[221] 879 F.3d 568 (5th Cir. 2018).
[222] *See id.* at 571–74.
[223] *Id.*
[224] *Id.* at 574–76 (referencing Norfolk So. Ry. Co. v. Kirby, 543 U.S. 14, 15 (2004)). In *Kirby*, the U.S. Supreme Court held maritime law applied to a monetary claim for cargo damages resulting from an on-land train crash; the nature of contract in dispute was determined to be maritime commerce because the "primary objective" of subject bills of lading was "to accomplish the transportation of goods by sea from Australia to the United States' eastern coast." *Kirby*, 543 US at 15.
[225] *Doiron*, 879 F.3d at 575–76.
[226] *Id.* at 576.
[227] *Id.*

The new test set forth in *Doiron* places importance on the purpose of the contract and expectations of the parties.[228] That is not to say, however, that the opinion condemns as forever irrelevant those *Davis* factors not incorporated by the new test; the Fifth Circuit specifically acknowledged the potential utility of those factors, disregarded in *Doiron*, when disputed contracts and the expectations of parties to the same are unclear.[229] This caveat notwithstanding, the Fifth Circuit's two-step analysis delineated in *Doiron* is the "proper approach in a contract case and assists the parties in evaluating their risks, particularly their liability under [contractual] indemnification clauses."[230] Thus, the *Doiron* test should govern the analysis of whether a contract is maritime and, consequently, whether the second prong of *PLT* test is satisfied.

iii. PLT Prong 3: Conflict with State Law

In disputes over the enforceability of indemnity provisions, parties have often argued that the Texas Oilfield Anti-Indemnity Act or the Louisiana Oilfield Anti-Indemnity Act are inconsistent with non-maritime federal law. However, federal courts have consistently rejected this argument.[231]

b. Determining the "adjacent state" under OCSLA

Under OCSLA, courts apply, as surrogate federal law, the civil and criminal laws of the "adjacent state."[232] OCLSA's text describes the adjacent state as where "that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon" would be located if that state's "boundaries were extended seaward toward the outer margin of the outer Continental Shelf."[233] While OCSLA does not include a definition of "adjacent," it does contain a directive that grants to the U.S. President power to establish and publish such projected lines.[234] However, such state offshore boundaries have never been officially established.[235] It is important to note that federal agency-issued boundaries, such as those established by the Minerals Management Service (MMS), while relevant, are not binding in determining the adjacent

---

[228] *Id.*
[229] *Id.* at 577.
[230] *Id.* at 576; see also In re Crescent Energy Services, L.L.C. for Exoneration from or Limitation of Liability, 896 F.3d 350, 359-60 (5th Cir. 2018).
[231] Knapp v. Chevron USA, Inc., 781 F.2d 1123, 1130 (5th Cir. 1986) (holding that the LOAIA is not inconsistent with federal law with respect to nonvessel-related indemnity agreements); Hodgen v. Forest Oil Corp., 87 F.3d 1512, 1528 (5th Cir.1996); Graham v. Freeport Sulphur Co., 962 F. Supp. 82, 84 (E.D. La. 1997) (same); Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1126, 1993 AMC 1008, 1024 (5th Cir. 1992) (holding that the application of TOAIA would not conflict with any fundamental purpose of maritime law).
[232] 43 U.S.C. § 1333(a)(2)(A).
[233] *Id.*
[234] *Id.* ("[T]he President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area.").
[235] *See* Snyder Oil Corp. v. Samedan Oil Corp., 208 F.3d 521, 523 (5th Cir. 2000) (stating "the President has not published the 'projected lines' required by § 1333(a)(2)(A)").

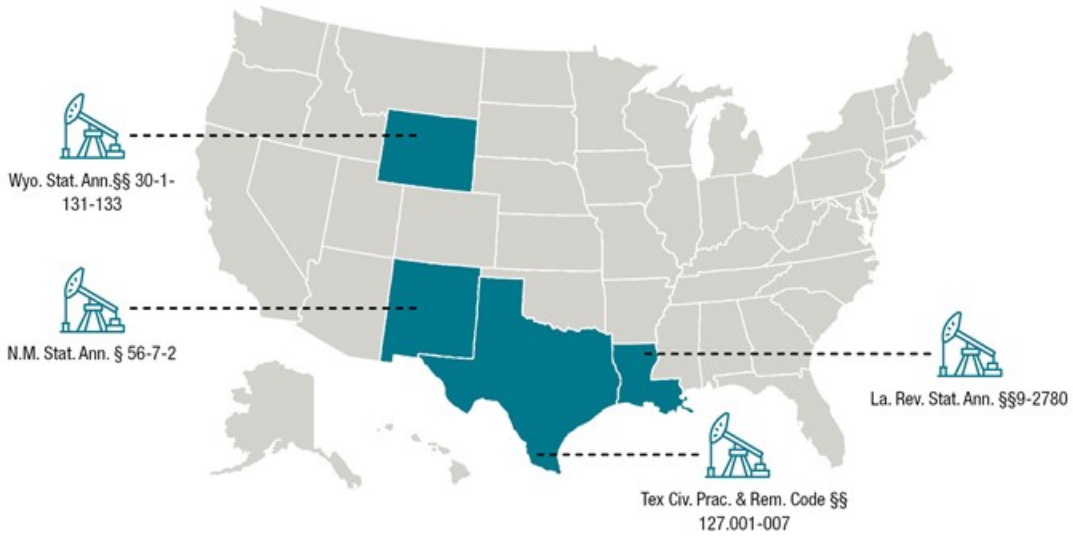
state under OCSLA's choice-of-law provision.[236] So, how should a court choose which state's law applies under OCSLA?

The Fifth Circuit addressed the issue of identifying the "adjacent state" for determining which law applies under OCSLA in *Snyder Oil Corp. v. Samedan Oil Corporation*.[237] While the *Snyder* court did not "articulate a specific test," it set forth the following four kinds of evidence to be considered in the OCSLA "adjacency" analysis:

1. Geographic proximity;
2. Which coast federal agencies consider the subject platform to be "off of";
3. Prior court determinations; and
4. Projected boundaries.[238]

Ultimately, based on a balancing of these four evidentiary factors, the court in *Snyder* upheld the lower court's ruling that Alabama law was properly applied as the law of the adjacent state under OCLSA, despite the fact that the OCSLA situs at issue was technically located more proximately to Louisiana.[239] As such, "adjacent" does not always mean "closer" when determining what state's law will apply under OCSLA.

V. OTHER STATES WITH ANTI-INDEMNITY ACTS



[236] *See* Danos & Curole Marine Contractors, Inc. v. BP Am. Prod. Co., 61 F. Supp. 3d 679, 685 (S.D. Tex. 2014) (citing *Snyder*, 208 F.3d at 525) (explaining that its holding—that MMS boundaries are not dispositive in determining the adjacent state under OCSLA—is supported by the Fifth Circuit, which explicitly stated in *Snyder* that "until official projections are published, an agency's boundaries developed even 'pursuant' to § 1333(a)(2)(A), do not control")).
[237] *Snyder*, 208 F.3d at 523–28.
[238] *Id.* at 524. (original format altered).
[239] *See generally id.* (analyzing and weighing each of the four factors of the adjacency analysis).

Three other states have enacted anti-indemnity statutes to address the oilfield-services industry: Louisiana, New Mexico, and Wyoming.[240] Each state's oilfield indemnity statute was specifically enacted to promote fairness and prevent owners and/or operators of oil and gas wells from shifting potential liabilities to well-service contractors with minimal bargaining power. However, each statute's composition and enforcement differ in significant ways.

A. Louisiana Oilfield Anti-Indemnity Act

1. Summary and Highlights

- The Louisiana Oilfield Anti-Indemnity Act ("LOAIA") prohibits an indemnitee from being indemnified for its own negligence or fault that causes death or bodily injury to another in agreements pertaining to a well.[241]

- Unlike the Texas anti-indemnitee statute, LOAIA does not apply to property damage.

- The Louisiana Supreme Court utilizes a two-step test to decide if LOAIA will apply. Step 1: Determine if the agreement "pertains to" an oil, gas or water well; and Step 2: determine if the agreement relates to exploration, development, production, or transportation of oil, gas, or water.[242]

- LOAIA's language precludes parties from using waivers of subrogation or additional insured provisions to circumvent the intent of the act.[243] Despite this prohibition, the Fifth Circuit has carved out an exception for instances where the indemnitee pays the additional cost associated with naming the indemnitee as an additional insured on the indemnitor's policy—known as the "*Marcel* exception."[244]

- Where the *Marcel* exception applies, LOAIA will not void an indemnity agreement that purports to indemnify the indemnitee for its own negligence.[245]

2. The Statute

L.A. REV. STAT. ANN. § 9:2780 (2016).

A. The legislature finds that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions, either or both, contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, to the extent those provisions

[240] Additionally, states such as California and Massachusetts have enacted broad anti-indemnity statutes that may apply to disputes offshore exploration and energy disputes.
[241] LA. REV. STAT. ANN. § 9:2780 (2016).
[242] *Transcon Gas Pipeline Corp.,* 953 F.2d at 991.
[243] LA. REV. STAT. ANN. § 9:2780(G).
[244] Marcel v. Placid Oil Co., 11 F.3d 563, 569–70 (5th Cir. 1994).
[245] *Id.*

apply to death or bodily injury to persons. It is the intent of the legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.

B. Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

C. The term "agreement," as it pertains to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, as used in this Section, means any agreement or understanding, written or oral, concerning any operations related to the exploration, development, production, or transportation of oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, including but not limited to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging, or otherwise rendering services in or in connection with any well drilled for the purpose of producing or excavating, constructing, improving, or otherwise rendering services in connection with any mine shaft, drift, or other structure intended for use in the exploration for or production of any mineral, or an agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidental transportation, and other goods and services furnished in connection with any such service or operation.

D.

(1) The provisions of this Section do not affect the validity of any insurance contract, except as otherwise provided in this Section, or any benefit conferred by the workers' compensation laws of this state, and do not deprive a full owner or usufructuary of a surface estate of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals on the owner's land.

(2) Any language in this Section to the contrary notwithstanding, nothing in this Section shall affect the validity of an operating agreement or farmout agreement, as defined herein, to the extent that the operating agreement or farmout agreement purports to provide for defense or indemnity as defined in Subsection B of this Section. This exception shall not extend to any party

who physically performs any activities pursuant to any agreement as defined in Subsection C of this Section. For purposes of this Subsection, operating agreement and farmout agreement shall be defined as follows:

(a) "Operating agreement" means any agreement entered into by or among the owners of mineral rights for the joint exploration, development, operation, or production of minerals.

(b) "Farmout agreement" means any agreement in which the holder of the operating rights to explore for and produce minerals, the "assignor", agrees that it will, upon completion of the conditions of the agreement, assign to another, the "assignee", all or a portion of a mineral lease or of the operating rights.

E. This Section shall have no application to public utilities, the forestry industry, or the sulphur industry, so long as the work being performed is not any of the operations, services, or activities listed in Subsection C above, except to the extent those operations, services, or activities are utilized in the sulphur industry.

F. The provisions of this Section do not apply to loss or liability for damages, or any other expenses, arising out of or resulting from:

(1) Bodily injury or death to persons arising out of or resulting from radioactivity; or

(2) Bodily injury or death to persons arising out of or resulting from the retainment of oil spills and clean-up and removal of structural waste subsequent to a wild well, failure of incidental piping or valves and separators between the well head and the pipelines or failure of pipelines, so as to protect the safety of the general public and the environment; or

(3) Bodily injury or death arising out of or resulting from performance of services to control a wild well so as to protect the safety of the general public or to prevent depletion of vital natural resources.

The term "wild well," as used in this Section, means any well from which the escape of salt water, oil, or gas is unintended and cannot be controlled by the equipment used in normal drilling practices.

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 provisions of this Section, shall be null and void and of no force and effect.

H. The provisions of this Act do not deprive a person who has transferred land, with a reservation of mineral rights, of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or

production of minerals in connection with the reserved mineral rights; provided such person does not retain a working interest or an overriding royalty interest convertible to a working interest in any production obtained through activities described in Subsection C of this Section.

I. This Act shall apply to certain provisions contained in, collateral to or affecting agreements in connection with the activities listed in Subsection C which are designed to provide indemnity to the indemnitee for all work performed between the indemnitor and the indemnitee in the future. This specifically includes what is commonly referred to in the oil industry as master or general service agreements or blanket contracts in whatever form and by whatever name. The provisions of this Act shall not apply to a contract providing indemnity to the indemnitee when such contract was executed before the effective date of this Act and which contract governs a specific terminable performance of a specific job or activity listed in Subsection C.

3. History and Intent

The Louisiana Oilfield Anti-Indemnity Act was enacted in 1981.[246] The Louisiana legislature was "concern[ed] about the unequal bargaining power of oil companies and contractors and . . . attempt[ed] to avoid adhesionary contracts under which contractors would have no choice but to agree to indemnify the oil company, lest they risk losing the contract."[247] The indemnification agreements in master service contracts which oil companies require all contractors to sign exposed contractors to both workers' compensation and tort liability.[248] Thus, the "purpose of the legislature, and thus the policy interest of the state, is to protect certain contractors, namely those in oilfields, from being forced through indemnity provisions to bear the risk of their principal's negligence."[249]

The Act declares null and void and against public policy any indemnity provisions in "agreements pertaining to a well for oil, gas, or water, or drilling for minerals" that require an indemnitor to indemnify or defend an indemnitee for the indemnitee's own negligence or fault resulting in death or bodily injury.[250] The Act does not apply to property damages. Further, the parties may not use waivers of subrogation or additional insured provisions to circumvent the intent of the Act.

4. Prominent Cases

***Meloy v. Conoco, Inc.*, 504 So. 2d 833 (La. 1987)** (holding LOAIA "nullifies completely any provision in any agreement that requires defense and/or indemnification where there is any negligence or fault on the part of the indemnitee").

---

[246] L.A. REV. STAT. ANN. § 9:2780.
[247] Fontenot v. Chevron U.S.A., Inc., 676 So. 2d 557, 562 (La. 1996).
[248] Meloy v. Conoco, Inc., 504 So. 2d 833, 837 (La. 1987).
[249] Am. Home Assurance. Co. v. Chevron, USA, Inc., 400 F.3d 265, 269 (5th Cir. 2005).
[250] L.A. REV. STAT. ANN. § 9:2780.

***Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co.*, 953 F.2d 985 (5th Cir. 1992)** (creating two step test for determining whether LOAIA applies and listing factors to consider:" [I]f (but only if) the agreement (1) pertains to a well and (2) is treated to exploration, development, production, or transportation of oil, gas, or water, will the Act invalidate any indemnity provision contained in or collateral to that agreement.").

***Marcel v. Placid Oil Co.*, 11 F.3d 563 (5th Cir. 1994)** (adopting an exception to LOAIA when the indemnitee pays the additional costs for liability coverage as an additional insured on the indemnitor's insurance policy:" [T]he exception does not apply if any material part of the cost of insuring the indemnitee is borne by the independent contractor procuring the insurance coverage.").

***Fontenot v. Chevron U.S.A., Inc.*, 676 So. 2d 557 (La. 1996)** (detailing the history of the LOAIA and providing general instructions on its application).

***Amco Prod. Co. COG-EPCO 1992 Ltd. P'ship v. Lexington Ins. Co.*, 745 So. 2d 676 (La. Ct. App. 1999)** (holding an insurance policy naming the indemnitee as an additional insured violated LOAIA and was unenforceable: "[F]actual distinctions do not warrant abandoning the public policy principles that prompted the passage of the LOAIA. . . it is the fear of competing contractors that unless they absorb the liability exposure of their customers, like Amoco, they will be excluded from the oilfield market by more customer friendly accommodating competitors, like Pride, who are able to absorb the added costs.").

B. New Mexico Oilfield Anti-Indemnity Act

1. Summary and Highlights

- The New Mexico Oilfield Anti-Indemnity Act (NMOAIA) voids indemnity provisions that allow the indemnitee to be indemnified for his or her own negligence.[251]
- NMOAIA applies to both claims for personal injury and property damage.
- NMOAIA does not contain a specific exception for Joint Operating Agreements.
- NMOAIA is a narrower anti-indemnity statute that applies only to production activities at the well site. It does not apply with respect to many services rendered in connection with the well.[252]
- NMOAIA does not have an insurance safe-harbor provision, similar to TEX. CIV. PRAC. & REM. CODE § 127.005 or Louisiana's "*Marcel* Exception."

[251] N.M. STAT. ANN. § 56-7-2 (West 2016).
[252] *See* Holguin v. Fulco Oil Servs. L.L.C., 245 P.3d 42, 47 (N.M. Ct. App. 2010).

2. The Statute

N.M. STAT ANN. § 56–7–2 (West 2016).

A. An agreement, covenant or promise, foreign or domestic, contained in, collateral to or affecting an agreement pertaining to a well for oil, gas or water, or mine for a mineral, within New Mexico, that purports to indemnify the indemnitee against loss or liability for damages arising from the circumstances specified in Paragraph (1), (2) or (3) of this subsection is against public policy and is void:

(1) the sole or concurrent negligence of the indemnitee or the agents or employees of the indemnitee;

(2) the sole or concurrent negligence of an independent contractor who is directly responsible to the indemnitee; or

(3) an accident that occurs in operations carried on at the direction or under the supervision of the indemnitee, 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.

B. As used in this section, "agreement pertaining to a well for oil, gas or water, or mine for a mineral" means an agreement:

(1) concerning any operations related to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging or otherwise rendering services in connection with a well drilled for the purpose of producing or disposing of oil, gas or other minerals or water;

(2) for rendering services in connection with a mine shaft, drift or other structure intended for use in the exploration for or production of a mineral; or

(3) to perform a portion of the work or services described in Paragraph (1) or (2) of this subsection or an act collateral thereto.

C. A provision in an insurance contract indemnity agreement naming a person as an additional insured or a provision in an insurance contract or any other contract requiring a waiver of rights of subrogation or otherwise having the effect of imposing a duty of indemnification on the primary insured party that would, if it were a direct or collateral agreement described in Subsections A and B of this section, be void, is against public policy and void.

D. Nothing in this section:

(1) deprives an owner of the surface estate of the right to secure indemnity from a lessee, operator, contractor or other person conducting operations for the exploration of minerals on the owner's land; or

(2) affects the validity of a benefit conferred by the Workers' Compensation Act [Chapter 52, Article 1 NMSA 1978].

3. History and Intent

The New Mexico Legislature enacted the Oilfield Anti-Indemnity Act in 1971.[253] The public policy behind NMOAIA is to promote safety.[254] The purpose of NMOAIA is to prevent the indemnitee, usually the operator of the well or mine, from delegating to subcontractors his duty to see that the well of mine is safe.[255] The Act proclaims any indemnity provision in an "agreement pertaining to a well for oil, gas or water, or mine for a mineral within New Mexico," that aims to indemnify the indemnitee for his own negligence.[256]

In 1999, the Legislature amended NMOAIA in response to *Reagan v. McGee Drilling Corp.*[257] In *Regan*, the New Mexico Supreme Court held that an indemnity provision covered by the indemnitor's insurance policy and governed by Texas Law was valid.[258] The court stated that "while a Texas indemnity contract covered by insurance is contrary to the letter of New Mexico law, it does not promote a policy at odds with New Mexico policy."[259] The 1999 amendment expressly states that indemnity provisions covered by the indemnitor's insurance are against public policy.[260]

In 2003, the Legislature amended NMOAIA again inserting the words "foreign and domestic" and "within New Mexico."[261] "The 2003 amendments merely make clearer what was already implicit in the 1999 amendments . . . indemnification agreements that undermine the indemnitee's incentive to promote safety at New Mexico well sites violate a fundamental public policy . . . are void and unenforceable . . . and further, agreements that purport to escape the effect of [NMOAIA] by invoking foreign law, likewise, are against public policy and are void and unenforceable."[262]

4. Prominent Cases

Guitard v. Gulf Oil Co., 670 P.2d 969 (N.M. Ct. App. 1983) ("The language in § 56–7–2(A) which makes void and unenforceable any agreement which purports to indemnify an indemnitee for injuries or death arising from the ... concurrent negligence of the

---

[253] N.M. STAT. ANN. § 56–7–2.
[254] Guitard v. Gulf Oil Co., 670 P.2d 969, 973–74 (N.M. Ct. App. 1983).
[255] *Id*.
[256] N.M. STAT ANN. § 56–7–2.
[257] 933 P.2d 867 (N.M. 1997); *see also* Pina v. Gruy Petroleum Mgmt., 136 P.3d 1029, 1034 (N.M. Ct. App. 2006).
[258] *Reagan*, 933 P.2d 867, 871 (N.M. 1997).
[259] *Id*.
[260] N.M. STAT ANN. § 56–7–2(C); *Pina*, 136 P.3d at 1034.
[261] N.M. STAT ANN. § 56–7–2(A) ("An agreement, covenant or promise, *foreign or domestic*, contained in . . . an agreement pertaining to a well for oil, gas or water, or mine for a mineral, within New Mexico, that purports to indemnify the indemnitee against loss or liability for damages arising from the circumstances specified . . . is against public policy and is void,").
[262] *Pina*, 136 P.3d at 1034.

indemnitee means only that the indemnitee cannot contract away liability for his own percentage of negligence."; "[B]oth 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.").

Amoco Prod. Co. v. Action Well Servs., Inc., 755 P.2d 52 (1988) (holding that the statute's insurance exception applies only "to insurance purchased by the indemnitor to protect its interests, and not the interests of the indemnitee.").

Holguin v. Fulco Oil Servs. L.L.C., 245 P.3d 42 (N.M. Ct. App. 2010) (concluding "it would not further the Legislature's intent . . . to exclude an agreement from the scope of [anti-indemnity] statutes simply because the agreement did not specifically define the type of work to be performed" and therefore holding "the Legislature intended that the general language be limited to production activities at the well head" and not to include activities away from the drilling site).

C. Wyoming Oilfield Anti-Indemnity Act

1. Summary and Highlights

- The Wyoming's Oilfield Anti-Indemnity Act (WOAIA) voids any agreement pertaining to any "well for oil, gas, or water, or mine for any mineral" that seeks to indemnify an indemnitee for its own negligence to the extent of the indemnitee's negligence.[263]

- WOAIA applies to both claims for personal injury and property damage.

- Courts allow "partial indemnity" under WOAIA to the extent the indemnitee is not negligent.[264]

- Unlike the Louisiana and New Mexico Acts, WOAIA does not include language expressly prohibiting the parties from including waivers of subrogation or provisions that require the indemnitee to be named as an additional insured on the indemnitor's insurance policy.

2. The Statute

WYO. STAT. ANN. §§ 30-1-131–133 (WEST 2016).

(a) All agreements, covenants or promises contained in, collateral to or affecting any agreement pertaining to any well for oil, gas or water, or mine for any mineral, which purport to indemnify the indemnitee against loss or liability for damages for:

(i) Death or bodily injury to persons;

[263] WYO. STAT. ANN. § 30-1-131 (West 2016).
[264] Cities Service Co. v. N. Prod. Co., 705 P.2d 321, 328 (Wyo. 1985).

(ii) Injury to property; or

(iii) Any other loss, damage, or expense arising under either (i) or (ii) from:

(A) 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 such indemnitee; or

(B) 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, are against public policy and are void and unenforceable to the extent that such contract of indemnity by its terms purports to relieve the indemnitee from loss or liability for his own negligence. This provision shall not affect the validity of any insurance contract or any benefit conferred by the Worker's Compensation Law [§§ 27-14-101 through 27-14-805] of this state.

The term "agreement pertaining to any well for oil, gas, or water, or mine for any mineral" as used in Wyoming Statute § 30-1-131, means any agreement or understanding, written or oral, concerning any operations related to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging, or otherwise rendering services in or in connection with any well drilled for the purpose of producing or disposing of oil, gas or other minerals, or water, and designing, excavating, constructing, improving, or otherwise rendering services in or in connection with any mine shaft, drift, or other structure intended for use in the exploration for or production of any mineral, or an agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidental transportation, and other goods and services furnished in connection with any such service or operation.

Provided that nothing in this act [§§ 30-1-131 through 30-1-133] shall be construed to deprive an owner of the surface estate of the right to secure an indemnity from any lessee, operator, contractor or other person conducting operations for the exploration or production of minerals on such owner's land.

3. History and Intent

Wyoming's Oilfield Anti-Indemnity Act was enacted in 1969.[265] The intent of the Act was to promote the public policy of safety.[266] The Act invalidated indemnity provisions in contracts "pertaining to any well for oil, gas, or water, or mine for any mineral" that indemnify the indemnitee for his own negligence as against public policy.[267]

[265] WYO. STAT. ANN. §§ 30-1-131–133.
[266] Mountain Fuel Supply Co. v. Emerson, 578 P.2d 1351, 1355 (Wyo. 1978).
[267] *Id*.

In 1977, it was projected that the "mining" sector in Wyoming employed 22,991 workers.[268] The significance of energy development was growing and "[i]t is generally known that the drilling and completion of oil and gas wells is always a hazardous undertaking, and that it [is] a particularly hazardous type of work."[269] The Wyoming Legislature recognized that the use of indemnity provisions "removed or reduced the incentives to protect workers and others from personal injury."[270] The clear legislative intent was to make void and unenforceable any agreement "pertaining to wells for oil, gas or water, or mines for minerals" that indemnify an indemnitee for his own negligence.[271]

Although indemnity agreements that indemnify the indemnitee for his own negligence are generally void and unenforceable, the Legislature provided an exception to the rule.[272] The Legislature expressly allowed the enforcement of any insurance contract by including the language "[t]his provision shall not affect the validity of any insurance contract."[273] Thus, an insurance policy that names an indemnitee as an additional insured is valid.

4. Prominent Cases

***Mountain Fuel Supply Co. v. Emerson*, 578 P.2d 1351 (Wyo. 1978)** (upholding constitutionality of Wyoming's Oilfield Anti-Indemnity Act).

***Cities Serv. Co. v. Northern Prod. Co., Inc.*, 705 P.2d 321 (Wyo. 1985)** (holding an agreement containing a provision violative of the anti-indemnity statue is only void and unenforceable to the extent that it indemnifies the indemnitee for his own negligence).

***Reliance Ins. Co. v. Chevron U.S.A. Inc.*, 713 P.2d 766 (Wyo. 1986)** ("[T]he phrase, 'rendering services . . . in connection with any well,' should be construed to cover only those services closely related to well drilling. Not covered are services or activities having a remote or indirect connection to the kinds of services enumerated in [the Act]." The court held that the digging of pits to contain waste fluids was not "rendering services in or in connection with any well").

***Gainsco Ins. Co. v. Amoco Prod. Co.*, 53 P.3d 1051 (Wyo. 2002)** (holding "that delivering oil by truck to a tank battery is not an activity closely related to well drilling" and thus, not covered by §30-1-131).

***R&G Elec., Inc. v. Devon Energy Corp.*, 53 Fed. Appx. 857 (10th Cir. 2002)** (holding parties' choice of law and indemnity provision pertaining to a well for oil, gas or water and indemnifying against parties' own negligence valid because servicing a pump 600 feet from a well is not an activity closely related to well drilling).

---

[268] *Mountain Fuel Supply Co.*, 578 P.2d at 1355 (Wyo. 1978).
[269] *Id.*
[270] *Id.*
[271] WYO. STAT. ANN. §§ 30-1-131–133; *Mountain Fuel Supply Co.*, 578 P.2d at 1355 (Wyo. 1978).
[272] Lexington Ins. Co. v. Precision Drilling Co., L.P., No. 15-8036, 2016 WL 3999896 (10th Cir. 2016).
[273] *Id.*; WYO. STAT. ANN. §§ 30-1-131–133.

VI. DRAFTING TIPS

The law allows significant flexibility in crafting the terms of an oilfield contract. However, it is important that parties to such a contract consider their needs and the consequences of including or omitting common contract language pertaining to indemnity and/or insurance. What follows is a simple summary of protections and provisions that parties to an oilfield contract should consider including so as to minimize potential exposure, as well as basic drafting tips to give effect to the parties' risk allocation intentions.

A. Indemnity



Your indemnity provision needs to be explicit about its intended breadth of coverage. Do you intend for the indemnity provision to allow the parties to seek indemnity for their own negligence? To what extent? Regardless of whether the indemnity agreement is narrow form, intermediate form, or broad form, the drafting parties should be explicit in their intent. Examples for the three common forms of indemnity are provided below:

> **Narrow Form**: *"Contractor shall defend, indemnify, and hold harmless Operator Group for damages arising out of the services performed under this Contract, but only to the extent caused by the negligent acts, errors or omissions of the Contractor…."*
>
> **Intermediate Form**: *"Contractor shall defend, indemnify, and hold harmless Operator Group from and against all damages, losses, claims or expenses (including court costs, attorney's fees and other litigation costs) that arise as a result, in whole or in part, from the negligent acts, errors or omissions of the Contractor…."*
>
> **Broad Form**: *"Contractor shall defend, indemnify, and hold harmless Operator Group from and against all damages, losses, claims or expenses (including court costs, attorney's fees and other litigation costs) arising in connection with this agreement, regardless of fault…."*



Without pass-through protection, parties to an indemnity agreement may end up with more liability exposure than they would have had with no indemnity agreement at all. There are three ways to contract for pass-through protection:

1. Require indemnity protection for contractual liability to third parties

2. State that indemnitor shall indemnify indemnitee, and all parties to whom indemnitee owes contractual indemnity

3. Provide that indemnity shall be provided to "Contractor Group" or "Company Group," and define those terms expansively to include the parties' contractors, subcontractors, and employees.



The express negligence doctrine requires that a party seeking indemnity for the consequences of its own negligence must express such intent in specific terms within the four corners of the document.[274] This requirement can be satisfied in a variety of ways. The intent can be expressed in the body of the indemnity clause itself. Alternatively, in a broad form indemnity agreement, the parties can draft the indemnity agreement to provide indemnity protection "regardless of fault," and define that term in a manner that satisfies the test:

Example No. 1

"THE PARTIES INTEND THIS INDEMNITY TO APPLY TO ALL SUCH CLAIMS AND LOSSES BASED ON ANY THEORY OF LIABILITY, INCLUDING BUT NOT LIMITED TO, NEGLIGENCE, GROSS NEGLIGENCE, NEGLIGENCE PER SE…."

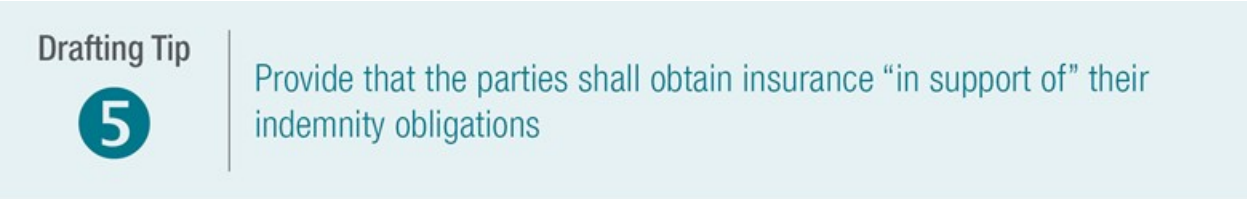
Example No. 2

THE TERM "REGARDLESS OF FAULT" MEANS WITHOUT REGARD TO THE CAUSE OR CAUSES OF ANY CLAIM, INCLUDING, WITHOUT LIMITATION, A CLAIM CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE (WHETHER SOLE, JOINT, CONCURRENT, COMPARATIVE, CONTRIBUTORY, ACTIVE, PASSIVE, GROSS, OR OTHERWISE), OR OTHER FAULT OF ANY MEMBER OF COMPANY INDEMNITEES, CONTRACTOR INDEMNITEES, INVITEES AND/OR THIRD PARTIES…."

[274] *Dresser,* 853 S.W.2d at 508; *Ethyl Corp.,* 725 S.W.2d at 707–08.



Make sure that your indemnity language is obvious to the reader and appears clearly on the face of the contract. Language may satisfy the conspicuousness requirement by appearing in larger type, contrasting colors, or otherwise calling attention to itself.[275] Generally, language concerning indemnity should be in bold or italic. Additionally, it is advisable for the drafter to include a heading that clearly identifies where indemnity language appears in the Contract (e.g. "**INDEMNITY**").



TEX. CIV. PRAC. & REM. CODE § 127.005(a) provides that an indemnity obligation will only be enforceable if **"the indemnity obligation will be supported by liability insurance coverage to be furnished by the indemnitor."** It is important that the drafter explicitly state that the insurance coverages detailed in the contract, or addendum thereto, are in support of the indemnity obligations set forth in the contract. If practicable, this language should refer to the indemnity obligations by contract section.

> **EXAMPLE**: *In support of the mutual indemnity obligations contained in sub-section 11(a)-(b) herein, Contractor and Company shall provide, each for the benefit of the other, liability insurance in the amounts set forth in Exhibit "A" to this Agreement…*



Texas appellate courts are split as to whether indemnity provisions covering gross negligence offends public policy when the parties are sophisticated entities bargaining from positions of substantially equal strength. Accordingly, it may be in the drafter's best interest to preclude indemnity coverage for punitive or exemplary damages:

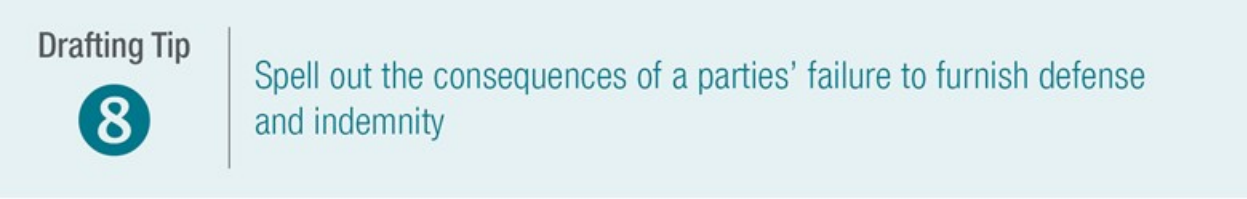
[275] *Storage & Processors, Inc.,* 134 S.W.3d at 192.

EXAMPLE: *The indemnity obligations contained in this Agreement do not include indemnification for punitive or exemplary damages under any law.*



In order to avoid circumstances where the indemnitee delays notifying the indemnitor of a potential indemnity claim under the contract, the parties should include language requiring prompt notice of a claim. Such language allows the parties to avoid potential delays in litigation and conflicts with insurance carriers.

EXAMPLE: *Each Party shall promptly notify the other Party after receipt of any claims, liabilities, losses, demands, fines, penalties, or causes of action of any kind or character for which it may seek indemnification. Each party further agrees to immediately notify the other of any occurrence in which physical injury or death occurs, or any incident which may be the subject of an indemnity claim hereunder.*



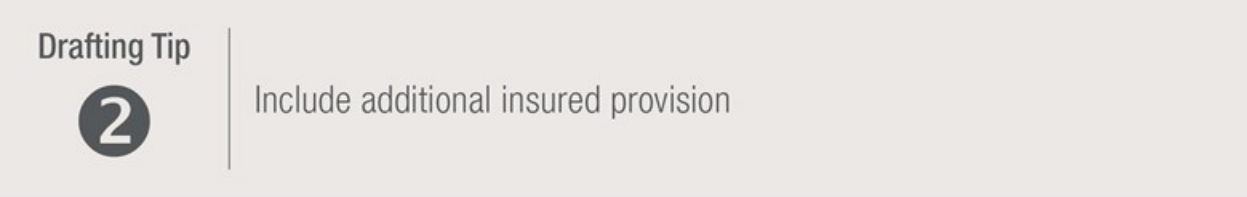
Indemnity disputes are not uncommon and can result in both parties to a contract expending hundreds of thousands of dollars in attorney's fees. As such, many parties prefer to spell out, in the body of the contract, that the unsuccessful party in an indemnity dispute must pay the other party's attorney's fees, costs, and expenses. These provisions may take many forms:

EXAMPLE: *If suit is brought to enforce the defense and/or indemnity obligations set forth herein, then the prevailing party shall be entitled to recover reasonable attorney's fees, costs, and expenses incurred in the enforcement of this Agreement.*

B. Insurance



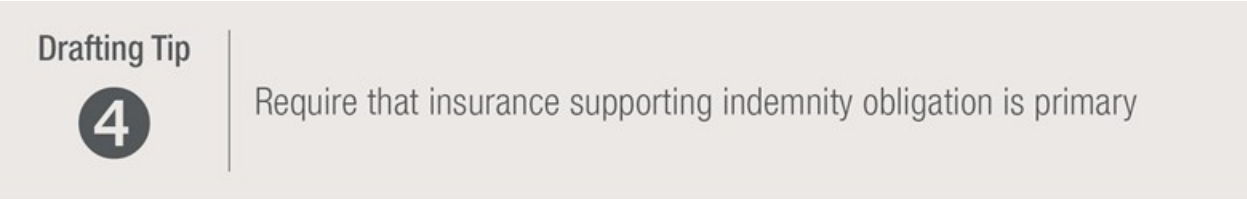
When drafting provisions relating to insurance protections, be sure to extend coverages to all indemnified parties. This can often be done by extending both indemnity and insurance protections to the same defined group that includes any contractors, employees, and/or subcontractors (e.g. "Contractor Group"). By extending insurance coverage to all potential indemnitees, the parties can be sure that their indemnity obligations will stand up under TOAIA.



EXAMPLE: *Company shall cause its underwriters to name Contractor Group as additional insureds but only to the extent of the risks, obligations, liabilities and indemnification obligations assumed by Company herein. Company agrees that the Company Group shall not be entitled to assert a claim against Contractor's insurance with respect to risks and liabilities assumed by Company or as to which Company has agreed to indemnify Contractor under the Contract.*[276]



EXAMPLE: *For the risks, liabilities and indemnity obligations assumed hereunder by Contractor, its insurance shall be endorsed to provide that the underwriters waive their right of subrogation against Operator Group.*



EXAMPLE: *The indemnifying party's liability insurance required under the Contract shall be primary and noncontributory and exclusive to any insurance which the parties to be indemnified may have obtained or may have in effect.*

[276] If you are the party to be named additional insured, insist that the additional insured provision require you be identified by name as an additional insured in the policy.

Drafting Tip 5

Require 30-60 days' advance notification of policy change or cancellation

EXAMPLE: *…In addition, all insurance policies must be endorsed to provide Company with 30 days' prior written notice of cancellation or material changes in said insurance.*

Drafting Tip 6

State that minimum insurance limits are not intended to limit indemnity

EXAMPLE: *The minimum insurance limits set forth in the Contract will not limit Contractor's indemnity obligations except to the extent expressly mandated by Applicable Law.*

bakerlaw.com

Recognized as one of the top firms for client service, BakerHostetler is a leading national law firm that helps clients around the world to address their most complex and critical business and regulatory issues. With five core national practice groups – Business, Intellectual Property, Labor and Employment, Litigation and Tax – the firm has more than 970 lawyers located in 14 offices coast to coast. For more information, visit bakerlaw.com.

Baker & Hostetler LLP publications inform our clients and friends of the firm about recent legal developments. This publication is for informational purposes only and does not constitute an opinion of Baker & Hostetler LLP. Do not rely on this publication without seeking legal counsel.

© 2019 BakerHostetler®

23.04.19.13.48_p03