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Oilfield Indemnity and "Separate Insurance" Provisions in the Wake of *Getty Oil*

By N. Stephan Kinsella*

I. INTRODUCTION

In oil and gas practice, the parties have not been completely satisfied with the how law allocates liability. This is shown by the extensive use of indemnity agreements to shift risks of liability from one party to another. Where the law might normally make, for example, a drilling contractor liable for negligent harm to the employees of the operator of a well, an indemnity clause will require the operator to indemnify the contractor for any damages paid to the employee.[1]

The wisdom—indeed, the economic efficiency—of such liability-shifting measures, having been developed in a relatively free market economy, can hardly be sensibly criticized by an external observer, any more than one can meaningfully say that two dollars is "too much" (or too little) for willing purchasers to pay for a gallon of milk.

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Nevertheless, the Texas legislature in 1973 concluded that some contractors working for oil and gas well owners had inferior "economic bargaining power," and were thus being "unfairly" "coerced" into indemnifying the well owners against the owners' liability for their own negligent acts.[2] The Texas Anti-Indemnity Statute[3] (hereinafter referred to as the "Act" or the "Texas Act") was therefore enacted. Because of important limitations in the Act, however, contracting parties may still allocate liability by using certain "separate insurance" (or "additional insured") provisions that are not affected by the Act.

The ability to shift liability via additional insured requirements is important for oilfield participants, especially given the restrictions placed by the Act on the traditional use of indemnities as a means of shifting liability. This article will examine oilfield participants' ability to contractually allocate liability in light of recent Texas case law interpreting the Act, and will recommend various drafting techniques in light of this analysis.

II. THE TEXAS ANTI-INDEMNITY STATUTE

The Act declares agreements that pertain to oil and gas wells to be void where one party agrees to indemnify another party against losses or damages resulting from the sole or concurrent negligence of the indemnitee, if the liability arises from personal injury, death, or property damage.[4]

In 1989, the Texas legislature added several exclusions to the Act, including "property damage resulting from cleanup and control of pollution,"[5] as well as certain types of catastrophic damage liability.

A. Mutual Indemnity Exception

The 1989 amendments also "resulted in separating indemnity agreements into two categories, and creating different treatments for insurance coverage for each newly created classification.[6] The two categories are 'mutual indemnity obligations' and 'unilateral indemnity obligations' . . . ."[7] "Unilateral indemnity obligations" are defined as agreements "in which one of the parties as indemnitor agrees to indemnify the other party as indemnitee."[8] "Mutual indemnity obligations" are defined as contracts between parties in which they "agree to indem-

nify each other and each other's contractors and their employees."[9]

Parties to "unilateral indemnity" agreements are allowed to create otherwise prohibited indemnity obligations as long as the indemnitor agrees in writing that its obligation is supported by insurance not required to exceed $500,000.[10] ". . . [P]arties to 'mutual indemnity' agreements are exempted from the general prohibition in the statute against certain oilfield indemnity agreements to the extent that the parties agree to provide equal amounts of insurance to cover their obligations."[11]

These exceptions are poorly written and their meaning is fuzzy.[12] In general, though, under the mutual indemnity exception, "parties to 'mutual indemnity' agreements are allowed to indemnify each other, even for each one's own negligent acts, so long as the agreement is mutual and they provide equal contractual liability insurance coverage."[13]

B. Separate Insurance v. Indemnities—*Getty Oil*

Although the Texas Act limits the amount of insurance coverage that one party may require another party to provide *in support of* the latter's indemnity obligations, the Texas Act expressly states that it does not affect the validity of insurance contracts.[14] Under this exclusion from the Texas Act, an agreement between two parties, otherwise within the scope of the Texas Act, by which one party agrees to name the other as an additional insured to a general liability insurance policy and obtain a waiver of subrogation is not voided by the Texas Act.[15] In contrast, in an oilfield indemnity agreement, any requirement to name the indemnitee as an additional insured is void under Louisiana law.[16]

In 1992, the Texas Supreme Court examined this insurance exclusion. In an opinion authored by Chief Justice Phillips in *Getty Oil Company v. Insurance Company of North America*[17] ("*Getty*"), the court reversed a court of appeals decision and held that the Texas Act does *not* invalidate contracts that require an oilfield contractor to provide insurance coverage for an oil and gas producing company, unless the required insurance coverage "supports" an otherwise unenforceable indemnity agreement.

In this case, Getty Oil Company ("Getty") purchased chemicals from NL Industries, Inc. ("NL"), to demulsify crude oil at Getty's producing wells. A drum of chemicals exploded at a wellsite, killing a worker. The worker's family sued Getty. Getty, in turn, sued NL for contractual indemnity under the terms of the purchase order by which Getty obtained the chemicals from NL. A jury determined that the worker's death was the result of Getty's sole negligence. Getty was unable to obtain indemnity from NL under the purchase order, because the indemnity provisions therein did not cover liability caused by Getty's sole negligence.[18] After Getty's insurance company settled the wrongful death and survivor claims for $14 million, Getty filed an insurance claim against NL's insurers to recover the settlement amount.

In addition to an indemnity provision, the Getty/NL purchase order contained an insurance-coverage requirement that obligated NL to extend its own insurance coverage to protect Getty. When NL's insurers refused to reimburse Getty for its losses, Getty sued both NL and NL's insurers. The trial court granted the joint motions of NL and its insurers for summary judgment. The court of appeals affirmed on the grounds that Getty's claims were (1) barred by res judicata, (2) unenforceable under the Texas Act, and (3) voided by the common-law express negligence doctrine.

The Texas Supreme Court applied its recently announced "transaction" test for res judicata, barring Getty's claim that NL breached its agreement to provide insurance and other related claims. The Court held that since Getty was adverse to the position of NL in the original wrongful-death action, and since all of Getty's claims were derived from the same transaction, all of Getty's actions against NL should have been brought in the original suit.

With respect to Getty's claims against NL's insurance carriers, however, the court held that Getty's claims were *not* barred by res judicata. Getty was prevented in the original wrongful death action from suing such insurance companies, because (i) the insurance policies themselves specifically prohibited any claims from being made until an insured party's liability was reduced to a judgment or compromised, and (ii) Getty was prevented from joining the insurance companies by Texas Rule of Civil Procedure 38(c). Rule 38(c) prohibits direct joinder of insurance companies in tort cases unless the insurance company is liable to the person who was injured. Because Getty could not have asserted its claims against NL's insurers in the

prior suit, such claims could not now be precluded by res judicata.

The Texas Act invalidates otherwise enforceable provisions in oilfield contracts which obligate one party to indemnify a second party for the second party's own negligence liability. The Supreme Court held that the Act applies exclusively to indemnity agreements and does not prohibit agreements to provide insurance, unless those agreements are "in support of" an otherwise unenforceable indemnity agreement. The Court declined to expand the language of the Act to encompass general insurance-coverage obligations. The insurance-coverage requirement in the Getty/NL purchase order was not voided by the Texas Act.

Finally, the Texas Supreme Court rejected speculation by the court of appeals that the Texas "express negligence" doctrine extends to insurance-coverage obligations. The "express negligence" doctrine requires that parties to a contract who seek to indemnify an indemnitee from the consequences of its own negligence must express such intent in specific (i.e., express) terms within the four corners of the contract. The Court declined, in this case, to extend the "express negligence" doctrine to contractual provisions other than indemnity agreements and held that the doctrine did not invalidate the insurance-coverage provisions of the purchase order.

III. RELEASES V. INDEMNITIES

A. "Fair Notice" Requirements

Although the Texas Supreme Court in *Getty* declined to extend the "express negligence" doctrine to insurance provisions, it subsequently extended the requirement of conspicuousness and the express negligence doctrine to cover certain contractual provisions other than indemnities. In *Page Petroleum, Inc. v. Dresser Industries, Inc.*,[19] the court held that "fair notice" requirements of conspicuousness and the express negligence doctrine apply to *releases* as well as to indemnities. In so holding, the court overruled *Whitson v. Goodbodys, Inc.*,[20] which had specifically declined to extend the express negligence doctrine to a release.[21]

> In *Page Petroleum*, The Texas Supreme Court stated: We can discern no reason to fail to afford the fair notice protections to a party entering into a release when the protections have been held to apply to indemnity agreements and both have the same effect. The policy considerations underlying the enforcement of releases are similar enough to the policy considerations underlying the enforcement of indemnity clauses to warrant the application of the fair notice requirements to releases as well.[22]

The Court stated that its opinion applies the fair notice requirements to indemnity agreements and releases only when such exculpatory agreements are utilized to relieve in advance a party of liability for its own negligence.[23]

The Texas Supreme Court held that, in order to promote certainty and uniformity in the law, the issue of compliance with the fair notice requirements is a *question of law* for the court. The court adopted the standard for conspicuousness contained in the Texas Uniform Commercial Code,[24] which provides that a term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. Under this requirement, something must appear on the face of the contract to attract the attention of a reasonable person when he looks at it. Thus, for a provision to be conspicuous it must be in capital letters, bold or larger type, under an identifying caption, in contrasting type or color or in an extremely short document, such as a telegram.

The Court also superimposed the express negligence doctrine onto the law of releases, which now requires a party seeking release or exculpation from the consequences of that party's own negligence to express that intent in specific terms within the four corners of the contract.

B. The Texas Anti-Indemnity Statute

The Supreme Court's opinion in *Page Petroleum* is also important because it suggests in footnote 5 that the Texas Act may apply to releases as well as to indemnity agreements. In response to Page's argument that the release provisions involved in this case were void under the Texas Act, the Court stated: "Although we do note that today's holding would suggest that [the Texas Anti-Indemnity Statute] would apply to releases as well as to indemnity agreements, we do not need to reach the merits of such an argument."[25]

C. Releases, Exculpatory Clauses, Waivers, and Reimbursement Provisions

Releases, sometimes known as waivers or exculpatory clauses,[26] are along with indemnities and reimbursement provisions, commonly used in contracts by oilfield operators and contractors as a means of allocating risks among the parties more efficiently than default or suppletive provisions of the law.

Under a reimbursement provision, which is similar in effect and purpose to indemnities and releases, one party agrees to compensate a second party if, for example, the second party suffers certain damages while working for the first party.[27] Although the Texas Supreme Court did not discuss reimbursement provisions in *Page Petroleum*, it nevertheless seems likely that the Court would also subject reimbursement provisions to "fair notice" requirements, because the policy considerations underlying the enforcement of reimbursements are probably similar enough to the policy considerations underlying the enforcement of indemnity clauses to warrant the application of the fair notice requirements to reimbursements as well.[28]

IV. RECOMMENDED DRAFTING TECHNIQUES[29]

A. Conspicuousness and Express Negligence

In future contracts containing provisions not void under the Texas Anti-Indemnity Statute, companies should ensure that indemnity provisions, releases, and reimbursement provisions contain language which complies with the express negligence doctrine and that the provisions are made conspicuous by printing them in capital letters, bold or larger type, under an appropriate identifying caption, in contrasting type or color, or making them conspicuous by some other means.

Companies should review their existing contracts and forms to assure compliance with the fair notice requirements announced in *Page Petroleum* and, if they are not, consider whether amendment's to such existing contracts or revisions to form contracts are warranted.

Finally, companies that have contracts such as drilling contracts, master service agreements, operating agreements or other agreements which contain provisions releasing, indemnifying or reimbursing the company in advance from liability for its negligence, should be aware that there is now a question as to whether the Texas Anti-Indemnity Statute applies to these provisions and that they may not be enforceable.

B. Waivers, Reimbursements, and Non-Negligence Indemnities

Before *Page Petroleum* overruled the holding of *Whitson* (that releases would be treated differently from indemnity provisions), parties may have been able to circumvent, to some extent, the express negligence doctrine and the Texas Anti-Indemnity Statute by using releases, exculpatory clauses, waivers, and reimbursement. As discussed above, it is now likely that all of these clauses will be subject to the conspicuousness and express negligence requirements, and possibly the Texas Act as well.[30] Furthermore, neither releases nor reimbursement provisions can help to shift any third-party liability which arises.

As discussed in part II.A, above, the Texas Act prohibits only indemnification for a party's own *negligence*. Therefore, parties are free to contract to indemnify each other for types of liability other than negligence, such as strict liability or liability under the DTPA.[31] But because they are limited to liability other than from negligence, such non-negligence indemnities also cannot help to shift third-party liability which arises from negligence. For these reasons, either mutual indemnities or insurance, or both, must be used to shift negligence- and third party-related liability.

C. Mutual Indemnities and Separate Insurance

As pointed out above in part II.A, the Texas Act's mutual indemnity exception is unclear and limited in scope. The inflexibility and uncertainty of the Texas Act make use of indemnity provisions—or, at least, use of indemnity provisions alone—a poor choice if parties wish to shift liability in the manner that appears most efficient and desirable to them in particular situations. Accordingly, it would be unwise to rely *solely* upon use of mutual indemnities in order to shift third-party liability.

Under the rationale of the decision in the *Getty Oil* case, an agreement requiring a party to extend its own insurance

coverage to another party will *not* be treated as an indemnity agreement, as long as it is not "in support of" an otherwise unenforceable indemnity agreement. The Texas Act and the "express negligence doctrine," which are applicable to indemnity agreements, thus do not apply to such insurance requirements.

Consequently, parties may use either mutual indemnities *and Getty*-condoned separate insurance provisions, or use only the insurance provisions, omitting the use of indemnification altogether.

1. Use of Indemnities and Separate Insurance. Employment of both insurance and indemnity provisions, as redundant ways of shifting liability, may not, in practice, be cost effective. Not only will more time (and accompanying attorneys' fees) be spent in drafting and analyzing such redundant provisions, but the added complexity of the documents may complicate or frustrate negotiations. It will also add to the overall level of uncertainty, which is bad for business planning. Further, having overlapping liability protection may even cause insurance premiums to increase.

However, redundancy is not necessarily valueless: two layers of insulation are better than one. And to the extent that a separate insurance provision is effective in protecting the additional insured, the indemnity obligation will not be called upon, implying that any extra cost associated with having indemnity protection as well as insurance protection is small. Additionally, amendment of the Texas Act by the legislature to also make *Getty*-style insurance agreements unenforceable and void is certainly conceivable. Whatever reasoning led the legislature to condemn certain oilfield indemnity agreements would seem to also apply to insurance agreements that have many of the same effects that indemnity agreements have.[32] Indeed, this is exactly why *Getty*-style insurance clauses are an attractive alternative to, or substitute for, unavailable indemnity clauses.

In the event that a separate insurance provision were to be held unenforceable—whether because the legislature has changed the law or because the Texas Supreme Court has changed its holdings—there would be no protection at all for the additional insured without a back-up mutual indemnity provision. Furthermore, because indemnities remain enforceable and continue to be used in other states, the inclusion of them in Texas contracts will be useful where companies wish to employ uniform contracts applicable in more than one jurisdiction.[33]

For these reasons, it may be advantageous for separate insurance provisions to be used in conjunction with a mutual indemnities section which is in compliance with the Texas Act. However, some parties may, not unreasonably, be willing to take the risk that the law will remain relatively stable, and may desire the simplicity, potential cost savings, and more straightforward approach of solely using additional insured clauses as a means of shifting third-party liability (discussed in part IV.C.3, below).

In the event that insurance alone is used in the contract, there is little danger of the insurance being considered to be insurance "in support of" an indemnity agreement, as there is no indemnity agreement to support. For the sake of caution, though, it would be prudent to have a sentence in the insurance section declaring that the insurance is not, and should not be considered to be, any form of indemnity, nor is it intended to support any indemnity.[34]

Where separate insurance is used in conjunction with mutual indemnities, additional precautions need to be taken. That the separateness of the sections must be made clear is a key teaching of *Getty*. Therefore the wording and the structure of the contract should emphasize the independence and separateness of these provisions. There should be a mutual indemnities section, with its own insurance (which is required in order to take advantage of mutual indemnity exception). There should also be an insurance section, separate from the mutual indemnities section, which requires the indemnitor to name the indemnified party as an additional insured and to procure a waiver of subrogation. This section should be physically separate, and logically independent, of the mutual indemnities section, to satisfy *Getty's* requirement that the insurance requirements not be "in support of" the indemnities.

2. Premium Allocation Clause. One final safeguard which might help insure the enforceability of an additional insured requirement is a "premium allocation clause." Either in the separate insured provision, or in the clause stating the price to be paid to the contractor by the operator, part of the price should be deemed to be allocated to the additional cost of premiums borne by the contractor resulting from naming the operator as an additional insured under its policy(ies). (Of course, a similar clause could

also apply, *mutatis mutandis,* to a contractual requirement that the operator name the contractor as an additional insured. Generally, however, in practice the operator will be the party which will be named as an additional insured under the contractor's insurance policy.)

Where determination of the exact additional costs borne by the contractor due to having to name the operator as an additional insured is not possible, the clause could nevertheless state that the consideration paid by the operator is deemed to include compensation to the contractor for any additional costs the contractor may incur because of naming the operator as an additional insured. Such a clause would help to rebut a claim that the additional insured requirement is functionally similar to prohibited indemnity agreements, because the additional insured party (e.g., the operator) would be itself (deemed to be) paying for its own insurance coverage, albeit through the use of the contractor's policy.[35]

While *Getty*'s interpretation of the Texas Act, unlike the Louisiana Act,[36] allows insurance agreements even if economically similar to indemnity agreements, such a premium allocation clause could be useful in the event of any future change in Texas law or interpretation of the Act. The clause would help prevent the additional insured requirement from being characterized as economically equivalent or similar to a (prohibited) indemnity, which would reduce the chance that the additional insured requirement would be held unenforceable under any law that prohibits indemnity-equivalent insurance agreements.

3. Use of Insurance Only. One commentator has suggested abandoning the mutual indemnities approach altogether.[37] There are both advantages and disadvantages, as discussed above, which would accompany a decision to utilize insurance *instead of*, rather than in addition to, indemnities.

By relying solely on insurance, a party would either rely on his own insurance, or would be named as an additional insured under the insurance policies of the other party to the contract. An operator could, for example, simply require its contractors to name the operator as an additional insured under its insurance policies and obtain a waiver of subrogation. If insurance alone were being relied upon in this manner to allocate risks of liability, the party assured would need to decide what insurance coverage was necessary to adequately protect itself from risks of liability typically associated with the work to be performed under the contract, and require that it be named as an additional insured under those policies. A waiver of subrogation would also be obtained from the insurer.

This approach is accompanied by various advantages and disadvantages, some of which are summarized below:

Advantages

- Less confusing language in the contract which may make the contract more acceptable to contractors.
- Less uncertainty of application by courts so that contracting parties may more reliably predict how the contract will be interpreted.
- Shorter overall document with less legal complexity and fewer legal costs needed to be incurred in the document's preparation and amendment.

Disadvantages

- *Getty*'s holding may be reversed or modified later, or the legislature may modify the Act—which could make the insurance provision unenforceable, with no enforceable indemnity clause which *is* in compliance with the Act (e.g., a mutual indemnity clause or an indemnity for liability arising from pollution control), and the operator would be left without any indemnity protection as a back-up.
- Contractors may be less willing to accept the unfamiliar format of a contract containing no indemnities.
- The contract would be of a different format from other contracts that contain indemnities which are used by the operator in other states.

The consideration of the relative advantages and disadvantages of choosing to forego use of indemnities must be a business decision made by companies. Companies should become completely familiar with the risks to the company that it is attempting to protect against. Any decision to rely solely on insurance should be made after discussions with the company's risk managers and after evaluating all relevant considerations.

V. CONCLUSION

The Texas Supreme Court's decision in *Getty Oil Company v. Insurance Company of North America* provides oilfield participants with an important tool to insulate themselves from the risks of liability and to efficiently allocate risks inherent in oilfield operations. Informed negotiating, as well as the adoption of wholly separate indemnity and insurance provisions in service and other oilfield contracts, can assist parties to take full advantage of the contractual freedom guaranteed them by *Getty Oil*.

NOTES

1. Black's defines an indemnity as "Reimbursement. An undertaking whereby one agrees to indemnify another upon the occurrence of an anticipated loss. . . . A contractual or equitable right under which the entire loss is shifted from a tortfeasor who is only technically or passively at fault to another who is primarily or actively responsible." BLACK'S LAW DICTIONARY 769 (6th ed. 1990). To indemnify is "To restore the victim of a loss, in whole or in part, by payment, repair, or replacement." *Id.*
2. *See* extensive analysis of the Texas Anti-Indemnity Statute in Patrick H. Martin & J. Lanier Yeates, *Louisiana and Texas Oil & Gas Law: An Overview of the Differences*, 52 LA.L.REV. 769, 853 (1992) (hereinafter "Martin & Yeates"). *See also* the Texas Anti-Indemnity Statute, TEX. CIV. PRAC. & REM. CODE § 127.001–127.007, at § 127.002(a); and J. Lanier Yeates, *Indemnification and Anti-Indemnity Statutes as They Relate to Mineral Rights and Contracts*, 33 L.S.U. MIN.L.INST. 109, 116-17 (1986) (hereinafter "Yeates").
3. TEX. CIV. PRAC. & REM. CODE § 127.001–127.007.
4. Martin & Yeates, *supra* note 2, at 853.

It should be noted that Louisiana has a similar anti-indemnity law, the Louisiana Oilfield Indemnity Act (LA. R.S. 9:2780) (the "Louisiana Act"). In *Thomas v. Amoco Oil Company*, 1993 WL 56854 (W.D. La. March 2, 1993), the federal district court held that Louisiana has a greater interest in enforcing its anti-indemnity statute than does Texas. In this case Woodson Construction Company ("Woodson") employed plaintiff. Amoco Pipeline Company ("Amoco") hired Woodson to perform services on a land-based Amoco pipeline in Texas. The plaintiff was injured and sued Amoco. Amoco, alleging that Woodson's negligence caused the plaintiff's injuries, brought a third-party complaint against Woodson for indemnification pursuant to the contract between Woodson and Amoco. Because there was no choice of law provision in the contract, the court conducted a choice of law inquiry to determine which state's law applied to the Amoco-Woodson contract.

The court examined Louisiana Civil Code art. 3537, which provides that the governing law is the law of the state "whose policies would be most seriously impaired if its law were not applied to that issue." The court held that, in this case, "Louisiana has a greater interest in enforcing its anti-indemnity statute than does Texas," and therefore the policies behind Louisiana's law would be "most seriously impaired" if Louisiana law was not applied.

The court based this conclusion on several factors. Woodson was a Louisiana corporation and contractor, and Louisiana's interest in protecting a resident contractor was greater than Texas's interest in protecting a non-resident contractor. Further, Texas would suffer no impairment of its interests if Louisiana law was applied. The contract was negotiated via mail and telephone conversations between Illinois and Louisiana, and was executed by Woodson in Louisiana. Further, the court stated that Texas was "*merely*" the place of performance of the contract and the location of the accident (despite the fact that the place of performance and location of an accident would seem to be significant factors in any balancing test). Neither party was domiciled in Texas nor should have expected the protection of the Texas indemnity statute in these circumstances. Finding that relatively little impairment of Texas' interests would result from applying Louisiana's anti-indemnity act, the court analyzed the validity of the indemnity agreement under Louisiana law.

5. Martin & Yeates, supra note 2, at 854, citing the Act, § 127.004(2), (3), and (4).
6. Texas Act, § 127.001(2) and (4), and § 127.005(b) and (c).
7. Martin & Yeates, *supra* note 2, at 855.
8. Texas Act § 127.001(5).
9. Texas Act § 127.001(2).
10. Texas Act § 127.005(c).
11. Martin & Yeates, *supra* note 2, at 856, citing the Texas Act, § 127.005(b). The unilateral indemnity exception is limited to $500,000 worth of protection, supported by insurance, whereas the mutual indemnities exception is unlimited. For this reason, this article focusses more on the mutual indemnities exception, as it has the most potential usefulness for significant transactions. Where $500,000 or less would be sufficient to insure against risks, however, parties may wish to consider using unilateral indemnity provisions, backed by appropriate insurance, rather than using the more limited mutual indemnities exception or the novel separate insurance provisions discussed herein.
12. *See, e.g.*, Martin & Yeates, *supra* note 2, at 856-58; Yeates, *supra* note 2; J. Lanier Yeates & Steven T. Lovelady, *An Update on Anti-Indemnity in Louisiana and Texas—Indemnification and Anti-Indemnity Statutes—Part II*, 38 L.S.U. MIN.L.INST. 443 (Baton Rouge, Louisiana: Paul M. Hebert Law Center, Louisiana State University; James M. Petersen, ed., 1992); Harlow Sprouse, *Indemnity and Liability Issues to Third Parties and Insurance Against Such Claims, Including Exhibit D*

to the Joint Operating Agreement, STATE BAR OF TEXAS ADVANCED OIL, GAS & MINERAL LAW COURSE Chapter M, at M-15 (1989); Owen L. Anderson, *The Anatomy of an Oil and Gas Drilling Contract*, 25 TULSA L. J. 359, 428 n. 450, 429 (1991); and Jeanmarie B. Tade, *Drafting Indemnity Provisions in Oil and Gas Contracts: Analysis and Application of Texas and Louisiana Case Law to Offshore Contracts*, NATURAL RESOURCES, ENERGY, AND ENVIRONMENTAL LAW SECTION MONOGRAPH SERIES, NO. 12, at 10 (1989).

13. Martin & Yeates, *supra* note 2, at 856.

For a case where a mutual insurance and indemnity provision was held to satisfy the Act, see *Dupre v. Penrod Drilling Corp.*, 788 F.Supp. 901 (E.D. La. 1992). In this case, Dupre sued Penrod Drilling Corporation ("Penrod") for injuries sustained while working for Total Minatome Corporation ("TMC") on a fixed stationary platform owned by TMC located in the Gulf of Mexico off the coast of Louisiana. Dupre alleged that he slipped on mud discharged from Penrod's jack-up rig onto scaffolding erected on TMC's platform. TMC filed a motion seeking contractual indemnity from Penrod, pursuant to a contract previously entered into between TMC and Penrod.

Because the contract directly involved the use of a vessel in performing drilling operations, the contract and the indemnity provisions contained therein were construed under maritime law. Under maritime law, the Texas choice of law in the contract was given effect. The indemnities at issue were those contained in the Daywork Drilling Contract, a form agreement developed by the International Association of Drilling Contractors. The court held that the mutual indemnity due to Penrod was limited only by the equal amounts of insurance agreed upon to support the mutual indemnities. According to text of the contract provided by the court, the contract apparently did not specify a dollar amount of insurance to be carried. The court therefore focused upon the amount of insurance that was *actually later obtained* by the parties.

In *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115 (5th Cir. 1992), the Fifth Circuit Court of Appeals held that, under the Texas Act, an indemnitee may collect indemnity up to the amount of insurance *actually obtained*. In this case, Union Texas Petroleum Corporation ("UTP") hired a drilling vessel from Sonat Offshore Drilling ("Sonat") to drill a well on the outer continental shelf off the coast of Louisiana. UTP also entered into an agreement with Frank's Casing Crew and Rental Tools, Inc. ("Frank's") to perform casing and other services on board the drilling vessel. Campbell, an employee of Frank's, was injured while transferring to Sonat's drilling vessel from a supply boat hired by UTP.

Campbell sued both UTP and Sonat based upon his injuries. UTP filed a third-party complaint against Frank's and Frank's insurers, seeking defense and indemnity for itself and for Sonat pursuant to the purchase order between UTP and Frank's which contained indemnity provisions. The court held that the purchase order between UTP and Frank's constituted a contract between those parties. The court then had to determine the law applicable to the contract. This was an important point because, if Louisiana law were to apply under the Outer Continental Shelf Lands Act (43 U.S.C. § 1333) ("OCSLA"), the Louisiana Act could potentially invalidate the indemnities in the contract. Under the OCSLA, the law of the adjacent state (i.e., Louisiana) is applied as surrogate federal law, unless federal (maritime) law applies of its own force. The court applied the factors announced in *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990), in holding that the contract was maritime in nature, because the contract was for maritime services to enable the drilling vessel to complete its mission. Therefore maritime law, rather than Louisiana law as surrogate federal law, was applicable to the contract.

Because the contract contained a Texas choice of law provision, the applicability of the Texas Act was at issue. At the time Campbell was injured (December 10, 1988), the Texas Act provided that an otherwise-unenforceable indemnity would be enforced to the extent that it was supported by insurance, but that the amount of insurance required could not exceed $300,000. Effective September 1989, the Act was modified to permit mutual insurance requirements of any amount.

Frank's argued that the old version of the Act applied. The court held that it did not matter whether the new version or the old version of the Act applied, because "Frank's procured $10,000,000 in excess insurance and, even under the unamended version of section 127.005 which Frank's relies upon, UTP is entitled to collect indemnity up to the amount of insurance Frank's *actually obtained*" (p. 1127, emphasis by the court). The court justified this holding by citing two cases: *Lirette v. Union Texas Petroleum Corp.*, 467 So. 2d 29, 34 (La. App. 4th Cir. 1985) (holding that Texas' $300,000 limit on insurance pursuant to indemnity contract did not place an absolute $300,000 limit on each claim where the contractor voluntarily provided more insurance), and *Maxus Exploration Co. v. Moran Bros.*, 773 S.W.2d 358, 361 (Tex. App.—Dallas 1989) (where indemnification was limited by statute, requiring a party to indemnify up to the amount of insurance actually obtained on ground that "[t]he purpose of the section 4(c) limit is to protect a weaker party from being coerced by a stronger party into providing high indemnity protection"), *aff'd on other grounds*, 817 S.W.2d 50 (Tex. 1991). Accordingly, the Fifth Circuit affirmed the district court's determination that Frank's must indemnify for the full amount of the UTP-Frank's agreement.

14. Texas Act § 127.006.

15. Texas Act § 127.006.

16. Martin & Yeates, *supra* note 2, at 856, also citing the Louisiana Act, LA. R.S. 9:2790(G).

17. 845 S.W.2d 794 (Tex. 1992).

18. *See Getty Oil Corp. v. Duncan*, 721 S.W.2d 475 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

19. 36 Tex. Sup. Ct. J. 737 (April 7, 1993).

20. 773 S.W.2d 381 (Tex. App.—Dallas 1989, writ denied).

21. *See also Joseph Thomas, Inc. v. Graham*, 842 S.W.2d 343 (Tex. App.—Tyler 1992, n.w.h.) (distinguishing a guaranty from an indemnity); *Stine v. Marathon Oil Co.*, 976 F.2d 254, 259-60 (5th Cir. 1992) (applying Texas law, characterized a contract's liability-shifting clause as an exculpatory clause, and subjected it to a test less stringent than the express negligence rule); and Michael P. Darden, *Amending the Anti-Indemnity Statute to Modify the Express Negligence Rule*, TEXAS STATE BAR SECTION REPORT—OIL, GAS AND MINERAL LAW SECTION Mar. 1993, Vol. 17, No. 3, at 19, 20-21.

22. 36 Tex. Sup. Ct. J. 737, 739 (April 7, 1993).

23. *Id.*

24. TEX. BUS. & COM. CODE § 1.201(10).

25. 36 Tex. Sup. Ct. J. at 740 (n.5).

26. *See id.* at 739, stating that "these agreements, whether labeled as indemnity agreements, releases, exculpatory agreements, or waivers, all operate to transfer risk."

Black's defines a release as "[a] writing or an oral statement manifesting an intention to discharge another from an existing or asserted duty." BLACK'S LAW DICTIONARY 1289 (6th ed. 1990). An exculpatory clause is "[a] contract clause which releases one of the parties from liability for his or her wrongful acts." *Id.* at 566. A waiver is "[t]he intentional or voluntary relinquishment of a known right . . . ." *Id.* at 1580.

27. Black's states that to reimburse is "[t]o pay back, to make restoration, to repay that expended; to *indemnify*, or make whole." BLACK'S LAW DICTIONARY 1287 (6th ed. 1990) (emphasis added).

28. In the appeals court decision in *Page Petroleum*, the court of appeals held that if the effect of an agreement is to exculpate a party from the consequences of its own negligence, the better policy is to cut through the ambiguity of those provisions and apply the express negligence rule. *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 821 S.W.2d 359, 368 (Tex. App.—Waco 1991). Under a reimbursement agreement, it is possible that a contractor's equipment may be destroyed, for example, while working for an operator, through the contractor's own negligence, in which case the contractor might still be entitled to reimbursement for the value of its lost equipment. Although the contractor would be relieved of the financial *consequences* of its own negligence by such a reimbursement, it is not clear that it would be "exculpated" from the consequences of its negligence, because when one negligently destroys one's own equipment, liability to oneself does not arise.

29. For general drafting advice with respect to indemnity clauses, see Richard L. Scheer, *Model Contractual Indemnity Provisions Effective to Protect an Indemnitee Against His Own Negligence or Other Fault*, 50 TEX. B.J. 602 (1987).

30. However, it is unclear exactly how the Texas Anti-Indemnity Act would apply to releases or reimbursement provisions. The Texas Act's harshness is ameliorated somewhat by the exclusions, e.g. the mutual indemnity exclusion. *See supra* notes 5-14 and accompanying text. But if releases or reimbursement provisions are within the scope of the Act, how will the mutual indemnity exception apply? What, exactly, is a "mutual release"? Or a "mutual reimbursement"? Whatever these creatures are, they are not defined in the Act.

31. Sprouse, *supra* note 12, at M-18.

32. Apparently Louisiana agrees with this analysis: As discussed above, in an oilfield indemnity agreement under Louisiana law, any requirement to name the indemnitee as an additional insured is void. *See supra* note 16 and accompanying text.

33. However, because Texas law in this area is very complicated, and differs greatly from that of many other states, it is recommended that separate form agreements be used which are specifically drafted to satisfy the unique requirements of the law governing indemnity in each state.

34. Where indemnities other than for negligence—which are not affected by the Texas Act—are used in the contract, the attorney must be careful when drafting insurance clauses. The separate insurance clause contemplated here, in order to take advantage of *Getty's* holding, must not be "in support of" prohibited indemnity agreements, nor should it be construed to be an indemnity, as explained above in the text. However, if the insurance is to cover *other* indemnity-related liability, the insurance clause should so provide, as long as it is clear that the insurance is not in support of those types of indemnities prohibited by the Texas Act.

35. *See* Tade, *supra* note 12, at 45, suggesting that an energy company:

> consider including a statement in the "price" provision of the drilling contract identifying a specific portion of the contract price as premium for additional assured and waiver of subrogation endorsements, and a statement that naming and waiving is an essential part of the consideration paid to the contractor under the contract. This would afford a basis to argue that the contractor is not being forced to obtain more insurance than he needs because of some inequality of bargaining position and that the bulk of the additional premiums paid for the endorsements is being funded by the energy company itself directly.

It should be noted that, when individuals, or individual companies, negotiate and contract in a free market, there is no "force" involved in the first place; the concept of "power" in the

often-cited phrase "bargaining power" is a type of power that has nothing whatever to do with "force." Furthermore, some market skeptics may assume such a premium allocation clause is some sort of ruse. However, the cost of obtaining necessary insurance is a cost of doing business, and necessarily is spread out, in some proportion, among the parties to a transaction. Because, in the real world, supply and demand curves are not 100% elastic or inelastic, it is evident that neither party to a contract can really bear the *entire* portion of a cost which necessarily burdens a given transaction. Therefore, it is clear that an operator who is named an additional insured of necessity always "pays" part of the premiums which are nominally paid by the contractor. As has been said before, "TANSTAAFL" ("There ain't no such thing as a free lunch").

36. *See supra* note 16 and accompanying text.

37. Sprouse, *supra* note 12, at M-17.

Case Notes

TORT LIABILITY OF OIL COMPANY

The Supreme Court of Texas rejected the holding that where an oil company has the right to control the details of the service station operation, the oil company's duty to the station's employees is one of ordinary care, to adopt the holding that the nature of the matters to which the right of control extends should be determinative of liability.

Exxon Corporation v. Tidwell, 36 Tex. Sup. Ct. J. ___, No. D-1639 (December 8, 1993).

FACTS: Jerry Morgan leased a 26-year-old full-service gas station from the Exxon Corporation. Morgan employed the plaintiff, Terry Tidwell, at the station as an attendant. On November 4, 1987, at approximately 10:00 p.m., Tidwell was shot during a robbery attempt by Todd Jones, who entered the service station through an open garage bay door.

Tidwell sued Exxon claiming that it failed to maintain a safe work place. In the trial court, the parties presented evidence on the issue of Exxon's right of control over the operations of the station. The presentation of this evidence was a result of the legal standard of liability at the time of the trial, i.e. that where a an oil company has the right to control the details of the service station operation, something more than a landlord tenant relationship exists, and the oil company's duty to the station's employees is one of ordinary care.

Following a bench trial, Tidwell secured a judgment of $382,716.48. However, the trial court made no specific findings on the right of control over the security and safety of the station.

The Texas Supreme Court granted Exxon's application for writ of error to consider its argument that the court of appeals erred in holding that Exxon owed a duty of ordinary care to protect its tenant's employees from the criminal acts of third parties.

DECISION: The Supreme Court of Texas reversed the judgment of the court of appeals and remanded the matter to the trial court holding that the standard of duty on which the trial court based its decision was overly broad.

As set forth in the case of *Hayes v. The Travelers Ins. Co.*, 358 S.W.2d 254 (Tex. App.—Waco 1962, writ ref'd), the issue in determining whether Exxon had a duty to insure a safe work place for Morgan and his employees would turn on whether Exxon had the right to control Morgan in the details of the work to be performed in the operation of the service station. However, the Texas Supreme Court rejected this standard asserting that the nature of the matters to which the right of control extends should be determinative. Thus, in a case alleging negligence in maintaining a safe work place, the court's inquiry must focus on who had specific control over the safety and security of the premises, rather than the more general right of control over operations. Issues concerning control over operations, such as who held title to the gasoline or who set the sanitation standard for the restroom obscure the true inquiry. The focus should be on whether Exxon had the right to control the alleged security defects that led to Tidwell's injury. If Exxon did not have any right to control the security of the station, it cannot have had any duty to provide the same. If Exxon had such right or control, its conduct may be found to have contributed to Tidwell's injury.

The Supreme Court concluded that the traditional test of the right to control over general operations, simply did not answer this question. The Supreme Court consequently