

Will Your Risk-Allocation Scheme Be Enforced?

The Texas and Louisiana Approaches to Anti-Indemnity

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Presentation Overview

- Background on Indemnity and Risk Allocation
- Anti-indemnity Acts
 - Louisiana (LOIA)
 - Texas (TOAIA)
- Choice of Law
- Lessons
- Discussion

Background:

Why Does Indemnity Matter?

- Offshore oil-and-gas operations include inherent risks of:
 - Bodily injury,
 - Property damage, and
 - Environmental damage

Background:

What To Do About Those Risks?

- Establish an indemnity scheme
- Allocate risks *ahead of time* and *without regard to fault*
- Why?
 - Creates more certainty
 - Reduces fees/costs
 - Reduces “brain drain”
 - Preserves business relationships
 - Mitigates claims paid to third parties

Background:

Who Accepts The Risks?

- Notion of reciprocity ingrained in business
- Allocate PD and BI risks based on:
 - Ownership of property, or
 - Employment of personnel
- For pollution, based on:
 - Custody of pollution-causing property, or
 - Binary formula
 - Above surface / Below surface

Background:

Basic Indemnity Scheme

Broad reciprocal indemnity (Texas style):

- Each party indemnifies the other and its “group” (indemnitees) for claims by other party and its “group”
- “Group” – affiliates, other contractors, employees, agents, and invitees
- INDEMNITOR promises:
 - Protect other party / group from claims brought by any member of INDEMNITOR’s group
 - Keep that promise in *another* contract

Background:

Consistent Indemnity Schemes

- Indemnity scheme in lead contract impacts all underlying contracts
- No pass-through = no recourse
 - Provision in underlying contracts to pass indemnity from contractors to drilling contractor
 - Puts pressure on company / operator
 - Requires protection from each contractor

Background:

How To Make a Pass-Through Provision

- “Group” definition: expand indemnitees to contractors and subcontractors
Campbell v. Sonat Offshore Drilling, Inc.
- Extend risk-allocation protections to indemnitee’s economic family
- Require INDEMNITOR to accept indemnitee’s contractual obligations to others
- Indemnity without a pass-through will not solve the problem
Foreman v. Exxon

Background:

Basic Indemnity Example

- Contractor's employee sues Operator
- Operator tenders lawsuit to contractor per indemnity scheme
- Contractor (and its insurer) responsible for claim

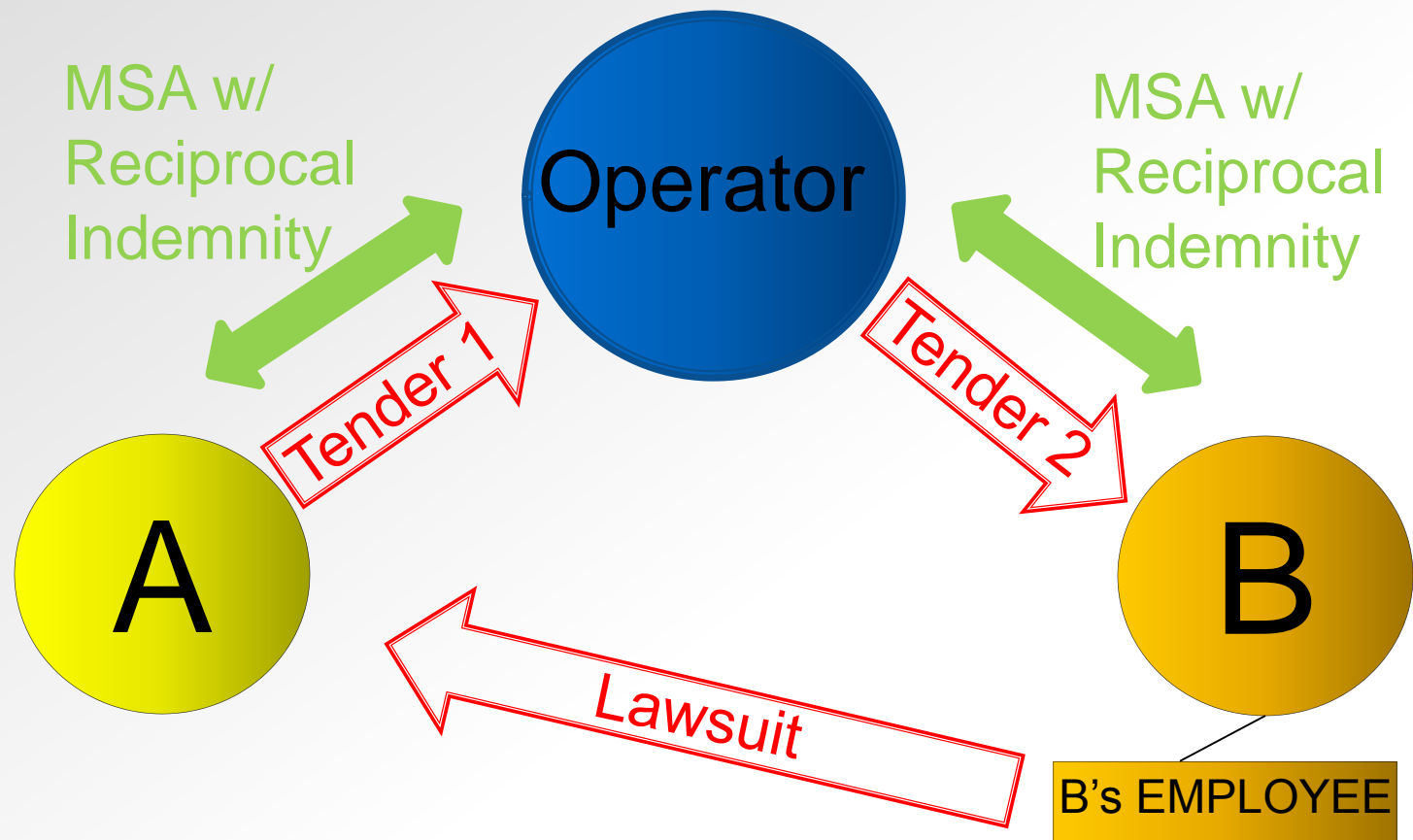
Background:

A More Complex Example

- Contractor B's employee sues Contractor A
- Contractor A tenders lawsuit to Operator per broad reciprocal indemnity scheme
- Operator, in turn, tenders claim to Contractor B, per indemnity scheme
- Contractor B indemnifies both Operator and Contractor A for claim

Background:

A More Complex Example



Background:

The Hand Grenade

- Making promise in one contract that you can't keep through another contract
- We call it a “mismatch”
- Creating a mismatch sets you up to be “the monkey in the middle”
- Why does it happen?

Background:

How Does It Happen?

Bad contracts:

- Form problems
- Legacy agreements
- Potpourri

Background:

How Does It Happen?

- Lack of:
 - Caution in negotiation
 - Understanding
 - Intellectual curiosity
- Internal pressure / lax controls
- “Silos”

Background:

Indemnity Schemes Should Work

- If risk-allocation scheme is correctly drafted and enforced, expect:
 - Claim will be tendered (ultimately) to owning or employing party, and
 - That party will be responsible for claim
- Pretty good plan
- So what's the problem?

Background:

Parties Try to Avoid Obligations

- When time to pay the piper, INDEMNITOR does not like result
- INDEMNITOR looks for way to void its reciprocal promise to pick up its own personnel or property
- Indemnitor seek refuge in anti-indemnity laws

Anti-Indemnity Acts:

How Do They Work?

- Industry preference is for “without regard to fault” indemnity schemes
- But state legislatures intervened
- Anti-indemnity acts void indemnity and insurance contracts that pertain to wells for oil, gas, water, etc.

Anti-Indemnity Acts:

Enforceability Issues

- Anti-indemnity acts
 - Louisiana
 - Texas
- Purposes
 - Perceived inequities
 - Enhance safety
- Strong public policy
 - Cannot contract out of it

Anti-Indemnity Acts:

LOIA

- Restricts indemnity and insurance
- Personal injury only

Anti-Indemnity Acts:

LOIA Scope

- Two-part test
 - (1) “Pertains to” a well
 - (2) Related to exploration, development, production, or transportation of oil, gas, or water
- Fact-intensive, case-by-case
- Broad scope
- Extent of commingling of production from different well / “nexus” to a well

Transco

Anti-Indemnity Acts:

LOIA

- *Tetra Technologies, Inc. v. Continental Insurance Co.*
- LOIA applies to salvaging a decommissioned platform
- *Verdine v. Ensco*
- LOIA applies to refurbishing fixed platform rig while in landside yard

Anti-Indemnity Acts:

LOIA

- Exceptions
 - JOA
 - Sulphur
 - Radioactivity
 - Wild Well
 - Oil Spills and Control
 - Workers' compensation
- Defense costs if indemnitee free from fault under *Meloy v. Conoco*
 - *But see Tanksley*
- *Marcel v. Placid Oil*

Anti-Indemnity Acts:

LOIA: *Marcel* Exception

Marcel provides narrow exception:

- Indemnatee pays full cost of extending indemnitor's insurance coverage, then
- Indemnity remains invalid, *but*
- Indemnitor's insurance coverage for indemnatee *is* enforceable

Anti-Indemnity Acts:

LOIA: *Marcel* Exception

- *Hodgen v. Forest Oil Corp.*
 - Unwritten “working policy” whereby contractors could factor in the cost of procuring insurance is insufficient
- *Amoco v. Lexington Ins. Co.*
 - Calculating premium for additional protection may be difficult
- But *Rogers v. Samedan*
 - If reasonable premium paid, insurance enforceable

Anti-Indemnity Acts:

TOAIA

- Personal Injury **and** Property Damage
- Exceptions
 - JOAs
 - Wild Well
 - Property Damage from Underground / Reservoir Damage
 - Radioactivity
 - Property Damage from Pollution
 - Workers' Compensation
 - Surface Owner Damage

Anti-Indemnity Acts:

TOAIA Scope

- Slightly different scope than LOIA
- “Close nexus” between production / servicing or drilling of wells

Anti-Indemnity Acts:

TOAIA Scope

- Agreement “pertaining to a well for oil, gas, or water or to a mine for a mineral”
 - Includes: drilling, reworking, repairing, testing, treating, transporting oil / water, and services “in connection with” a well drilled
 - Does not include: purchasing, selling, transporting, or storing gas, or refineries
 - Also does not include: maintenance, repair, or construction of oil, NGL, or gas pipelines

Anti-Indemnity Acts:

TOAIA Scope

- *In re John E. Graham & Sons*
 - Completing tie-in of wells on satellite platform to existing production facility pertained to a well
- *Catlin Specialty Ins., Co. v. L.A. Contractors, Ltd.*
 - Supplying materials for construction of well pad sites and building private roads did *not* pertain to a well
- *Delahoussaye v. Pices Energy, LLC.*
 - Providing company men and crane operator for workover on offshore, fixed platform pertained to a well
- *Coastal Transp. Co. v. Crown Central Petroleum Corp.*
 - Terminal loading agreement between trucking company and petroleum refiner did *not* pertain to a well

Anti-Indemnity Acts:

TOAIA Scope

- Exceptions for indemnity supported by insurance
 - Unilateral indemnity (\$500,000)
 - Mutual indemnity (up to common amount of insurance obtained “for the benefit of the other party as indemnitee”)
 - Act does not apply to insurance that does not directly support the indemnity

*Getty Oil Co. v. Insurance Company of North America;
Certain Underwriters at Lloyd’s London v. Oryx Energy
Co.*

Anti-Indemnity Acts:

TOAIA Scope

Insurance that does not support indemnity

- Two prongs – unclear if both are critical:
 - Two different insurance requirements
 - Insurance should apply to all policies

Anti-Indemnity Acts:

LOIA & TOAIA: Other Exceptions

LOIA	TOAIA
JOA	JOA
Radioactivity	Radioactivity
Wild well	Wild well
Sulphur	
Oil spills and control	Property damage from pollution
	Property damage from underground/reservoir damage
Workers' compensation	Workers' compensation
	Surface owner damage

Choice of Law:

Considerations

- Applicable law can mean success or failure
- OCSLA reigns supreme
- Maritime v. state law

Choice of Law:

OCSLA – PLT Test

- Adjacent state law applies as “surrogate” federal law if:
 - OCSLA “situs”
 - Focus of the contract
 - Where work is performed
 - Location of underlying tort unimportant
 - Federal maritime law does not apply
 - State law is not inconsistent with federal law
- OCSLA is a “super choice of law” clause

Choice of Law:

OCSLA – PLT Test

- Adjacent state *Sndyer Oil Corp. v. Samedan*
- Consider:
 - Geographic proximity
 - Federal agency determinations
 - Extension of traditional boundaries
 - Prior court decisions
- Do *not* consider:
 - Evidence of parties' intent

Choice of Law:

Maritime or Not?

- Maritime vs. state law is often pivotal
- *Davis & Sons* multiple-factor test no longer the rule
- Replaced by *In re Larry Doiron, Inc. (2018)*
 - Flow-back services to improve offshore gas well
 - Crane barge required to lift equipment onto platform
 - After failed effort, injury while using crane to rig down
- Rule: degree of involvement of vessel in the work
- Will *Doiron* change the results?

Choice of Law:

***Pre-Doiron* Maritime Contracts**

- *Lewis, Theriot, Dupre, Dupont*
 - Contract to provide drilling services aboard special-purpose vessel
- *Corbitt, Campbell, Demette*
 - Contract to provide casing services aboard vessel provided by another party

Choice of Law:

Pre-*Doiron* Maritime Contracts

- *Lefler*
 - Contract to provide catering services on fixed platform and cleaning services on vessel adjacent to the platform where claim arises out of latter obligation
- *Hoda*
 - Torquing down BOP stacks from jack-up drilling rig used as work platform

Choice of Law:

Pre-*Doiron* Non-Maritime Contracts

- *Thurmond*
 - Contract to provide wireline services on fixed structures using transportation barge
- *Laredo*
 - Contract to construct stationary platform
- *Union Texas Petroleum*
 - Contract to construct offshore pipeline
- *Alleman*
 - Contract to provide helicopter services

Choice of Law:

Maritime v. State Law

- *Texaco v. AmClyde*
- Product liability claim
- Damage caused when defective crane dropped platform module in GOM
- All parties assume maritime law applies
- Fifth Circuit concludes OCSLA applies
 - Not maritime law because not related to maritime commerce

Choice of Law:

Strategy

- Not predictable
- Do not count on elected choice of law
- Risk of broad reciprocal
- Understand risk and avoid surprises

Lessons:

Anti-Indemnity Lessons

- Insurance sometimes provides more protection
- Belt and suspenders
- Savings / severability clause
- Choice of law critical
- Back-up plan
- Liability insurance

Discussion:

