Will Your Risk-Allocation Scheme Be Enforced?

The Texas and Louisiana Approaches to Anti-Indemnity

Presented by:
Harold J. Flanagan
Presentation Overview

• Background on Indemnity and Risk Allocation

• Anti-indemnity Acts
  • Louisiana (LOIA)
  • Texas (TOAIA)

• Choice of Law

• Lessons

• Discussion
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
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**

- **MSA w/ Reciprocal Indemnity** from A to Operator
- **Tender 1**
- **MSA w/ Reciprocal Indemnity** from Operator to B
- **Tender 2**
- **Lawsuit** from B’s EMPLOYEE to A
- **B’s EMPLOYEE**

A diagram showing the interactions and legal arrangements between A, B, and the Operator, with specific notations for MSA, reciprocal indemnity, tender actions, and a lawsuit.
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?
Bad contracts:

- Form problems
- Legacy agreements
- Potpourri
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?
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**

  - 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:

- Indemnitee pays full cost of extending indemnitor’s insurance coverage, then
- Indemnity remains invalid, *but*
- Indemnitor’s insurance coverage for indemnitee *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
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

  - 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.*
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

<table>
<thead>
<tr>
<th>LOIA</th>
<th>TOAIA</th>
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<tbody>
<tr>
<td>JOA</td>
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<td>Radioactivity</td>
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<td>Wild well</td>
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<td>Sulphur</td>
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<td>Oil spills and control</td>
<td>Property damage from pollution</td>
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<td>Property damage from underground/reservoir damage</td>
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<td>Workers’ compensation</td>
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<td>Surface owner damage</td>
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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: