

INDEMNITY AND INSURANCE IN THE TEXAS OIL PATCH

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I. INTRODUCTION

Exploring for oil and gas, whether onshore or offshore, is an endeavor by several parties who perform their roles pursuant to contracts. In these contracts between the owner/operator, the drilling contractor, and numerous other contractors and subcontractors, the parties almost always undertake obligations of defense and indemnity—sometimes mutual, sometimes unilateral—to their counterparties. Almost always, every party involved has managed its risk to some degree by purchasing insurance, which is often used to backstop a party's indemnity obligations to its counterparty.

Similar to an earlier article addressing Louisiana law,¹ this Article will address various facets of the Texas law of indemnity and insurance in the oil and gas industry. The Article begins with a discussion of the rules governing the interpretation of indemnity provisions, the difference between an indemnity and a release, and the two main types of indemnity. Next, the Article addresses indemnification for an indemnitee who is at fault and the role that insurance can play in catching risks that are not caught by indemnity provisions. The Article continues with a discussion of the Texas Oilfield Anti-Indemnity Act,² including the purpose of the Act and the interplay between insurance and indemnity in the oilfield. In conclusion, the Article examines choice of law principles, the Outer Continental Shelf Lands Act,³ and maritime law, and their intersection with the Texas law of indemnity and insurance.

II. INTERPRETATION OF INDEMNITY PROVISIONS

A. General Rules

A court interpreting an indemnity provision in a contract will attempt to discern the parties' intent. Generally speaking, a court construing a contractual indemnity provision under Texas law will apply the following rules:

- (1) The terms of a contract will be given their plain, ordinary, and generally accepted meaning, unless the contract shows that they were intended to be used in a different or technical sense.⁴

1. Gerald F. Slattery, Jr., *Indemnity and Insurance in the Louisiana Oil Patch*, GULF COAST LAND INSTITUTE (Sept. 7, 2014), <http://www.landman.org/docs/marketing-ads/gerald-slattery-paper.pdf>.

2. TEX. CIV. PRAC. & REM. CODE ANN. § 127.001–007 (West 2002).

3. 43 U.S.C. §§ 1331–1356(b) (2012).

4. *Marathon E.G. Holding Ltd. v. CMS Enters. Co.*, 597 F.3d 311, 316 (5th Cir. 2010) (citing *Heritage Res. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996)).

- (2) A court will not deem a contract ambiguous when it is worded such that its terms can be given a definite meaning.⁵ In such a circumstance, the court will apply the contract as it is written.⁶
- (3) Conversely, when the language of a contract is ambiguous, the court will consider parol evidence, such as circumstances before and after the making of the contract, prior negotiations, and operative usage evidence.⁷
- (4) Courts may not consider parties' oral statements about what they intended the contract language to mean.⁸
- (5) Indemnity agreements are strictly construed in favor of the indemnitor, and the indemnity must be clearly expressed.⁹

In addition to these general principles, there are some specific rules that drafters of agreements should consider closely. These concern inter-party versus third-party claims, the use of an indemnity or release provision as a defense, and the different types of indemnity.

B. Difference Between Indemnity and Release

A distinction between two types of risk-shifting provisions is sometimes missed by drafters of contracts who use the terms "release" and "indemnify" as though they were synonyms, such that the use of both terms merely emphasizes a single concept. But this is not correct, because as a matter of Texas law, the words have different meanings.

An indemnity provision is "a promise by the indemnitor to safeguard or hold the indemnitee harmless against existing or future loss or liability."¹⁰ It relates only to claims brought by third parties, not claims between the parties: "An indemnity provision does not apply to claims between the parties to the agreement, but obligates the indemnitor to protect the indemnitee against claims brought by third parties."¹¹ Conversely, a release relates to claims between the parties. It is an agreement by one party to surrender its own cause of action against the

5. *Id.* (citing *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 422 (Tex. 2000)).

6. *See id.* at 318.

7. *Id.* at 316–17 (citing *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518–19 (Tex. 1968)).

8. *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex. 1968).

9. *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487, 492 (5th Cir. 2000) (citing *Safeco Ins. Co. of America v. Gaubert*, 829 S.W.2d 274, 281 (Tex. App.—Dallas 1992, writ denied)).

10. *MG Bldg. Materials, Ltd. v. Moses Lopez Custom Homes, Inc.*, 179 S.W.3d 51, 63 (Tex. App.—San Antonio 2005, pet. denied) (citing *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993)).

11. *Id.* at 63.

other party: “In general, a release surrenders legal rights or obligations between the parties to an agreement. . . . It operates to extinguish the claim or cause of action as effectively as would a prior judgment between the parties and is an absolute bar to any right of action on the released matter.”¹²

The practical consequences of the difference between a release and an indemnity have been addressed in two cases decided by Texas appellate courts. In *MG Building Materials, Ltd. v. Moses Lopez Custom Homes, Inc.*, a couple entered into a home construction contract with a builder and obtained interim financing for the construction from a lender.¹³ As part of its collateral to secure the couple’s note, the lender held an assignment from the builder of its mechanic’s lien. In the assignment the builder promised to hold the lender “harmless from any loss, claim or expense” in connection with the construction of the home.¹⁴

When the lender rejected the builder’s final draw request because it was for more than the funds remaining under the note, the builder filed suit, alleging breach of contract as one of its theories of recovery.¹⁵ The lender asserted the hold harmless provision as a defense, but the court rejected the defense because the language, being an indemnity and not a release, did not preclude the builder’s own claims:

The language used in the assignment of lien provision providing that Lopez agreed to “hold MG harmless” from any loss, claim or expense arising out of construction of the Gonzales home constitutes an indemnity agreement, not a release; consequently, the provision did not release MG from liability on Lopez’s claims.¹⁶

The other case, *National City Mortgage Co. v. Adams*, also addressed a dispute involving a homeowner, a lender, and a homebuilder.¹⁷ There, the homeowner sued the lender and the builder, claiming that the lender had funded the builder’s draw request even though the builder had defaulted on the construction contract.¹⁸ The lender answered and filed a counterclaim (presumably to recover the paid draw request; the opinion is not clear), relying on an indemnity provision in its loan agreement with the homeowner.¹⁹

12. *Dresser*, 853 S.W.2d at 508.

13. *MG Building*, 179 S.W.3d at 55.

14. *Id.* at 63.

15. *Id.* at 56.

16. *Id.* at 64.

17. *Nat’l City Mortgage Co. v. Adams*, 310 S.W.3d 139 (Tex. App.—Fort Worth 2010, no pet.).

18. *Id.* at 141.

19. *Id.*

After the trial court issued a take-nothing judgment on both the principal demand and the counterclaim, the lender appealed, arguing that pursuant to the loan agreement and Texas law, it was entitled to recover its attorney's fees.²⁰ The court of appeals affirmed the trial court's rejection of this claim because the provision the lender relied upon was an indemnity provision, applicable only to third-party claims, not claims between the parties themselves:

The provision of the Loan Agreement under (xviii) is clearly one of indemnity

. . . “[A] contract of indemnity does not relate to liability claims between the parties to the agreement but, of necessity, obligates the indemnitor to protect the indemnitee against liability claims of persons not a party to the agreement.”

. . . Consequently, the trial court did not abuse its discretion by refusing to award NCM its attorney's fees under the Loan Agreement and Texas law.²¹

The holdings in *MG Building Materials* and *Adams* do not mean that Texas courts perform only a rote exercise, looking for the words “release” or “indemnity” in order to reach a decision. The point is always to enforce what the parties intended, and if a court is convinced that the parties intended risk-shifting to apply to claims between themselves, it will not frustrate that intent because the parties used the word “indemnity” instead of “release.” For example, the court in *Ganske v. Spence*, while noting that “an indemnity provision generally does not apply to claims between the parties to an agreement,” did observe that the court “should not be heard to say that an indemnity provision cannot be written such that the parties indemnify each other against claims they later assert against the other.”²² And the Fifth Circuit Court of Appeals, in a case applying Texas law, observed that “[w]hile some Texas appellate courts have stated that the contracting parties generally do not indemnify each other for their own claims, even those courts acknowledge that a specific contract term overrides that limitation.”²³ Nonetheless, words do matter, and drafters of risk-shifting

20 *Id.* at 142.

21. *Id.* at 143–44 (emphasis added) (quoting *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 821 S.W.2d 359, 362–63 (Tex. App.—Waco 1991), *aff'd in part, rev'd in part*, 853 S.W.2d 505 (Tex. 1993)).

22. *Ganske v. Spence*, 129 S.W.3d 701, 708 (Tex. App.—Waco 2004, no pet.) (citing *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 208 (Tex. 1999)).

23. *Offshore Drilling Co. v. Gulf Copper & Mfg. Corp.*, 604 F.3d 221, 225 (5th Cir. 2010).

provisions in contracts need to be careful about the legal distinction between a release and an indemnity.²⁴

C. “Liability” and “Damage” Indemnity Provisions

Another important issue in the interpretation of indemnity provisions is the identification of the risk that a provision protects against. The Fifth Circuit Court of Appeals addressed this issue in *Smith International, Inc. v. The Egle Group, LLC*, and explained how Texas law categorizes indemnity agreements:

All indemnity provisions fall under one of two categories: those that indemnify against liabilities and those that indemnify against damages. . . . Liability indemnity agreements may be called “broader,” often holding the indemnitee “harmless” against all “claims” and “liabilities.” Under a liability indemnity agreement, the indemnitee’s right to sue does not accrue, however, until liability becomes “fixed and certain, as by rendition of a judgment, whether or not the indemnitee has yet suffered actual damages” Damages indemnity agreements, on the other hand, are not as broad, and the indemnitee’s right to sue does not accrue until the indemnitee has suffered damages or injuries by being compelled to pay the judgment or debt.²⁵

The gist of the Fifth Circuit’s explanation is that a liability indemnity protects the indemnitee against the adjudication of a claim, while a damage indemnity protects the indemnitee against actually having to pay that claim.²⁶ The practical consequence of this difference is when the indemnitee’s claim against its indemnitor accrues:

[U]nder Texas law, the earliest possible accrual date for an indemnity agreement is the date that judgment is entered against the indemnitee, and that accrual date applies only when the indemnity clause is so broad that it constitutes a liability indemnity agreement. In contrast, the cause of action for a damage indemnity

24. So do litigators. In *Offshore Drilling Co.*, the Fifth Circuit found in the district court record “no claim by TODCO that the indemnity provision would not apply to claims between the parties. On appeal, though, TODCO in its reply brief argued that the provision only applied to claims brought by third parties. This question was not answered by the district court because neither party asked it. Raising it now is too late.” *Id.*

25. *Smith Int’l, Inc. v. Egle Grp., LLC*, 490 F.3d 380, 388–89 (5th Cir. 2007) (citations omitted) (quoting *Ingersoll-Rand*, 997 S.W.2d at 207) (internal quotation marks omitted).

26. *See id.*

agreement does not accrue until even later, that is, when the indemnitee is “compelled to pay the judgment or debt.”²⁷

III. INDEMNIFICATION FOR INDEMNITEE’S FAULT

A. *Indemnitee’s Negligence: The Fair Notice Rule*

A common scenario that gives rise to indemnity litigation involves an agreement between a property owner and a contractor, wherein the contractor agrees to indemnify the owner from claims brought by any of the contractor’s employees, invitees, or subcontractors. This may be a unilateral obligation running in one direction, for example an obligation in favor of the owner as indemnitee, or it may be part of a reciprocal obligation where the owner and contractor undertake similar indemnity obligations.²⁸

As the scenario unfolds, an employee of the contractor is injured on the job during operations pursuant to the contract. He sues the owner, alleging that the owner’s negligence caused his injury. The owner in turn impleads the contractor as a third-party defendant, seeking indemnity and arguing that the contractor’s indemnity obligation includes the owner’s negligent acts. This scenario has been addressed by the Texas Supreme Court in three cases that establish and elaborate upon the “fair notice” rule, which governs when a negligent indemnitee may expect indemnity for its own negligent acts.²⁹ The fair notice rule has two components: the express negligence doctrine and the conspicuous requirement.³⁰

The first and leading case on the express negligence doctrine is *Ethyl Corp. v. Daniel Construction Co.*³¹ In that case, the archetypal scenario described above occurred. A contractor’s employee who was injured on the job brought a negligence action against the owner, who in turn sought indemnity from the contractor based upon the following provision in their contract: “Contractor shall indemnify and hold Owner harmless against any loss or damage to persons or property as a result of operations growing out of the performance of this contract and caused

27. *Id.* at 389 (quoting *Tubb v. Bartlett*, 862 S.W.2d 740, 750 (Tex. App.—El Paso 1993, writ denied)).

28. *See, e.g.*, *Enron Corp. Savings Plan v. Hewitt Assoc., LLC*, 611 F. Supp. 2d 654 (S.D. Tex. 2009) (reviewing a reciprocal indemnity agreement where both parties indemnified each other); *Atlantic Richfield Co. v. Petroleum Pers., Inc.*, 768 S.W.2d 724 (Tex. 1989) (reviewing a unilateral obligation of the contractor to indemnify the owner); *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705 (Tex. 1987) (reviewing a unilateral indemnification agreement between a contractor and an owner, with the owner as indemnitee).

29. *See Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993); *Atlantic Richfield*, 768 S.W.2d 724; *Ethyl Corp.*, 725 S.W.2d 705.

30. *Dresser*, 853 S.W.2d at 508.

31. *Ethyl Corp.*, 725 S.W.2d 705.

by the negligence or carelessness of Contractor, Contractor's employees, Subcontractors, and agents or licensees."³²

The jury found the owner and contractor both negligent, in the respective proportions of 90% and 10%.³³ The trial court awarded the owner full indemnity from the contractor.³⁴ The court of appeals then reversed, finding that the indemnity provision did not clearly and unequivocally require the contractor to indemnify the owner for its own negligence or for the parties' concurrent negligence.³⁵ The Texas Supreme Court affirmed the judgment of the court of appeals, denying indemnity to the owner through application of a new express negligence doctrine.³⁶

It is clear from the Supreme Court's opinion that the court had been waiting for a case like this. Until that time, Texas courts had followed the "clear and unequivocal" test in deciding whether an indemnity provision adequately expressed an intent to indemnify for the indemnitee's own negligence.³⁷ As the name suggests, this test required that such an intent be stated in a manner that left no doubt about the issue, although it was not necessary that the intent be stated "in so many words."³⁸

The Texas Supreme Court began by noting its dismay at the untoward consequences that the clear and unequivocal test had brought about:

[T]he scriveners of indemnity agreements have devised novel ways of writing provisions which fail to expressly state the true intent of those provisions. The intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that intent from the indemnitor. The result has been a plethora of lawsuits to construe those ambiguous contracts.³⁹

The court accordingly held that "the better policy is to cut through the ambiguity of those provisions," and adopted the express negligence doctrine:

The express negligence doctrine provides that parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms. Under the

32. *Id.* at 707.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 708–09.

37. See *Sira & Payne, Inc. v. Wallace & Riddle*, 484 S.W.2d 559, 561 (Tex. 1972).

38. *Ethyl Corp.*, 725 S.W.2d at 708.

39. *Id.* at 707–08.

doctrine of express negligence, the intent of the parties must be specifically stated within the four corners of the contract. We now reject the clear and unequivocal test in favor of the express negligence doctrine.⁴⁰

Applying the new, rigorous “express negligence” test, the Texas Supreme Court denied indemnity to the owner, affirming the judgment of the court of appeals, which had similarly denied indemnity based upon the former clear and unequivocal test.⁴¹

Two years later, another case presenting substantially similar facts arrived at the Texas Supreme Court. In *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, the defendant platform owner in a negligence action brought by its contractor’s employee impleaded the contractor, seeking indemnity based on a provision requiring the contractor to indemnify the owner from claims “in any matter arising from the work performed hereunder, including but not limited to *any negligent act or omission*” of the owner.⁴²

On cross-motions for summary judgment, the trial court, applying the still new express negligence doctrine, denied indemnity to the owner.⁴³ The court of appeals affirmed, holding that “the intent of the parties is not specifically stated within the four corners of the contract . . . [and the phrase] ‘any negligent act’ is not sufficient to define the parties’ intent.”⁴⁴ The Texas Supreme Court, however, reversed:

It would be difficult for [the contractor] to argue from this language that it was unaware of its agreement to indemnify [the owner] for [its] negligence.

Therefore, we hold that this language meets the requirements of the express negligence rule. Although the language does not differentiate between degrees of negligence, the language “any negligent act of [the owner]” is sufficient to define the parties’ intent.⁴⁵

The other component of the fair notice rule, the conspicuous requirement, was expounded upon by the Texas Supreme Court in

40. *Id.* at 708.

41. *Id.* at 706.

42. *Atlantic Richfield Co. v. Petroleum Pers., Inc.*, 768 S.W.2d 724 (Tex. 1989).

43. *Id.*

44. *Id.* at 724–25 (quoting *Robledo v. Grease Monkey, Inc.*, 758 S.W.2d 834, 844 (Tex. App.—Corpus Christi 1988, no writ)).

45. *Id.* at 726. In a footnote, the Supreme Court added a caveat: “We do not decide whether indemnity for one’s own gross negligence or intentional injury may be contracted for or awarded This issue is not presented in this appeal. . . . Public policy concerns are presented by such an issue” *Id.* n.2.

*Dresser Industries, Inc. v. Page Petroleum, Inc.*⁴⁶ According to the Court, “[t]he conspicuous requirement mandates that something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it.”⁴⁷ The requirement is derived from Texas’ version of the Uniform Commercial Code:

We thus adopt the standard for conspicuousness contained in the Code for indemnity agreements and releases like those in this case that relieve a party in advance of responsibility for its own negligence. *When a reasonable person against whom a clause is to operate ought to have noticed it, the clause is conspicuous.* For example, language in capital headings, language in contrasting type or color, and language in an extremely short document . . . is conspicuous.⁴⁸

In another observation from that case, the Texas Supreme Court recognized that the two components of the fair notice rule—the express negligence doctrine and the conspicuous requirement—“have only been applied to indemnity agreements and have not as yet been applied to releases that relieve a party in advance of liability for its own negligence.”⁴⁹ Nevertheless, the court stated:

However, 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 indemnity clauses to warrant the application of the fair notice requirements to releases as well. . . . Therefore, we hold that the fair notice requirements of conspicuousness and the express negligence doctrine apply to both indemnity agreements and to releases in the circumstances before us . . .⁵⁰

The Court further held that compliance with both of the fair notice requirements is a question of law for the court, not a question of fact for the jury.⁵¹

Dresser Industries, and later cases that have cited the decision, have elaborated upon both components of the fair notice rule in different contexts. For example, in *Dresser Industries*, the Texas Supreme Court

46. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 505 (Tex. 1993).

47. *Id.* at 509 (quoting *Ling & Co. v. Trinity Sav. & Loan Ass’n*, 482 S.W.2d 841, 843 (Tex. 1972)) (internal quotation marks omitted).

48. *Id.* at 511 (emphasis added) (citing TEX. BUS. & COM. CODE ANN. § 1.201(b)(10) (West 2009)).

49. *Id.* at 508.

50. *Id.* at 508–09 (citations omitted).

51. *Id.* at 509 & n.4.

made clear that the rule cannot be used as a “gotcha” argument, because its requirements “are not applicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement.”⁵² Additionally, pursuant to the court of appeals’ decision in *Oxy USA, Inc. v. Southwestern Energy Production Co.*, the fair notice rule similarly does not apply to exculpatory agreements entered into after the conduct in question has already occurred:

The fair notice requirements apply to indemnity agreements when the effect . . . is to relieve a party *in advance* of responsibility for its own negligence. However, [they] have not been applied to exculpatory agreements utilized by parties *after* the transaction or occurrence takes place. . . . The application of the fair notice requirements has been explicitly limited to releases and indemnity clauses in which one party exculpates itself from its own future negligence. . . .

. . . Both parties were fully aware of the risk-shifting nature of the agreement and limited it in scope to liability arising from a specific series of transactions that had already occurred. We decline to extend the fair notice requirements.⁵³

The court in *Gilbane Building Co. v. Keystone Structural Concrete Co.*, citing *Dresser Industries*, 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 does not expressly provide that Keystone will indemnify Gilbane for Gilbane’s own negligence.”⁵⁴ And the court in *Enron Corp. Savings Plan v. Hewitt Associates, LLC* held that if indemnification for the indemnitee’s negligence must be inferred, then by definition the express negligence rule has not been met:

The express negligence doctrine precludes precisely this type of supposition and inference. . . . “Statements that require inference or extension to impose an indemnification obligation for the indemnitee’s own negligence do not satisfy the express negligence doctrine. . . .” “An indemnification of ‘any and all claims’ will not include the negligence of the indemnitee.

52. *Id.* at 508 n.2 (citing *Cate v. Dover Corp.*, 790 S.W.2d 559, 561 (Tex. 1990)).

53. *Oxy USA, Inc. v. Southwestern Energy Prod. Co.*, 161 S.W.3d 277, 283–84 (Tex. App.—Corpus Christi 2005, pet. denied) (citations omitted) (internal quotation marks omitted).

54. *Gilbane Bldg. Co. v. Keystone Structural Concrete Co.*, 263 S.W.3d 291, 296–97 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (emphasis omitted).

Indemnity ‘is an area in which to cover *all* does not include one of its parts.’”⁵⁵

And on the conspicuous requirement, the *Enron* court agreed with the indemnitor that an indemnity provision with the following characteristics was not conspicuous:

[E]ach of the seventeen sections of the ASA [Administrative Services Agreement], spanning twenty-two, single-spaced pages, is made up of multiple paragraphs defining the parties’ rights and obligations, with twenty-nine pages of single-spaced schedules attached. The key [s]ection 10, on which Hewitt relies, is composed of seventeen paragraphs, all of which are in the same font, type face, and color as the rest of the fifty-one page ASA; nothing stands out or seems designed to attract the attention of a reasonable person against whom the provision was to operate.⁵⁶

The adoption of the express negligence doctrine by the Texas Supreme Court in 1987 has generated a large number of cases that have expounded upon both that doctrine and the conspicuous requirement.⁵⁷ As a result, drafters of indemnity provisions that reach an indemnitee’s negligence have substantial guidance to rely upon. There is not much guidance, however, about the circumstances where Texas law may allow indemnity for an indemnitee’s willful misconduct.

B. Indemnitee’s Willful Misconduct: Courts Are Wary

The idea of indemnity for one’s own negligence is not inherently problematic; after all, that is exactly the purpose of liability insurance. Texas courts have become familiar, even comfortable, with the concept, as the several cases that have dealt with the fair notice rule over the decades demonstrate.⁵⁸

Indemnity for gross negligence or willful misconduct, however, is a different story. This kind of behavior is not just simple carelessness, but instead features an actor who is aware of the possibility of harm to other people, but, indifferent to that possibility, proceeds nonetheless.⁵⁹

55. *Enron Corp. Sav. Plan v. Hewitt Assocs., LLC*, 611 F. Supp. 2d 654, 669 (S.D. Tex. 2009) (quoting *Quorum Health Resources, LLC v. Maverick Cnty. Hosp. Dist.*, 308 F.3d 451, 463 (5th Cir. 2002); *Seal Offshore, Inc. v. Am. Standard, Inc.*, 736 F.2d 1078, 1081 (5th Cir. 1984)).

56. *Id.* at 665.

57. *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 705 (Tex. 1987).

58. *See id.* (adopting the express negligence doctrine in 1987); *Ling & Co. v. Trinity Sav. & Loan Ass’n*, 482 S.W.2d 841, 843 (Tex. 1972) (discussing the conspicuous requirement in the early 1970s).

59. *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998).

According to the Texas Civil Practice and Remedies Code, “gross negligence” means an act or omission,

(A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety or welfare of others.⁶⁰

As this definition demonstrates, gross negligence is very close to willful misconduct, which according to Texas law “bears the element of intent.”⁶¹

The legal definitions of gross negligence and willful misconduct explain the wariness with which Texas courts approach the issue of indemnity for such conduct. In *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, the Texas Supreme Court expressed its deep ambivalence about the issue, citing “[p]ublic policy concerns.”⁶² And in the context of insurance, the court in *Oxy* acknowledged the “public policy rationale that an insured is more likely to engage in behavior which is harmful to society if he believes he will not have to bear the financial costs of his intentional indiscretions.”⁶³

Nonetheless, there have been circumstances where Texas courts have allowed indemnity for gross negligence or willful misconduct. For example, in *Oxy*, an oil company and a seismic exploration company entered into an agreement to conduct seismic surveys on certain lands. Unbeknownst to the oil company, however, the seismic company had earlier entered into a contract with a third party to survey the same lands and, additionally, had agreed to sell to yet another party nonexclusive licenses for the same seismic data.⁶⁴

When the seismic company’s machinations came to light as the result of an investigation conducted by its parent company, the seismic company’s senior management either resigned or were terminated.⁶⁵ The new management then offered to indemnify the oil company from

60. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(11) (West 2002).

61. *Baskin v. Mortgage & Trust, Inc.*, 837 S.W.2d 743, 746 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

62. *Atlantic Richfield Co. v. Petroleum Pers., Inc.*, 768 S.W.2d 724, 726 n.2 (Tex. 1989).

63. *Oxy USA, Inc. v. Southwestern Energy Prod. Co.*, 161 S.W.3d 277, 286 (Tex. App.—Corpus Christi 2005, pet. denied) (quoting *Wessinger v. Fire Ins. Exch.*, 949 S.W.2d 834, 840 (Tex. App.—Dallas 1997, no writ)) (internal quotation marks omitted).

64. *Id.* at 280.

65. *Id.* at 281.

any claims related to the project.⁶⁶ The oil company agreed, and then entered into an indemnification agreement with the seismic company, in order to protect the oil company if the third party claimed an interest in the project.⁶⁷

The third party did make such a claim by filing a lawsuit accusing the oil company of tortious interference with contract, conversion, and abuse of rights.⁶⁸ The oil company tendered defense and indemnity to the seismic company, which ultimately refused indemnity, and the oil company thereupon settled with the third party.⁶⁹ In the ensuing lawsuit by the oil company to enforce indemnity, the seismic company raised the defense, among others, that the indemnity obligation was unenforceable as against Texas public policy, to the extent it would indemnify the oil company for its own intentional torts.⁷⁰ The trial court agreed and awarded summary judgment to the seismic company, but the court of appeals reversed:

We find the public policy argument of deterring misconduct by preventing a party from contracting away liability to be inapplicable in this case because the Indemnity Agreement is limited to actions that have already occurred. The public policy goal is especially inapplicable because the Indemnity Agreement acknowledges that part of the rationale underlying its adoption lies in the misconduct of [the seismic company]

. . . [P]ublic policy does not prohibit the enforcement of the Indemnity Agreement⁷¹

On the public policy considerations of the enforceability of indemnity against gross negligence, another Texas court of appeals, in construing an indemnity provision that satisfied the express negligence rule but did not use the word “gross,” noted the mutuality of the indemnity obligations between the parties and their substantially equal bargaining positions in concluding that “[t]he waiver and indemnity provision absolving Kellogg of all liability sounding in . . . gross negligence does not offend public policy.”⁷²

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See id.* at 282.

71. *Id.* at 287.

72. Valero Energy Corp. v. M.W. Kellogg Constr. Co., 866 S.W.2d 252, 257–58 (Tex. App.—Corpus Christ 1993, writ denied); *see also* RLI Ins. Co. v. Union Pac. R.R. Co., 463 F. Supp. 2d 646, 650 (S.D. Tex. 2006) (“[T]he release provision’s reference to ‘any negligence’ also meets the express negligence doctrine with respect to RLI’s gross negligence . . . claims.”); Webb v. Lawson-Avila Constr., Inc., 911 S.W.2d 457, 461 (Tex. App.—San Antonio 1995, writ

On balance, the relatively few cases addressing indemnity for gross negligence and intentional misconduct indicate that Texas courts recognize public policy concerns associated with indemnifying against such behaviors and will take a harder stance with willful misconduct than with gross negligence.

C. “Separate and Independent” Insurance Provisions

Oil and gas exploration and development operations can be dangerous work for the employees of owners and contractors. Indemnity provisions are one of the ways contracting parties manage the risk posed by such operations. Another way of managing risk, of course, is insurance, and it is not uncommon for one party (e.g., the platform or property owner) to require the other party (e.g., the drilling or other contractor) to purchase liability insurance and to designate its counterparty as an additional insured on those policies.

Where a party has agreed both to indemnify and to name its counterparty as an additional insured, the counterparty will have rights directly against the insurer under the policy. If the language of the policy is ambiguous about coverage, should the court decide the issue solely by reading the insurance policy? Or, in order to determine the intent of the parties, should it consider the indemnity provisions in the underlying contract in its analysis of coverage?

Generally, provided that the additional insured provision in the contract is “separate from and additional to” the indemnity provision, the scope of insurance coverage will not be limited by the indemnity clause in the contract.⁷³ Two cases, one from the Texas Supreme Court and the other from the United States Fifth Circuit Court of Appeals, demonstrate how courts determine whether an insurance provision is separate and independent from an indemnity provision.⁷⁴ And in the most recent case on the issue—*In re Deepwater Horizon*, arising from the April 2010 Macondo oil spill—the Fifth Circuit was unable to decide whether it should construe the scope of insurance coverage by reference only to the policy itself, or whether it needed to consider the parties’ indemnity obligations also, and so certified the question to the Texas Supreme Court.⁷⁵

dism’d) (“[W]hen the parties used the term ‘negligence,’ they indicated their intent to indemnify Lawson-Avila from the consequences of all shades and degrees of its own negligence, including gross negligence.”).

73. *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc. (ATOFINA)*, 256 S.W.3d 660, 664 n.5 (Tex. 2008).

74. *Travelers Lloyds Ins. Co. v. Pac. Emp’rs Ins. Co.*, 602 F.3d 677 (5th Cir. 2010); *ATOFINA*, 256 S.W.3d at 660.

75. *Ranger Ins., Ltd. v. Transocean Offshore Deepwater Drilling, Inc. (In re Deepwater Horizon)*, 728 F.3d 491, 500 (5th Cir. 2013).

1. *ATOFINA* and Its Fifth Circuit Progeny

In *ATOFINA*, a refinery owner entered into a service contract requiring that the contractor both (i) indemnify the refinery owner (except to the extent that any claim arose from the concurrent or sole fault of the refinery owner), and (ii) name the refinery owner as an additional insured on the contractor's primary and excess liability policies.⁷⁶ The contract required that each of these coverages be no less than \$500,000; in fact the policies obtained by the contractor provided coverage in the amounts of \$1 million primary and \$9 million excess.⁷⁷

An employee of the contractor was killed on the job, and his survivors sued the contractor and the refinery owner.⁷⁸ The contractor's primary carrier tendered its policy limits of \$1 million.⁷⁹ The refinery owner thereupon demanded coverage from the excess carrier, and when its demand was refused, impleaded that insurer as a third-party defendant.⁸⁰ Thereafter the refinery owner settled the survivors' claim, and the case proceeded on the refinery owner's and the insurer's cross-motions for summary judgment.⁸¹ On the coverage issue, the trial court granted the insurer's motion for summary judgment, the court of appeals reversed, holding in favor of the refinery owner, and the case then proceeded to the Texas Supreme Court.⁸²

There were two facets to the coverage issue faced by the Supreme Court in *ATOFINA*. First, the insurer argued no coverage on the grounds that its policy was intended to be a "following form" policy, such that it would cover only the risks that the service contract indemnified against.⁸³ Since the indemnity provision in the service contract indisputably did not extend to the refinery owner's negligence, the argument went, there was no coverage under the policy.⁸⁴

The Supreme Court decisively rejected this argument, ruling that the refinery owner had direct rights against the insurer under the policy, independently of the service contract.⁸⁵ The court's explanation is worth quoting at length:

Under the terms of the service contract, *ATOFINA* [the refinery owner] is not entitled to be indemnified by Triple S [the contractor] if the Jones loss was occasioned in any way by *ATOFINA*'s

76. *ATOFINA*, 256 S.W.3d at 661.

77. *Id.* at 663.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 670.

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negligence. But ATOFINA does not seek indemnity from Triple S; it claims instead that it is entitled to indemnification from Evanston by virtue of its status as an additional insured on the umbrella policy Instead of looking, as the court of appeals did, to the indemnity agreement in the service contract to determine the scope of any coverage, we base our decision on the terms of the umbrella policy itself. . . .⁸⁶

. . . [W]here an additional insured provision is separate from and additional to an indemnity provision, the scope of the insurance requirement is not limited by the indemnity clause.⁸⁷

. . . .

. . . [I]t is unmistakable that the agreement in this case to extend direct insured status to ATOFINA as an additional insured is separate and independent from ATOFINA's agreement to forego contractual indemnity for its own negligence.⁸⁸

The second facet of the Texas Supreme Court's examination of the coverage issue was the limits provided by the policy.⁸⁹ A paragraph in the policy contained (at least) six clauses defining who was an "insured."⁹⁰ One of these clauses, favored by the insurer, limited coverage to the amount provided by the underlying policy: \$1 million.⁹¹ But another clause, relied upon by the refinery owner, did not so limit coverage; if it trumped the clause the insurer favored, the full \$9 million policy limits would be available.⁹²

The Supreme Court began by recognizing the familiar rule of interpretation that resolves doubts in favor of the insured:

When interpreting an insurance contract, we "must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent." "Exceptions or

86. *Id.* at 663–64.

87. *Id.* at 664 n.5 (citing *Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794, 804 (Tex. 1992)).

88. *Id.* at 670.

89. *Id.* at 668.

90. *Id.* at 664, 667.

91. *Id.* at 664.

92. *Id.* at 667.

limitations on liability are strictly construed against the insurer and in favor of the insured”⁹³

Mindful of this rule of interpretation, and reviewing the paragraph of the policy about which the parties were arguing, the Supreme Court observed that “each grant of coverage in paragraph III.B [could] be read independently as a self-contained grant of coverage,” and so concluded:

Because ATOFINA is entitled to coverage under more than one who-is-an-insured clause in paragraph III.B, it is not unreasonable to conclude that the policy should be read to provide the broader measure of coverage available under the applicable clauses. We therefore hold that the Evanston policy provides the broader scope of coverage⁹⁴

ATOFINA shows that a contractual indemnitee who is also an additional insured under a policy provided by its counterparty will have rights against the insurer directly. In such a scenario, the scope of coverage will be determined solely by the language of the policy itself, if the insurance provision in the parties’ contract is “separate from and additional to” its indemnity provision.⁹⁵

The Fifth Circuit case, *Travelers Lloyds Insurance Co. v. Pacific Employers Insurance Co.*, addresses an indemnitee’s enforcement of rights under a policy issued by his indemnitor’s insurer, where he cannot enforce rights against the indemnitor himself.⁹⁶ In that case, a customer exiting a retail store was injured, and then sued the store and the store’s shopping center landlord.⁹⁷ The landlord and its insurer tendered the claim to the tenant’s insurer, arguing that they were additional insureds under the tenant’s insurer’s policy.⁹⁸ The tenant’s insurer refused the tender, whereupon the landlord’s insurer settled the action, and then sued the tenant and its insurer for reimbursement of its defense costs and settlement of the underlying claim.⁹⁹ Each party moved for summary judgment.¹⁰⁰

The court’s analysis of the cross-motions for summary judgment began with the parties’ rights under the section of the lease dealing with

93. *Id.* at 668 (quoting *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991)).

94. *Id.* at 668–69.

95. *Id.* at 664 n.5.

96. *Travelers Lloyds Ins. Co. v. Pac. Emp’rs Ins. Co.*, 602 F.3d 677 (5th Cir. 2010).

97. *Id.* at 680.

98. *Id.*

99. *Id.* at 680–81.

100. *Id.* at 681.

insurance and indemnity.¹⁰¹ That section required that the tenant purchase a liability policy naming the landlord as an additional insured, and further required that the tenant indemnify the landlord against a broad array of claims.¹⁰² The parties stipulated, however, that the indemnity provision did not satisfy the fair notice rule, and so did not provide indemnity for the indemnitee landlord's negligence.¹⁰³ That was the basis of the tenant's insurer's defense, which the Fifth Circuit quickly rejected:

Pacific [the tenant's insurer] contends that the lease's requirements regarding insurance for The Centre [the landlord] as an additional insured are similarly void because, Pacific argues, the requirement that Best Buy [the tenant] name The Centre as an additional insured solely supports the lease's indemnity provision Insurance procurement, or additional insured, provisions are subject to the express negligence doctrine only if they "directly support indemnity agreements." A contract provision that extends direct insured status as an additional insured is deemed to be separate and independent from the indemnity agreement.¹⁰⁴

The Fifth Circuit recognized that more than once it had "upheld additional insured provisions despite void indemnity provisions present in the same contract,"¹⁰⁵ and concluded that the insurance and indemnity provisions in the shopping center lease were separate and independent, such that the unenforceability of the indemnity provision was no bar to the shopping center landlord's rights under the insurance policy:

Although it is not necessary that the additional insured provision and the contractual indemnity provisions be in separate paragraphs, those provisions are in separate paragraphs in the Best Buy lease, underscoring the distinct and independent nature of the indemnity obligation and Best Buy's obligation to name The Centre as an additional insured.

101. *Id.* at 682.

102. *Id.*

103. *Id.*

104. *Id.* (quoting *Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W. 2d 794, 805–06 (1992)).

105. *Id.* at 683 (citing *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487, 494 n.8 (5th Cir. 2000); *LeBlanc v. Global Marine Drilling Co.*, 193 F.3d 873, 875 (5th Cir. 1999); *Certain Underwriters at Lloyd's London v. Oryx Energy Co.*, 142 F.3d 255, 258–60 (5th Cir. 1998)).

The district court properly concluded that the contractual provision requiring Best Buy to include The Centre as an additional insured under the policy procured from Pacific is enforceable.¹⁰⁶

Under *ATOFINA*, *Travelers Lloyds*, and other cases,¹⁰⁷ it does not seem that Texas law imposes a very heavy burden on a party seeking indemnity under a policy provided by his counterparty for liabilities he is not indemnified against in the contract itself. But *In re Deepwater Horizon*¹⁰⁸ may portend differently, at least for indemnitee/additional insureds that are sophisticated.

2. *In re Deepwater Horizon*

What is presumably the largest pending insurance provision dispute arose from the Macondo oil spill, which commenced on April 20, 2010 during operations by the Deepwater Horizon drilling rig in the Gulf of Mexico offshore Louisiana.¹⁰⁹ In the drilling contract between BP America Production Company (BP) as operator and Transocean Holdings, Inc. (Transocean) as contractor, Transocean was required to name BP as an additional insured on its primary and excess insurance policies.¹¹⁰ The policies that Transocean obtained, \$50 million of primary coverage and \$700 million of excess coverage, did give BP rights as an additional insured, by means of their definitions of "Insured," which included BP, and "Insured Contract," which included the drilling contract.¹¹¹

The drilling contract itself obligated Transocean to name BP as an additional insured by means of the following language: "[BP], its subsidiaries and affiliated companies . . . shall be named as additional insureds in each of [Transocean's] policies, except Workers' Compensation for liabilities assumed by [Transocean] under the terms of this Contract."¹¹² Transocean's insurers argued that this language limited the scope of their coverage to the liabilities that Transocean had

106. *Id.* at 683–84.

107. *See, e.g.*, *Aubris Resources, LP v. St. Paul Fire and Marine Ins. Co.*, 566 F.3d 483 (5th Cir. 2009); *Pasadena Refining Sys., Inc. v. McCraven*, No. 14-10-00837-CV, 2012 WL 1693697 (Tex. App.—Houston [14th Dist.] May 15, 2012, pet. dism'd).

108. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on Apr. 20, 2010, No. 11-274, 2011 WL 5547259 (E.D. La. Nov. 15, 2011), *rev'd and remanded sub nom. In re Deepwater Horizon*, 710 F.3d 338 (5th Cir. 2013), *opinion withdrawn on reh'g*, 728 F.3d 491 (5th Cir. 2013).

109. *Ranger Ins., Ltd. v. Transocean Offshore Deepwater Drilling, Inc. (In re Deepwater Horizon)*, 728 F.3d 491, 494 (5th Cir. 2013).

110. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on Apr. 20, 2010, No. 11-274, 2011 WL 5547259, at *3. BP and Transocean were the successors to the original parties to the drilling contract.

111. *Id.*

112. *Id.* at *17.

assumed in the drilling contract, which did not include the pollution caused by the spill.¹¹³ BP, on the other hand, argued that the insurance provisions in the drilling contract were separate and independent from its indemnity provisions, and that the policies themselves did not limit their coverage to the liabilities assumed by Transocean.¹¹⁴

Before the district court, BP filed a motion for judgment on the pleadings, seeking a ruling that it had broad coverage under Transocean's policies, not limited in scope to the liabilities assumed by Transocean in the drilling contract, and determined solely by reference to the policies themselves.¹¹⁵ The district court began its step-by-step analysis by addressing BP's argument that *ATOFINA* and *Aubris*¹¹⁶ in effect prohibited the court from looking at the drilling contract in determining the scope of the policies.¹¹⁷

The district court rejected BP's reading of both cases.¹¹⁸ It noted the Texas Supreme Court's statement in *ATOFINA*, cited by the Fifth Circuit in *Aubris*, that the scope of the insurance required by a contract is not limited by the indemnity clause "where an additional insured provision is separate from and additional to [the] indemnity provision."¹¹⁹ By contrast, according to the district court, in the case before it,

BP is to be named as an additional insured "for liabilities assumed by [Transocean] under the terms of this Contract." Thus, the insurance provision, in stating the scope of additional insured coverage, incorporates, without limitation, the "terms of this Contract"—which is the Drilling Contract. . . . The terms of the Drilling Contract certainly include the indemnity provisions¹²⁰

Having held that the additional insured provision in the drilling contract was not separate and independent from the indemnity provisions, the district court proceeded to examine those provisions and the policies themselves to determine the scope of coverage.¹²¹ Importantly for the district court's analysis, in the cross-indemnity provisions of the drilling contract, Transocean had not assumed liability

113. *Id.* at *6.

114. *Id.* at *4–6.

115. *Id.* at *1.

116. *Aubris Res. LP v. St. Paul Fire and Marine Ins. Co.*, 566 F.3d 483 (5th Cir. 2009).

117. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on Apr. 20, 2010, 2011 WL 5547259, at *5.

118. *Id.* at *12.

119. *Id.* (quoting *ATOFINA*, 256 S.W.3d at 664 n.5); *see also Aubris Res. LP*, 566 F.3d at 488–89).

120. *Id.* at *14 (alteration in original) (citations omitted) (quoting Rec. Doc. 3211-6, at 17).

121. *Id.* at *15.

for the pollution caused by the spill—BP had.¹²² Because the insurance provision in the drilling contract required Transocean to provide coverage only for the liabilities it had assumed, BP was not an additional insured under the policies for the pollution caused by the spill:

Article 24.1 [in the Drilling Contract] allocates to Transocean liabilities for pollution originating on or above the surface of the water. The Deep Water Horizon Incident entailed a subsurface release; thus, Transocean did not assume pollution liabilities arising from the Incident. . . . Because Transocean did not assume these liabilities, there is no additional insurance obligation in favor of BP for these liabilities.¹²³

The district court accordingly denied BP's motion for judgment on the pleadings and later entered a partial final judgment on the insurance coverage issue pursuant to Fed. R. Civ. P. 54(b), whereupon the parties headed to the Fifth Circuit.¹²⁴

In its original consideration of BP's appeal,¹²⁵ the Fifth Circuit panel¹²⁶ stated that Texas law required that in determining the scope of coverage, "we look to the 'terms of the . . . insurance policy itself,' instead of looking to the indemnity agreement in the underlying service contract. . . . so long as the indemnity agreement and the insurance coverage provision are separate and independent."¹²⁷

The panel stated that first it would analyze the language of the "umbrella" policy itself.¹²⁸ But it did not do so directly, instead discussing at length the language of the insurance policies and additional insured provisions in *ATOFINA*, *Aubris*, and *Pasadena Refining*.¹²⁹ About these cases and others, the panel stated:

This case law makes clear to us that only the umbrella policy itself may establish limits upon the extent to which an additional insured is covered in situations such as the one now before us. . . . [W]e can find no principled distinction between the policy language in these three cases and in the case now at hand. Just as the policies in these three earlier cases did not limit coverage, so here the policy

122. *Id.* at *23.

123. *Id.*

124. *Id.* at 24.

125. *Ranger Ins., Ltd. v. Transocean Offshore Deepwater Drilling, Inc. (In re Deepwater Horizon)*, 710 F.3d 338 (5th Cir. 2013), *opinion withdrawn on reh'g*, 728 F.3d 491 (5th Cir. 2013).

126. Judges Jolly, Benavides, and Higginson.

127. *Id.* at 344 (citation omitted) (quoting *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc. (ATOFINA)*, 256 S.W.3d 660, 664 (Tex. 2008)).

128. *Id.*

129. *Id.*; *Pasadena Refining Sys., Inc. v. McCraven*, No. 14-10-00837-CV, 2012 WL 1693697 (Tex. App.—Houston [14th Dist.] May 15, 2012, pet. *dism'd*).

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itself does not contain any limitation on additional insured coverage nor incorporate any limits from the underlying drilling contract.¹³⁰

The second question the panel set for itself was whether the additional insured provision and the indemnity provisions in the drilling contract were separate and independent.¹³¹ On this issue, the panel flatly and simplistically held that “to render an additional insured provision separate from and additional to an indemnity provision, Texas law only requires the additional insured provision be a discrete requirement.”¹³²

But the panel was uneasy with its reversal of the district court’s decision.¹³³ Therefore, on a petition for rehearing, it unanimously withdrew its opinion and, reciting that the case involved “important and determinative questions of Texas law as to which there is no controlling Texas Supreme Court precedent,” certified the issue to the Texas Supreme Court.¹³⁴ Significantly, on the question whether the indemnity and additional insured provisions in the drilling contract were separate and independent, and contrary to what it had said in its earlier opinion, the panel acknowledged “potentially important distinctions between the facts of the instant case and *ATOFINA*” that made the outcome of the parties’ arguments unclear under Texas law.¹³⁵ These distinctions, and the question whether there should be a “sophisticated insured” exception to the general rule of interpreting insurance coverage clauses in favor of the insured, caused the panel to certify the following determinative questions of Texas law to the Texas Supreme Court:

1. Whether [*ATOFINA*] compels a finding that BP is covered for the damages at issue, because the language of the umbrella policies alone determines the extent of BP’s coverage as an additional insured if, and so long as, the additional insured and indemnity provisions of the Drilling Contract are “separate and independent”?

130. *Id.* at 347; *see id.* n.9 (finding “unpersuasive” the difference in the facts of *ATOFINA* noted by the district court).

131. *Id.* at 348.

132. *Id.* at 349.

133. *Ranger Ins., Ltd. v. Transocean Offshore Deepwater Drilling, Inc. (In re Deepwater Horizon)*, 728 F.3d 491, 500 (5th Cir. 2013) (expressing doubt about the basis of the court’s decision to reverse the district court by noting that “[u]ncertainty regarding the outcome under *ATOFINA* ultimately triggered this certification”).

134. *Id.* at 493.

135. *Id.* at 499.

2. Whether the doctrine of *contra proferentem* applies to the interpretation of the insurance coverage provision of the Drilling Contract under the *ATOFINA* case given the facts of this case?¹³⁶

On September 6, 2013, the Texas Supreme Court accepted the questions certified to it by the Fifth Circuit.¹³⁷ At the time this Article was written, the parties had completed their briefing and the case had been orally argued, but the Supreme Court had not decided the certified questions.¹³⁸ Therefore, it remains to be seen whether the Texas Supreme Court will endorse the district court's analysis, the original panel opinion's unnuanced understanding of the "separate and independent" question, or take some other approach.

D. Recovery of Attorney's Fees

The familiar "defend, indemnify, and hold harmless" mantra that appears in so many indemnity provisions requires the indemnitor's payment of not only the claims referred to in the provisions, but also the indemnitee's attorney's fees in proceedings related to the claims before judgment or settlement. These costs of defense, as most people read the phrase, are covered by the word "defend"; however, as a Texas appeals court has pointed out, the words "hold harmless" can serve this function as well:

Where a party agrees to hold another party harmless from all suits relating to work performed under the contract, courts have construed this general indemnity language to include indemnification for costs and expenses incurred in defense of the claim. Because the section in question required Gulsby to hold Tenneco harmless for any loss . . . Gulsby also had to indemnify Tenneco for all costs and expenses incurred in defense of suit.¹³⁹

Indemnitees commonly tender to their indemnitors claims from the outset, not waiting until the claim has been settled or reduced to judgment. Does the indemnitor to whom such a claim has been tendered at the outset owe a defense, irrespective of whether the claim ultimately is held to be within its indemnity obligation? Or, are the

136. *Id.* at 500 (citation omitted). The Fifth Circuit further "disclaim[ed] any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the questions certified." *Id.*

137. See Don Cruse, *SCOTX Takes the Deepwater Horizon Case*, THE SUPREME COURT OF TEXAS BLOG (Sept. 6, 2013), <http://www.scotxblog.com/case-notes/scotx-takes-the-deepwater-horizon-case-sep-6-2013/>.

138. *Id.*

139. *Tenneco Oil Co. v. Gulsby Eng'g, Inc.*, 846 S.W.2d 599, 607 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

defense and indemnity obligations examined together, such that a defense is owed only if indemnity is also owed? Two decisions by the Texas Supreme Court suggest that an indemnitor who is not an insurer will owe defense costs only if it also owes indemnity, but a decision by a court of appeals points to an opposite conclusion.

The first of the two Texas Supreme Court cases involved an application of the express negligence rule. In that case, *Fisk Electric Co. v. Constructors & Associates, Inc.*, the Supreme Court framed the issue before it as “whether an indemnitor . . . must pay attorney’s fees and other expenses incurred by an indemnitee . . . when the indemnitee is accused of negligence, but not found to be negligent, and the indemnity agreement does not meet the express negligence test.”¹⁴⁰ This case reached the Supreme Court after the court of appeals reversed the trial court’s decision, which had answered the question in the negative, holding that “an obligation to indemnify one for its attorney’s fees and costs of defense is separate from an obligation to indemnify one for its own negligence.”¹⁴¹

The Supreme Court reversed the court of appeals, holding that no obligation to indemnify an indemnitee for attorney’s fees and costs associated with a negligence claim arises unless the indemnity provision satisfies the express negligence test.¹⁴² In so holding, the Court indicated that the duty to defend and the duty to indemnify are strongly linked so that one is not owed unless both are owed: “Fisk’s obligation to pay attorney’s fees arises out of its duty to indemnify. Absent a duty to indemnify there is no obligation to pay attorney’s fees. Cases from the courts of appeals holding to the contrary are hereby disapproved.”¹⁴³ According to the Supreme Court, this rule was necessary to avoid an unjust result that “would leave indemnitors liable for a cost resulting from a claim of negligence which they did not agree to bear.”¹⁴⁴

The second Texas Supreme Court case referred to is *Ingersoll-Rand Co. v. Valero Energy Corp.*¹⁴⁵ In that case, a refinery owner sued a contractor and a subcontractor on a claim on which the defendants ultimately prevailed, because the claim was among those the owner had released in advance pursuant to the indemnity provision in the prime contract.¹⁴⁶ This release obligation owed by the owner, which was the demise of its claim, also included the obligation to hold the contractor

140. *Fisk Elec. Co. v. Constructors & Assocs., Inc.*, 888 S.W.2d 813, 813 (Tex. 1994).

141. *Id.*

142. *Id.* at 814.

143. *Id.* at 815.

144. *Id.*

145. *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203 (Tex. 1999).

146. *Id.* at 205.

and subcontractor harmless from all legal fees and court costs.¹⁴⁷ Therefore, the owner owed the attorney's fees and costs incurred by the contractor and subcontractor in defending against the owner's claim.¹⁴⁸

The defendants counterclaimed for their defense fees and costs after their motion for summary judgment that defeated the contractor's claim had been granted, and more than four years after the owner had brought its claim.¹⁴⁹ The owner argued that the counterclaims were therefore barred by *res judicata* and the Texas statute of limitations for breach of contract.¹⁵⁰ In response, the contractor and subcontractor asserted that their counterclaims were not compulsory—hence not barred by *res judicata*—because they did not mature until the adjudication of the contractor's principal claim, and were timely because they had been filed sooner than four years thereafter.¹⁵¹

The defendants' position prevailed before the Texas Supreme Court, which cited “the longstanding rule that a claim under a liability indemnification clause does not accrue, and thus is not mature, until the indemnitee's liability to the party seeking damages becomes fixed and certain.”¹⁵² The Supreme Court acknowledged that it allowed indemnitees to assert claims against their indemnitors before judgment was rendered against the indemnitees, but observed that “[w]e allow such claims to be brought, in the interest of judicial economy, as an exception to the accrual rule for indemnity claims. Such claims are contingent on accrual.”¹⁵³ The Supreme Court then emphasized the accrual rule for indemnification in the context of the attorney's fees claims:

[A] specific accrual rule applies to claims for indemnification: an indemnity claim does not accrue until all of the potential liabilities of the indemnitee become fixed and certain. . . . The facts that entitle an indemnitee to seek indemnification through suit come into existence when the indemnitee's liabilities become fixed and certain by judgment.¹⁵⁴

The Supreme Court in *Fisk* held that if indemnity is not owed per the express negligence rule, neither are attorney's fees; and in *Ingersoll-*

147. *Id.*

148. *Id.*

149. *Id.* at 206.

150. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(3) (West 2002)).

151. *Id.*

152. *Id.* at 208. The Supreme Court recognized that it faced the “anomalous situation of an indemnitor (Valero) acting concurrently as the plaintiff seeking damages from the indemnitee (*Ingersoll-Rand*).” *Id.*

153. *Id.* at 209.

154. *Id.* at 210.

Rand it applied the accrual rule for liability indemnity claims to claims for defense costs.¹⁵⁵ These holdings therefore suggest that an indemnitor's obligation to pay defense costs arises only if, and not before, its obligation to indemnify against the underlying claim has been established. But a Texas appeals court, while acknowledging the holding in *Fisk*, held on the facts before it that an indemnitor owed a duty to defend that was separate from, and not dependent upon, its duty to indemnify.¹⁵⁶

That case is *English v. BGP International, Inc.*¹⁵⁷ There, the defendant seismic company, BGP, had contracted to perform seismic services for the benefit of the plaintiff, English, on lands owned by several different parties.¹⁵⁸ The consent of each of the affected landowners was required before seismic operations could begin; however, BGP began work without having obtained all of the required consents.¹⁵⁹ As a result, forty-three landowners filed lawsuits against BGP and English, alleging trespass and negligence theories of recovery.¹⁶⁰

An indemnity provision in the contract between English and BGP obligated BGP to defend and indemnify English from claims arising from BGP's failure to obtain the consent of 100% of the affected landowners, and claims arising from BGP's negligence.¹⁶¹ The indemnity provision did not, however, satisfy the express negligence rule in order to indemnify English from her own negligence.¹⁶² On the basis of the indemnity provision, English tendered the defense of the forty-three underlying lawsuits to BGP.¹⁶³ When BGP refused the tender, English filed an action seeking a declaratory judgment that BGP owed her defense and indemnity.¹⁶⁴

On cross-motions for summary judgment, the trial court ruled in favor of BGP and against English, dismissing the action without prejudice on the grounds that it was premature and not ripe for adjudication until the conclusion of the forty-three underlying lawsuits.¹⁶⁵ On appeal, BGP pressed this argument and the express

155. *Id.* at 205; *Fisk Elec. Co. v. Constructors & Assocs., Inc.*, 888 S.W.2d 813, 813 (Tex. 1994).

156. *English v. BGP Int'l, Inc.*, 174 S.W.3d 366, 373 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

157. *Id.* at 366.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 375.

163. *Id.* at 369.

164. *Id.*

165. *Id.*

negligence rule.¹⁶⁶ The court of appeals framed the issue before it as “whether BGP owes a duty to step in and defend English in the landowner lawsuits.”¹⁶⁷

BGP relied upon *Fisk* for its prematurity defense, particularly the Texas Supreme Court’s statement in that case that “absent a duty to indemnify, there is no obligation to pay attorney’s fees.”¹⁶⁸ But the court of appeals, citing several cases involving insurers, stated that “numerous courts have held that the duty to defend, unlike the duty to indemnify, is, in most situations, a justiciable issue.”¹⁶⁹ The court of appeals stated that “we find little reason why the principles regarding an insurer’s duty to defend should not apply with equal force to an indemnitor’s contractual promise to defend its indemnitee.”¹⁷⁰

The court of appeals also rejected BGP’s argument based upon the express negligence doctrine.¹⁷¹ The court clearly found it significant that BGP’s actions were the reason why all of the underlying lawsuits were filed, and that, although those lawsuits pleaded several claims sounding in negligence, in reality all were variations on a theme of trespass:

Although the pleadings specifically allege “negligence” and “negligence per se,” it appears that these theories of liability stem primarily from the fact that BGP was exploring without the permission of all the landowners. In other words, remove the trespass and all other causes of actions are negated. . . . [S]imply pleading negligence is not sufficient to void BGP’s responsibility to provide a defense from suit caused, initially, by its commencement of operations before receiving 100 percent of the landowners’ permission.¹⁷²

Accordingly, notwithstanding that the indemnity provision clearly did not satisfy the express negligence doctrine, and even assuming that some of the forty-three underlying lawsuits’ claims sounded in negligence, “the additional trespass claims undoubtedly give rise to BGP’s obligation to defend English regardless of the express negligence doctrine.”¹⁷³ The court of appeals therefore reversed and rendered

166. *Id.*

167. *Id.* On appeal, English dropped her claim for a declaratory judgment on indemnification, conceding that it was premature, and pursued only her claim on BGP’s duty to defend. *Id.* at n.3.

168. *Id.* at 371 (quoting *Fisk Elec. Co. v. Constructors & Assocs., Inc.*, 888 S.W.2d 813, 815 (Tex. 1994)) (internal quotation marks omitted).

169. *Id.* at 371.

170. *Id.* at 372 n.6.

171. *Id.* at 376.

172. *Id.* at 373 (citation omitted).

173. *Id.* at 375.

judgment in favor of English, holding that BGP was contractually required to defend English in the forty-three underlying lawsuits.¹⁷⁴

The indemnity provision in *English* expressly required BGP to defend and indemnify English from trespass claims if BGP “commence[d] field operations without the permit acquisition of 100% of the mineral owners and 100% of the surface owners.”¹⁷⁵ In the court of appeals’ view, the forty-three landowner lawsuits were precisely what BGP had promised to defend and indemnify English against, and had arisen because of BGP’s actions.¹⁷⁶ The court was offended by BGP’s argument that English would have to endure the expense of defending the numerous lawsuits that BGP’s premature operations had brought about.¹⁷⁷ The court therefore looked behind the allegations in the landowners’ petitions to determine that they sounded primarily in trespass, in order to address BGP’s express negligence rule argument, and looked to insurance cases to support its imposition on BGP of a duty to defend English before its obligation to indemnify from liability had been adjudicated.¹⁷⁸

IV. TEXAS OILFIELD ANTI-INDEMNITY ACT

A. *The Purpose of the Act*

In 1973, the Texas legislature enacted the Texas Oilfield Anti-Indemnity Act (the Act), in order to redress an inequity it perceived in “certain agreements pertaining to wells for oil [and] gas.”¹⁷⁹ The legislature declared void as against public policy those agreements’ provisions that would indemnify an indemnitee from its own negligence that resulted in personal injury, death, or property damage.¹⁸⁰

According to the Texas Supreme Court in *Ken Petroleum Corp. v. Questor Drilling Corp.*, the legislative history of the Act shows that at the time of its promulgation, drilling and other contractors found it difficult or impossible to obtain liability insurance to cover their indemnity obligations in the contracts.¹⁸¹ The solution fashioned by the legislature was to prohibit indemnification for a negligent indemnitee, unless the parties had agreed in writing that the indemnity obligation

174. *Id.* at 376.

175. *Id.* at 369.

176. *Id.* at 373.

177. *Id.* at 374.

178. *Id.* at 373–75.

179. TEX. CIV. PRAC. & REM. CODE ANN. § 127.002(a) (West 2002).

180. *Id.* at §§ 127.002–.003.

181. *Ken Petroleum Corp. v. Questor Drilling Corp.*, 24 S.W.3d 344, 348 (Tex. 2000).

would be supported by available liability coverage not to exceed certain dollar limits.¹⁸²

By 1989, liability insurance for oil and gas operations had become much more available. The Texas legislature, “in response to requests by contractors and operators alike,” reacted to the change in the insurance market by loosening the restrictions on indemnity agreements that were supported by insurance.¹⁸³ The legislature made mutual indemnity obligations enforceable, provided they were fully supported by liability insurance; unilateral indemnity obligations, on the other hand, were made enforceable to a limit of \$500,000, provided they were supported by insurance to that amount.¹⁸⁴

The fair notice rule is always applicable where a contractual provision would indemnify an indemnitee from the consequences of its own negligence.¹⁸⁵ Therefore, when the Act additionally applies, such a provision must satisfy two requirements:

Texas law requires a court to perform a two-step analysis in determining the validity of indemnity agreements. First, the indemnity provision must satisfy the express negligence test. Then, if the indemnity agreement passes muster with the express negligence test, such provision must meet the exceptions provided in the Texas anti-indemnity statute.¹⁸⁶

B. Evolution of the Role of Insurance

Where the Act applies, and assuming that a provision indemnifying an indemnitee for its own negligence satisfies the fair notice rule, the enforceability of such a provision depends upon whether it is supported by liability insurance coverage. On this issue, section 127.005 of the Act in its current form provides as follows:

(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.

182. *Id.* at 349.

183. *Id.*

184. TEX. CIV. PRAC. & REM. CODE ANN. § 127.005(b)–(c).

185. *See Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993) (emphasis added).

186. *Dupre v. Penrod Drilling Corp.* (*Dupre I*), 788 F. Supp. 901, 905 (E.D. La. 1992), *aff'd*, 993 F.2d 474 (5th Cir. 1993) (citations omitted).

(c) With respect to a unilateral indemnity obligation, the amount of insurance required may not exceed \$500,000.¹⁸⁷

Section 127.005 is the core of the Act, tying the enforceability of indemnity obligations to insurance, and has been heavily litigated.¹⁸⁸ It has been amended five times since its original promulgation in 1973,¹⁸⁹ and as its language has evolved, the courts have addressed such questions as the efficacy of self-insurance;¹⁹⁰ what happens when a party says it will provide insurance, but does not, or does not say it will provide insurance, but does;¹⁹¹ and what happens when an insurer providing coverage for an indemnity obligation becomes insolvent.¹⁹²

Maxus Exploration Co. v. Moran Brothers, Inc. was decided by a Texas appeals court in 1989, while the initial 1973 version of section 127.005 was still in effect.¹⁹³ In that case, an operator, Diamond Shamrock, and a contractor, Moran, executed a daywork drilling contract in which each indemnified the other from claims brought by their respective (sub)contractors, employees, or invitees, even if such claims arose from the indemnified party's negligence.¹⁹⁴ Each party also agreed that its indemnity obligations would be supported by liability insurance or self-insurance.¹⁹⁵

Following their settlement of a personal injury action brought by an employee of one of Diamond Shamrock's other contractors, Diamond Shamrock and Moran litigated Moran's entitlement to indemnity for its share of the settlement payment.¹⁹⁶ The version of section 127.005 then in effect made indemnity for an indemnitee's negligence enforceable "if the parties agree in writing that such indemnity obligation will be supported by available liability coverage to be furnished by indemnitor."¹⁹⁷ Diamond Shamrock argued that its agreement to

187. TEX. CIV. PRAC. & REM. CODE ANN. § 127.005(b)–(c).

188. There are over 200 citing references to section 127.005 listed on Westlaw, whereas many of the other sections of the statute have fewer than 50 citing references. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 127.001–.008.

189. See *Ken Petroleum Corp. v. Questor Drilling Corp.*, 24 S.W.3d 344, 349–51 (Tex. 2000).

190. *Id.*

191. *Id.*

192. See *Nabors Corp. Servs., Inc. v. Northfield Ins. Co.*, 132 S.W.3d 90 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

193. *Maxus Exploration Co. v. Moran Bros., Inc.*, 773 S.W.2d 358, 360 (Tex. App.—Dallas 1989, writ), *aff'd*, 817 S.W.2d 50 (Tex. 1991) (analyzing the 1973 version of section 127.005). The appeals court in *Maxus* "assume[d] without deciding that Texas law should control" the issues before it. *Id.* The Texas Supreme Court affirmed the court of appeal's judgment, but held that Kansas law rather than Texas law applied, and "express[ed] no opinion on whether the indemnity provisions at issue would be valid under Texas law." 817 S.W.2d at 58.

194. See *Maxus Exploration Corp.*, 773 S.W.2d at 362–63.

195. *Id.*

196. *Id.*

197. TEX. REV. CIV. STAT. ANN. art. 2212b(4)(c) (Vernon 1973).

indemnify Moran for Moran's negligence was unenforceable both because it did not comply with the statute's requirements, and because it did not satisfy the express negligence rule.¹⁹⁸

Diamond Shamrock made a three-fold "gotcha" argument that its indemnity obligation was unenforceable in whole or in part under the statute: (i) the indemnity agreement gave Moran the option to self-insure, which the statute did not allow; (ii) the policy that Moran did provide contained a \$1 million deductible, which was tantamount to no insurance; and (iii) Diamond Shamrock's liability should be limited to the then statutorily required minimum of \$300,000 coverage, notwithstanding that Moran had provided more insurance.¹⁹⁹ The court rejected all of these arguments, on the grounds that (i) self-insurance was acceptable because the statute required only coverage, not a policy;²⁰⁰ (ii) the \$1 million deductible provision was of no moment because the statute required only a written agreement to provide insurance and "[did] not void an indemnity provision if, in fact, insurance coverage [did] not exist";²⁰¹ and (iii) Diamond Shamrock's liability as indemnitor was not limited to the minimum coverage limits, as more coverage had been provided and nothing in the statute imposed a limit in such event.²⁰²

Diamond Shamrock's argument based upon the express negligence rule fared no better under the court of appeal's common sense, plain language approach. The parties' reciprocal indemnity obligations under the contract were expressly "without limit and without regard to . . . the negligence of any party or parties, whether such negligence be sole, joint or concurrent, active or passive," which the court held did meet the requirements of the express negligence rule.²⁰³ The court accordingly ruled in Moran's favor, awarding it indemnity against Diamond Shamrock.²⁰⁴

Three years later, pursuant to the same version of the statute, the Texas Supreme Court decided *Getty Oil Co. v. Insurance Co. of North America*.²⁰⁵ In that case, an operator had purchased various chemicals from a supplier, and, pursuant to a clause in the purchase order, the supplier had provided liability insurance for the operator's benefit.²⁰⁶ A barrel of the chemicals exploded, killing an employee of one of the

198. See *Maxus Exploration Corp.*, 773 S.W.2d at 360-63.

199. *Id.* at 361 n.3.

200. *Id.* at 361.

201. *Id.*

202. *Id.* at 360-61.

203. *Id.* at 362-63 (emphasis omitted).

204. *Id.* at 363.

205. *Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794 (Tex. 1992).

206. *Id.* at 796-97.

operator's contractors, and in the ensuing wrongful death lawsuit the operator was found 100% negligent in causing the accident.²⁰⁷ The operator's insurers then settled the wrongful death action, and the operator thereupon filed an insurance claim with the chemical supplier's insurer, which the insurer rejected.²⁰⁸

In the ensuing lawsuit the insurer argued, and the court of appeals held, that the "additional insured" provision of the purchase order was facially invalid under the statute, because, in effect, it made the supplier indemnify the operator for the operator's own negligence.²⁰⁹ The Texas Supreme Court rejected this argument and reversed the court of appeals' holding:

[T]he language of article 2212b applies exclusively to indemnity agreements. Section 4(c) does not prohibit "insurance shifting" schemes that do not fall within its parameters; rather it permits certain indemnity agreements if they are supported by liability insurance and meet the section's other requirements. The Anti-Indemnity Statute does not purport to regulate any agreements for the purchase of insurance unless they are in support of indemnity agreements.

. . . The [purchase order's] additional insured provision, which does not support an indemnity agreement, is not prohibited by the language of the Anti-Indemnity Statute.²¹⁰

Six years later still, the United States Fifth Circuit Court of Appeals followed *Getty* in *Certain Underwriters at Lloyd's London v. Oryx Energy Co.*²¹¹ In *Oryx* the court had to decide whether the Act prohibited insurance coverage for an indemnitee as an additional named insured, where the indemnity language was unenforceable under the Act.²¹² The Fifth Circuit read *Getty* as holding that "the Act applied only to indemnity agreements and that section 127.005 does not purport to regulate any agreements for the purchase of insurance unless the insurance is only to support the performance of the indemnity."²¹³ Applying this holding to the facts before it, the Fifth Circuit held that:

207. *Id.* at 797.

208. *Id.* at 797-98.

209. *Getty Oil Co. v. Ins. Co. of N. Am.*, 819 S.W.2d 908 (Tex. App.—Houston [14th Dist.] 1991), writ granted (Apr. 8, 1992), *aff'd in part, rev'd in part*, 845 S.W.2d 794 (Tex. 1992).

210. *Id.* at 804 (citations omitted).

211. *Certain Underwriters at Lloyd's London v. Oryx Energy Co. (Oryx)*, 142 F.3d 255, 259 (5th Cir. 1998).

212. *Id.* at 257.

213. *Id.* at 260.

by paying premiums, Mallard [the platform owner] and Oryx [the contractor] essentially shifted the risk of loss to Underwriters. Mallard and Oryx intended to and did enter into a contract in which all insurance coverage carried by Mallard was to extend to and protect Oryx. . . . Underwriters should pay as directed under the policy.²¹⁴

Cases decided under the Act have always emphasized both that the Act is concerned only with indemnity agreements, and that it conditions the enforceability of those agreements, to the extent they would reach an indemnitee's negligence, on what the agreements say. The first of these two points was the principle upon which *Getty* and *Oryx* were decided, where stand-alone agreements to provide insurance for the benefit of a counterparty were enforced.²¹⁵ The second of these two points—that the enforceability of an indemnity agreement depends upon what the agreement says, not what happens later—was the principle upon which another important case, *Nabors Corporate Services, Inc. v. Northfield Insurance Co.*, was based.²¹⁶

In *Nabors*, which was decided under the current version of section 127.005, an oilfield operator, Abraxas, and a contractor, Pool, entered into a master service agreement in which each agreed to indemnify the other for claims—including those based on the indemnitee's negligence—brought by their respective employees, and further agreed to support these indemnity obligations with insurance.²¹⁷ These mutual indemnity obligations satisfied the requirements of section 127.005.²¹⁸

One of Pool's employees was fatally injured on the job, and the decedent's estate sued Abraxas, asserting negligence claims.²¹⁹ Pool accepted Abraxas' tender of defense, and the wrongful death suit was ultimately settled.²²⁰ In the meantime, however, Pool's insurer had become insolvent, so Pool had to contribute its own funds to the settlement of the claim.²²¹

Pool then sought to recover its settlement contribution from Abraxas' insurer, arguing that once its own insurer was placed into receivership, there was no longer any supporting insurance coverage and its indemnity provision in the master service agreement thereby became

214. *Id.*

215. *See Oryx*, 142 F.3d 255; *Getty Oil Co.*, 845 S.W.2d 794.

216. *Nabors Corp. Servs., Inc. v. Northfield Ins. Co.*, 132 S.W.3d 90 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

217. *Id.* at 93.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

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void under the Act.²²² The court of appeals rejected Pool's argument, based on its reading of the Act and the parties' agreement. About the Act, the court stated:

The plain language of the statute does not support Pool's argument. To fall within the [Act's] exclusion under section 127.005, the parties need only "agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the indemnitor. . . ." Once an agreement falls within the statute's exception, there is no language in the [Act] which would retroactively void the agreement.²²³

The court of appeals also felt that the parties' agreement contemplated the result dictated by the Act:

We read these provisions and the contract as a whole as indicating an intent by the parties that Pool acquire and maintain the requisite insurance for the duration of the Agreement, and thus, bear the risk of any loss associated with its underlying insurance obligations. There is nothing in the contract which excepts from those obligations the possibility Pool's insurer may become insolvent, and nothing in the contract which indicates Abraxas contracted to bear liability for that contingency.²²⁴

The Texas legislature, in its successive amendments to section 127.005 since its promulgation in 1973, has concisely set forth the conditions under which indemnification for a party's own negligence will be enforceable in oil and gas operations.²²⁵ Texas courts, in their turn applying the Act in a variety of factual circumstances, seem to have ensured that contractual risk-shifting by means of indemnity and insurance conforms with the expressed intent of the legislature.

V. CHOICE OF LAW ISSUES

A. *Onshore: Contractual Choice of Law Rules*

It is not unusual for parties to agree that the laws of a designated state will govern the interpretation and enforcement of their contract. They may do this because they are familiar with the laws of the state they designate, or because they want to avoid another state's law which would apply in the absence of an agreement, or for both reasons.

222. *Id.* at 95 & n.12.

223. *Id.* at 96-97 (quoting TEX. CIV. PRAC. & REM. CODE § 127.005(a) (West 2002)).

224. *Id.* at 98.

225. *See* Ken Petroleum Corp. v. Questor Drilling Corp., 24 S.W.3d 344, 349 (Tex. 2000) (discussing the evolution of the Act since its original promulgation in 1973).

Generally, Texas' statutory choice of law rules show remarkable deference to the parties' freedom of contract. In some circumstances, these rules will apply the law chosen by the parties even where doing so will violate the public policy of Texas, or another state with a more significant relationship to the transaction than the state whose law the parties have chosen.

Texas' contractual choice of law rules are codified in sections 271.001–.011 of Chapter 271 in Title 9 of the Business and Commerce Code, titled “Rights of Parties to Choose Law Applicable to Certain Transactions.”²²⁶ Section 271.005 addresses the law chosen by parties to a “qualified transaction”—defined in section 271.001 as including a transaction where one of the parties receives consideration worth \$1 million or more—to govern an issue related to that transaction, “including the validity or enforceability of . . . a provision of the agreement.”²²⁷ According to that section, if the transaction “bears a reasonable relation” to the state whose law the parties have chosen, that law will govern, “*regardless of whether the application of that law is contrary to a fundamental or public policy of this state or of any other jurisdiction.*”²²⁸

In the context of contractual indemnity for an indemnitee's negligence in, say, a contract between an operator and a drilling contractor, section 271.005 would work as follows. Assume that the contractor has unilaterally agreed to indemnify the operator for the operator's sole negligence, without a monetary limit and without having obtained insurance to support the indemnity. The absence of a monetary limit (\$500,000) and insurance supporting that unilateral indemnity obligation would make it unenforceable under the Texas Oilfield Anti-Indemnity Act.²²⁹

But assume further that the parties have chosen the law of a state other than Texas, under which the unilateral indemnity provision is enforceable, and that the drilling contract “bears a reasonable relation” to that state,²³⁰ because the principal place of business of one of the parties is located in that state.²³¹ Under this scenario the choice of law statute would require a Texas court to enforce the indemnity

226. TEX. BUS. & COM. CODE ANN. § 271 (West 2009).

227. *Id.* at §§ 271.001, 271.005.

228. *Id.* at § 271.005(a)(2), (b) (emphasis added).

229. TEX. CIV. PRAC. & REM. CODE ANN. §§ 127.003, 127.005(a), 127.005(c) (West 2002).

230. TEX. BUS. & COM. CODE ANN. § 271.005(a)(2).

231. *Id.* at § 271.004(b)(1)(B) (“A transaction bearing a reasonable relation to a particular jurisdiction includes . . . a transaction in which . . . a party to the transaction has the party's place of business . . . in that jurisdiction . . .”). The statute includes many more examples of what are deemed to be “reasonable relation[s]” to a jurisdiction. *Id.* at § 271.004.

obligation,²³² despite the Texas legislature's specific finding in the Oilfield Anti-Indemnity Act that such an agreement, because not limited and not supported by insurance, is inequitable and against public policy.²³³

The approach taken by the choice of law statute is different from and easier to apply than the approach Texas courts followed before 2009, when the statute became effective. Under this earlier approach, Texas courts deciding whether to enforce a contractual choice of law provision engaged in a multi-step, highly subjective analysis, guided by the principles of the Restatement (Second) of Conflict of Laws.²³⁴ The approach required a determination of the state with the most significant relationship to the issue, the policies of other interested states, the parties' justified expectations, and other factors.²³⁵ If the law chosen by the parties would violate the public policy of the state with the most significant relationship to the issue, the court would apply the law of the state with the most significant relationship to the issue instead of the law of the state the parties had chosen.²³⁶

Regarding the parties' election of which state's law would govern indemnity for an indemnitee's negligence, a 2002 Texas court of appeals case is a good example of the approach followed by Texas courts before the enactment of the current statute. In *Chesapeake Operating, Inc. v. Nabors Drilling U.S.A., Inc.*,²³⁷ a Texas appeals court found it extremely difficult to decide the issue, and required a specially appointed eleventh justice to reach a 6-5 en banc decision. An operator, Chesapeake, had entered into a daywork drilling contract with a Texas-based contractor, Nabors, to drill a well in Louisiana.²³⁸ The contract contained mutual indemnity provisions protecting each party from suit by the other party's employees or subcontractors, regardless of who was at fault.²³⁹ Each party also agreed to back up its indemnity obligation with \$1 million in insurance.²⁴⁰ The parties further agreed that Texas law would govern the interpretation and enforcement of the drilling contract.²⁴¹

232. Pursuant to TEX. BUS. & COM. CODE ANN. § 271.011, the analysis and possibly the result would be different if the Oilfield Anti-Indemnity Statute had its own choice of law provision, but it does not.

233. TEX. CIV. PRAC. & REM. CODE ANN. § 127.002(a)-(b).

234. See, e.g., *Minn. Mining & Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733, 735-36 (Tex. 1997).

235. *Id.* at 736.

236. *Id.* at 736-37.

237. *Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, 94 S.W.3d 163 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

238. *Id.* at 166.

239. *Id.*

240. *Id.*

241. *Id.*

Employees (both Texas residents) of two of Chesapeake's contractors were injured during drilling operations in Louisiana, and filed separate suits in Texas against Chesapeake and Nabors.²⁴² In both cases, Nabors cross-claimed against Chesapeake for indemnity.²⁴³ In one case, the trial court applied Texas law and awarded Nabors indemnity;²⁴⁴ in the other case, the trial court applied Louisiana law and denied Nabors' indemnity claim.²⁴⁵ On appeal, the rulings were eventually consolidated for consideration by the en banc court.²⁴⁶

The court determined that Nabors' indemnity claim would be enforceable under Texas law, but not under Louisiana law, which declares indemnity provisions in oilfield contracts void if they would indemnify a party against its own negligence.²⁴⁷ The court therefore had to decide, pursuant to sections 187 and 188 of the Restatement (Second) of Conflict of Laws, whether to apply Texas law, as the parties had chosen.²⁴⁸ These sections required the court to analyze whether Louisiana had a more significant relationship and a greater interest in the indemnity issue than did Texas, and if so, whether applying Texas law would frustrate a fundamental policy of Louisiana.²⁴⁹

The court felt that Texas had the most significant relationship to the indemnity issue: Texas was where the contract had been negotiated and executed, where the contractor was domiciled, where the injured plaintiffs resided, and where the lawsuits that triggered the indemnity obligation had been filed.²⁵⁰ Louisiana was where the drilling contract had been performed, but the court did not consider this to be a weighty factor: "Nabors' claim . . . is for liability and legal services incurred in Texas, not for drilling services performed in Louisiana. Considering only the particular issue in dispute, the place of performance of that obligation was in Texas."²⁵¹

Having identified and weighed all of the factors that convinced it that Texas had a more significant relationship to the issue than Louisiana did, the court then proceeded, as required by section 6 of the Restatement, to consider principles such as parties' justified expectations, certainty and predictability of results, policies of interested states and of indemnity law generally, and ease in determining and

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* (citing LA. REV. STAT. ANN. § 9:2780(B) (West 1991)).

248. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 187-188 (1971)).

249. *Id.* at 173-78.

250. *Id.* at 170.

251. *Id.* at 171-72.

applying the law.²⁵² The court felt that these section 6 factors also pointed toward Texas, considering its and Louisiana's interests, the interests of the injured workers, and the interests and expectations of the contracting parties.²⁵³

As to the relative interests of Texas and Louisiana, the court noted that Texas' "strong commitment to the principle of contractual freedom. . . . outweighs any interest Louisiana has in voiding a contract between foreign companies regarding foreign litigation."²⁵⁴ And as to the interests of the injured workers, the court stated:

[B]y requiring indemnities that are mutual and supported by adequate insurance, Texas law increases the probability that injured parties may recover not just a paper judgment, but one that is collectible. . . . A plaintiff with a strong negligence case against a financially weak contractor is clearly better off if that contractor is backed up by an indemnitor and its insurance.²⁵⁵

Finally, with regard to the justified expectations of the parties, the court recognized that applying Louisiana law would have the effect of "relieving Chesapeake of the indemnity it promised to pay and the insurance coverage it promised to provide."²⁵⁶ Conversely:

Texas indemnity law allows companies to substitute insurance in place of uncertain liability, thus limiting their costs and making them more predictable. . . . Because these sophisticated parties drafted a contract to meet Texas law, and deemed it to apply, we believe they should have what they bargained for.²⁵⁷

The *Chesapeake* court thus applied Texas law, enforced Chesapeake's indemnity obligations, and awarded judgment to Nabors on its cross-claims against Chesapeake.²⁵⁸ If the case had arisen later, after the choice of law statute became effective, the court would have reached the same conclusion, but much faster and more easily. Applying section 271.005, and noting that Nabors was based in Texas, the court would have gone straight to the conclusion that Texas law applied, without any belabored, subjective weighing of competing interests and relationships. Texas' choice of law statute has increased predictability in the law, and

252. *Id.* at 175–76.

253. *Id.* at 176–77.

254. *Id.* at 176 (quoting *Churchill Forge, Inc. v. Brown*, 61 S.W.3d, 368, 371 (Tex. 2001)) (internal quotation marks omitted).

255. *Id.* at 180.

256. *Id.* at 175.

257. *Id.* at 180 (citation omitted).

258. *Id.*

to that extent has had a salutary effect, in that parties can have more confidence that courts will uphold the risk-allocating indemnity and insurance provisions in their contracts.

B. Offshore: OCSLA and Maritime Law

In the Gulf of Mexico, the Outer Continental Shelf is the seabed and subsoil lying between the seaward extent of the jurisdictions of the states of Texas, Louisiana, Mississippi, Alabama, and Florida, and the seaward extent of federal jurisdiction, 200 or more nautical miles out from those states' waters.²⁵⁹ Pursuant to the Outer Continental Shelf Lands Act (OCSLA), the United States has affirmed its civil and political jurisdiction over the Outer Continental Shelf and all structures temporarily or permanently attached to the seabed for the purpose of exploring, developing, or producing mineral resources.²⁶⁰ Therefore the Shelf and the structures and installations attached to it are subject to federal law and, to the extent they are not inconsistent with federal law, to the laws of the adjacent state, applied as surrogate federal law.²⁶¹

The master service agreements, drilling contracts, and other agreements entered into in connection with oil and gas exploration and production on the Outer Continental Shelf frequently include provisions indemnifying one or more of the parties from claims arising from their own negligence. If OCSLA applies to the contract, the validity and enforceability of any such risk-shifting provisions will be determined by the law of the adjacent state, applied as surrogate federal law.²⁶² Conversely, if the contract is deemed to be a maritime contract, the adjacent state's law will not apply; maritime law will.²⁶³

A court's determination whether OCSLA or maritime law applies to a contractual indemnity dispute has additional ramifications for the parties if they have included a choice of law provision in their contract. If OCSLA applies, the parties' choice of law is immaterial, because the law of the adjacent state will be applied regardless of their election: "OCSLA is itself a Congressionally mandated choice of law provision requiring that *the substantive law of the adjacent state is to apply even in the presence of a choice of law provision in the contract to the contrary.*"²⁶⁴ Conversely, if maritime law applies, the parties' choice of

259. *Outer Continental Shelf*, BUREAU OF OCEAN ENERGY MANAGEMENT, <http://www.boem.gov/Outer-Continental-Shelf/> (last visited Oct. 27, 2014); *see also* 43 U.S.C. §§ 1301(a), 1331(a).

260. 43 U.S.C. § 1331.

261. *Id.* at § 1333(a)(1)–(2)(A).

262. *Alleman v. Omni Energy Servs. Corp.*, 580 F.3d 280, 283–86 (5th Cir. 2009).

263. *Id.*

264. *Union Tex. Petroleum Corp. v. PLT Eng'g, Inc. (PLT)*, 895 F.2d 1043, 1050 (5th Cir. 1990) (emphasis added); *see also* *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 482 n.8 (1981) ("OCSLA does supersede the normal choice-of-law rules that the forum would

law will probably be honored: “[U]nder admiralty law, where the parties have included a choice of law clause, that state’s law will govern unless the state has no substantial relationship to the parties or transaction or the state’s law conflicts with the fundamental purposes of maritime law.”²⁶⁵

Fifth Circuit cases addressing whether OCSLA or maritime law governs a contractual indemnity dispute usually begin their analysis by invoking a long-established test:

[F]or adjacent state law to apply as surrogate federal law under OCSLA, three conditions are significant. (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 Federal law.²⁶⁶

The cases where this three-part test is applied turn most often on either the first factor, whether the indemnity dispute arose on an OCSLA situs, or the second factor, whether maritime law applies of its own force. The Fifth Circuit has acknowledged that its case law addressing these two factors has been inconsistent, which makes it difficult for operators and contractors to know whether the indemnity and choice of law provisions in their contracts will be enforced.²⁶⁷

1. OCSLA Situs

In actions to enforce indemnity obligations in a contract, the factual narrative usually begins with an accident allegedly caused by a party’s negligence, as when a contractor’s employee is injured because of the alleged negligence of the operator of a fixed platform. The injured employee files a tort action, and the defendant operator thereupon files a third-party demand against the injured employee’s contractor, based on an indemnity provision in the contract between the operator and the contractor.

apply.”).

²⁶⁵. *Stoot v. Fluor Drilling Servs., Inc.*, 851 F.2d 1514, 1517 (5th Cir. 1988) (citing *Hale v. Co-Mar Offshore Corp.*, 588 F.Supp. 1212, 1215 (W.D. La. 1984)). Maritime law itself does not bar indemnity for an indemnitee’s negligence, provided that intent is “clearly and unequivocally expressed.” *Seal Offshore, Inc. v. Am. Standard, Inc.*, 736 F.2d 1078, 1081 (5th Cir. 1984); *see also East v. Premier, Inc.*, 98 Fed. App’x 317, 319 (5th Cir. 2004) (unpublished) (quoting *Seal Offshore, Inc.*, 736 F.2d at 1081); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 540 (5th Cir. 1986) (same); *Energy XXI, GOM, LLC v. New Tech Eng’g, L.P.*, 787 F. Supp.2d 590, 609 (S.D. Tex. 2011) (same).

²⁶⁶. *PLT*, 895 F.2d at 1047 (this three-part analysis is commonly referred to as the “*PLT* test”).

²⁶⁷. *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC (Grand Isle IV)*, 589 F.3d 778, 786–87 (5th Cir. 2009).

Looking at the third-party demand, which sounds in contract, the court examines the first factor of the *PLT* test: whether the controversy arose on a situs covered by OCSLA.²⁶⁸ What is the situs of the breach of contract claim, which is the controversy about whether indemnity is owed? Is it the same as the situs of the tort that gave rise to the action? Or can it be different? This was the issue addressed by the Fifth Circuit in *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, an en banc decision that was intended by the court to clarify this area of the law, because its prior case law was “conflicting and confusing.”²⁶⁹

In *Grand Isle*, the owner-operator of an offshore platform, BP American Production Company (BP), had entered into a contract with Grand Isle Shipyard, Inc. (Grand Isle) for repair and maintenance of its platforms, and another contract with Seacor Marine, LLC (Seacor) for the transport of workers employed by BP and its contractors.²⁷⁰ The BP-Grand Isle contract required Grand Isle to indemnify BP and BP’s other contractors for claims brought by Grand Isle’s employees.²⁷¹

A Grand Isle employee was injured when he fell on the deck of a Seacor vessel while the vessel was transporting him from his work platform to the residential platform where his living quarters were located.²⁷² At the time of the accident, the vessel was close to, but not in physical contact with, the residential platform.²⁷³ After the employee filed a negligence action against Seacor, Seacor demanded indemnity from Grand Isle and further claimed coverage under an insurance policy Grand Isle had obtained to support its indemnity obligations.²⁷⁴ Grand Isle and its insurer thereupon sued Seacor, seeking a declaratory judgment that neither indemnity nor insurance coverage was owed.²⁷⁵

The parties filed cross-motions for summary judgment before the district court.²⁷⁶ Grand Isle and its insurer argued that OCSLA applied, and that because the platforms were offshore Louisiana, the Louisiana Oilfield Indemnity Act, applied as surrogate federal law, rendered the indemnity provision in the BP-Grand Isle contract unenforceable.²⁷⁷

268. *PLT*, 895 F.2d at 1047.

269. *Grand Isle IV*, 589 F.3d at 786.

270. *Id.* at 781.

271. *Id.* at 782.

272. *Id.* at 781.

273. *Id.* at 781–82.

274. *Id.* at 782.

275. *Id.*

276. *Id.*

277. *Id.* at 781–82 (citing LA. REV. STAT. ANN. § 9:2780(B) (West 1991)). Grand Isle and its insurer also made an alternative argument, that the indemnity provision was unenforceable under section 905(b) of the Longshoremen and Harborworkers’ Compensation Act, 33 U.S.C. § 905(b). *Id.* at 782. The Fifth Circuit’s en banc decision ultimately mooted this alternative argument. *Grand Isle Shipyard, Inc. v. Seacor Marine LLC (Grand Isle III)*, 569 F.3d 523 (5th Cir. 2009) (en banc).

Seacor argued that general maritime law governed the dispute, and that as a result the indemnity provision was valid and enforceable.²⁷⁸ The district court granted Grand Isle's and its insurer's motions, and denied Seacor's motion, reasoning that the controversy before it was a contractual indemnity dispute. Hence, the situs of that controversy was the stationary platform where the work contemplated by the contract was performed, and Louisiana law, applied pursuant to OCSLA, invalidated the indemnity provision in the contract.²⁷⁹

Seacor appealed, and the Fifth Circuit panel reversed, reasoning that because the Grand Isle employee's accident had occurred on a vessel traveling on navigable waters, the indemnity dispute arising from the accident had not arisen on an OCSLA situs.²⁸⁰ Consequently, according to the panel, Louisiana law did not apply pursuant to OCSLA to void the indemnity agreement, and the panel therefore vacated and remanded on that basis.²⁸¹ Grand Isle then filed a petition for rehearing en banc, which was granted.²⁸²

The en banc court began its analysis with a discussion of the situs portion of the three-part test set forth in *PLT* in light of two Supreme Court decisions, *Rodrigue v. Aetna Casualty & Surety Co.* and *Offshore Logistics, Inc. v. Tallentire*.²⁸³ The court acknowledged that *Rodrigue* and *Tallentire* provided the situs rule for tort cases, but stated that "it does not follow that contract cases triggered by an underlying tort depend upon the situs of that tort, i.e., the location of that occurrence."²⁸⁴ Significantly for the court, *PLT* was a "pure contract case," and the Fifth Circuit in that case "did not focus on where the underlying incident that gave rise to the contract claim occurred . . . but looked instead to where the work under the contract was performed."²⁸⁵

According to the en banc court, some Fifth Circuit decisions, ostensibly applying the *PLT* situs test to contract cases, "have ignored the situs of the contract and looked instead to the situs of the underlying tort," and "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."²⁸⁶ These

278. *Grand Isle IV*, 589 F.3d at 782.

279. *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC (Grand Isle I)*, No. 06-1405, 2007 WL 2874808, at *3-6 (E.D. La. Sept. 26, 2007).

280. *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC (Grand Isle II)*, 543 F.3d 256, 262 (5th Cir. 2008), *on reh'g en banc*, 589 F.3d 778 (5th Cir. 2009).

281. *Id.* at 259-60, 263-64.

282. *Grand Isle III*, 569 F.3d at 523.

283. *Grand Isle IV*, 589 F.3d at 784-85 (citing *Rodrigue v. Aetna Cas. & Surety Co.*, 395 U.S. 352 (1969); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986)).

284. *Grand Isle IV*, 589 F.3d at 785.

285. *Id.*

286. *Id.* at 785-86.

cases, some of which had reached the correct result for other reasons, but whose analysis the en banc court nonetheless found faulty, included *Diamond Offshore Co. v. A&B Builders, Inc.*,²⁸⁷ *Demette v. Falcon Drilling Co.*,²⁸⁸ *Hodgen v. Forest Oil Corp.*,²⁸⁹ *Hollier v. Union Texas Petroleum Corp.*,²⁹⁰ and *Smith v. Penrod Drilling Corp.*²⁹¹

The *Grand Isle IV* panel, employing the same faulty analysis, had vacated the district court's decision. The en banc court therefore expressed its desire "to clarify this area and to resolve at least some of the conflict among our cases,"²⁹² and reasoned and held as follows:

Once we recognize that the claim for indemnity is a claim based in contract rather than in tort, we see no reason to apply tort analysis to determine where the contractual controversy arose. It makes more sense to apply a focus-of-the-contract test and say that a contractual dispute—the "controversy" under the first condition of the *PLT* test—arises under a OCSLA situs if a majority of the work called for by the contract is on stationary platforms or other enumerated OCSLA situses. . . .

This approach is sounder because it applies contract principles rather than tort principles to a contract case. Applying tort rules would allow the fortuitous location of an accident to determine the situs—and the applicable law—of a contractual controversy. The tort-situs approach prevents commercial parties from reliably allocating risk in their contractual arrangements because they have no way of predicting where "controversies" might arise and thus no way of knowing which law will govern.

. . . .

. . . [W]e hold that, in determining the first condition of the *PLT* test, 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).²⁹³

The en banc court therefore overruled *Diamond*, *Demette*, *Hodgen*, *Hollier*, and *Smith*, "with respect to the extent (and only to that extent)

287. *Diamond Offshore Co. v. A&B Builders, Inc.*, 302 F.3d 531, 546 (5th Cir. 2002).

288. *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 498–500 (5th Cir. 2002).

289. *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512, 1527 (5th Cir. 1996).

290. *Hollier v. Union Tex. Petroleum Corp.*, 972 F.2d 662, 663–64 (5th Cir. 1992).

291. *Smith v. Penrod Drilling Corp.*, 960 F.2d 456, 458–59 (5th Cir. 1992).

292. *Grand Isle IV*, 589 F.3d at 787.

293. *Id.*

the ‘tort’ analysis was used in those cases to determine situs,”²⁹⁴ and affirmed the district court’s decision that the indemnity dispute had arisen on an OCSLA situs, because “a majority, if not all, of the work called for under the contract was to be performed on stationary platforms on the OCS.”²⁹⁵ The court expressed its expectation that this performance-based approach to determining the situs of a contract dispute would help contracting parties manage risk better, by increasing predictability and stability.²⁹⁶ It further agreed with the district court that maritime law did not apply, as the Grand Isle contract for platform repair and maintenance was not a maritime contract, and that the adjacent state’s law, the Louisiana Oilfield Indemnity Act, was not inconsistent with federal law.²⁹⁷ The district court therefore had correctly granted Grand Isle’s and its insurer’s summary judgment motions, and so the en banc court affirmed.

2. Does Maritime Law Apply of Its Own Force?

The several contracts that the operator of a fixed platform may enter into—for drilling operations, drilling mud, chemicals, electrical logging, completion, wireline services, transport of workers, reworking operations, rig maintenance and repair, and supplies—may specifically designate that a vessel be used to perform the contract. Or, the operator’s counterparty may only occasionally or incidentally use a vessel in its performance of the contract. How does a court determine if a particular contract is maritime, or not? This is a difficult question, about which the Fifth Circuit has expressed its frustration more than once.²⁹⁸

In *Dupre v. Penrod Drilling Corp.*, the Fifth Circuit employed a focus-of-the-contract approach in order to determine whether maritime law governed the contract.²⁹⁹ In that case an operator, Minatome, and a drilling contractor, Penrod, entered into a daywork drilling contract to be performed offshore Louisiana.³⁰⁰ Pursuant to a provision in the contract, Minatome had agreed to indemnify Penrod from any claims brought by Minatome’s employees, regardless of any party’s

294. *Id.* at 788 & n.8.

295. *Id.* at 789.

296. *Id.* at 787.

297. *Id.* at 789.

298. *Alleman v. Omni Energy Servs. Corp.*, 580 F.3d 280, 283 (5th Cir. 2009) (“Determining whether a contract is maritime is a well-trod but not altogether clear area of the law.”); *Hoda v. Rowan Companies, Inc.*, 419 F.3d 379, 380 (5th Cir. 2005) (“[T]he final result turns on a minute parsing of the facts. . . . [This] creates uncertainty, spawns litigation, and hinders the rational calculation of costs and risks by companies participating in this industry.”); *Planned Premium Servs. of La., Inc. v. Int’l Ins. Agents, Inc.*, 928 F.2d 164, 165 (5th Cir. 1991) (“The waters become murky when we seek the precise parameters of a maritime contract.”).

299. *Dupre v. Penrod Drilling Corp. (Dupre II)*, 993 F.2d 474 (5th Cir. 1993).

300. *Id.* at 476.

negligence.³⁰¹ The parties had also agreed that Texas law would govern the contract and its interpretation.³⁰²

A Minatome employee was injured on the job and brought a negligence action against Penrod.³⁰³ Pursuant to its rights under the drilling contract, Penrod impleaded Minatome as a third-party defendant, seeking indemnity.³⁰⁴ Minatome argued that OCSLA was applicable, in turn making the Louisiana Oilfield Indemnity Act applicable as surrogate federal law and defeating Penrod's indemnity action, as that statute forbids a party to an oil and gas contract from being indemnified for its own negligence in a personal injury or wrongful death action.³⁰⁵ Penrod, conversely, argued that maritime law applied, and that pursuant to maritime law, the parties' choice of Texas law should be honored, allowing Penrod indemnity against Minatome pursuant to the contract.³⁰⁶

Was the contract maritime, such that Penrod's indemnity claim would succeed, or not? The district court noted the drilling contract's specific requirement that Penrod use a special purpose offshore jack-up drilling vessel alongside Minatome's fixed platform in order to drill, complete, and tie-back the Minatome wells.³⁰⁷ It therefore concluded that the employment of the vessel in the performance of the drilling contract made the contract maritime, in turn allowing the parties' choice of Texas law to stand, and entitling Penrod to indemnity from Minatome.³⁰⁸

The Fifth Circuit agreed.³⁰⁹ It first observed that deciding whether a contract is maritime requires a fact-specific inquiry into, among other questions, the relationship of the work being done to the mission of the vessel.³¹⁰ The Fifth Circuit then elaborated on the issue:

[A] contract related to oil and gas exploration and drilling takes on a salty flavor when the performance of the contract is more than incidentally related to the execution of the vessel's mission. . . .” Here, the contract did not merely touch incidentally on a vessel, but specifically focused on the use of a vessel to drill, complete, and tie-back Minatome's four wells. Minatome does not dispute that Penrod could not have performed its obligations under the contract

301. *Id.* at 478.

302. *Id.*

303. *Id.* at 475.

304. *Id.*

305. *Id.* at 475–76 (citing LA. REV. STAT. ANN. § 9:2780 (West 1991)).

306. *Id.* at 475.

307. *Dupre v. Penrod Drilling Corp. (Dupre I)*, 788 F. Supp. 901, 905 (E.D. La. 1992), *aff'd*, 993 F.2d 474 (5th Cir. 1993).

308. *Id.* at 907.

309. *Dupre II*, 993 F.2d at 477.

310. *Id.*

without the vessel. . . . [C]ontracts to drill a well offshore or to provide general services in connection therewith are, when performed from a movable drilling platform, maritime obligations.³¹¹

Because maritime law thus applied, it was not necessary to analyze the first and third *PLT* factors, whether the controversy had arisen on an OCSLA situs and whether the adjacent state's law was not inconsistent with federal law. The parties' choice of Texas law—which maritime law honored—therefore stood and, as the indemnity obligations of the parties conformed with Texas law, Minatome was required to honor its indemnity obligations to Penrod.

Years later, in *Alleman v. Omni Energy Services Corp.*, the Fifth Circuit employed essentially the same approach it had used in *Dupre*, but reached the opposite conclusion based upon the facts before it.³¹² There, the court addressed whether a contractual indemnity provision was governed by OCSLA, in which case the law of Louisiana as the adjacent state would apply, or by maritime law, which the parties had chosen to govern the contract.³¹³ The issue arose in wrongful death and personal injury actions following a helicopter accident on a fixed platform, where the helicopter company sought indemnity for its own negligence pursuant to its contract with the platform operator.³¹⁴ If Louisiana law applied through OCSLA, the indemnity provision would not be enforceable;³¹⁵ conversely, if maritime law applied, there would be no impediment to the enforcement of the indemnity provision.³¹⁶

The court began by reciting the three-part test to determine whether OCSLA applies:

(1) The controversy must arise on a situs covered by OCSLA (i.e. the subsoil, seabed, or artif[i]cial 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 Federal law.³¹⁷

There was no dispute that the controversy had arisen on an offshore platform, and that the law of Louisiana was not inconsistent with federal

311. *Id.* at 477 (citations omitted) (quoting *Domingue v. Ocean Drilling & Exploration Co.*, 923 F.2d 393, 396 (5th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992); *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083, 1086 (5th Cir. 1990)).

312. *Alleman v. Omni Energy Servs. Corp.*, 580 F.3d 280, 283 (5th Cir. 2009).

313. *Id.* at 283.

314. *Id.* at 282–83.

315. *Id.* at 283.

316. *Id.*

317. *Id.* (alteration in original) (citing *Union Tex. Petroleum Corp. v. PLT Eng'g, Inc. (PLT)*, 895 F.2d 1043, 1047 (5th Cir. 1990)).

law.³¹⁸ That left a single issue: whether maritime law applied of its own force.³¹⁹ The court first pointed out that whether the contract was maritime depended not upon “whether a ship or other vessel was involved in the dispute,” but instead upon “the nature and character of the contract, and . . . whether it has reference to maritime service or maritime transactions.”³²⁰ And in order to make that determination, the court then utilized a two-part inquiry the Fifth Circuit had earlier developed:

We look both to the “historical treatment in the jurisprudence” as well as to six fact-specific factors:

1) what does the specific work order in effect at the time of 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?³²¹

The helicopter company, arguing for the application of maritime law so the indemnity provision in its favor would be enforceable, relied on tort cases applying maritime law to helicopter accidents that occurred over water.³²² The rationale of these cases, in the words of the United States Supreme Court, was that the “helicopter was engaged in a function traditionally performed by waterborne vessels: the ferrying of passengers from an ‘island,’ albeit an artificial one, to the shore.”³²³

But the court rejected the helicopter company’s argument, because “the tests for maritime *contract* law and maritime *tort* law have long been different. . . . [M]aritime contract law applies based on the nature and character of the contract, rather than looking to where it occurred.”³²⁴ Considering the subject matter of the contract, which “was to provide helicopters and other aircraft to ferry workers between

318. *Id.* at 283.

319. *Id.*

320. *Id.* at 284 (citing *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 23, 24 (2004)).

321. *Id.* (quoting *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990)).

322. *Id.*

323. *Id.* (quoting *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 219 (1986)) (internal quotation marks omitted).

324. *Id.* at 285 (emphasis in original) (citations omitted). The latter part of the quoted language is essentially identical to a passage in *Theriot v. Bay Drilling Corp.*: “Whether a particular contract can be characterized as maritime depends on the nature of the contract, not on the situs of its performance or execution.” *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538 (5th Cir. 1986). The court in *Dupre II* cited *Theriot* in support of its conclusion that the contract at issue was governed by maritime law, not OCSLA. *Dupre v. Penrod Drilling Corp. (Dupre II)*, 993 F.2d 474, 477–78 (5th Cir. 1993).

platforms and the shore,” the Fifth Circuit held that maritime law did not apply and OCSLA did.³²⁵ Accordingly, Louisiana’s prohibition against indemnity for a party’s own negligence governed as surrogate federal law, defeating the helicopter company’s contractual indemnity claim.³²⁶

From a pragmatic point of view, it is difficult to reconcile the Fifth Circuit’s *Dupre* and *Alleman* decisions. In *Dupre*, Penrod’s special purpose vessel, in order to perform under the drilling contract, was “jacked up”—elevated on three legs—next to the Minatome well.³²⁷ It was temporarily attached to the seabed, and during drilling operations its derrick hovered directly over the Minatome platform, which was permanently attached to the seabed.³²⁸ The Penrod drill string passed through a bay area in the fixed Minatome platform in order to drill the well.³²⁹ Yet the Fifth Circuit held that OCSLA did not apply to the contract, because maritime law governed the contract.³³⁰ In *Alleman*, the subject matter of the contract was the transport of passengers over water—through the air by means of a helicopter, but transport from point to point over water nonetheless.³³¹ One might intuit that the Fifth Circuit would therefore hold that maritime law governed, but the court held that OCSLA, not maritime law, applied because “a contract to ferry workers to offshore platforms is not a maritime contract.”³³²

It seems—to this writer, anyway—that *Alleman* is better reasoned than *Dupre*, and that the Fifth Circuit in both cases should have concluded that OCSLA, and hence the adjacent state’s law, applied. But the *PLT* test is subjective, and expressly allows for the possibility that maritime law will apply to a controversy that has arisen on an OCSLA situs.³³³ Business people therefore will continue to be uncertain about which law will govern their indemnity agreements. The uncertainty inheres in the test itself.

VI. CONCLUSION

Of course care is always required in the drafting of contracts. Where those contracts touch upon indemnity and insurance issues in the context of oil and gas operations, or where a party will be indemnified for its own negligent acts, the drafter must be familiar with both the fair

325. *Alleman*, 580 F.3d at 285.

326. *Id.*

327. *Dupre v. Penrod Drilling Corp. (Dupre I)*, 788 F. Supp. 901, 904 (E.D. La. 1992), *aff’d*, 993 F.2d 474 (5th Cir. 1993).

328. *Id.*

329. *Id.*

330. *Dupre v. Penrod Drilling Corp. (Dupre II)*, 993 F.2d 474 (5th Cir. 1993).

331. *Alleman*, 580 F.3d at 284–85.

332. *Id.* at 285.

333. *Id.*

notice rule—incorporating the express negligence doctrine and the conspicuous requirement—and the Texas Oilfield Anti-Indemnity Act. Further, when master service or other agreements will govern operations outside Texas, the drafter must be familiar with Texas’ choice-of-law rules if the parties want Texas law to apply. Finally, as the OCSLA and maritime cases referred to above demonstrate, these choice-of-law issues become more complex when the oil and gas operations will occur offshore.