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Comment

***177 CHARTING THE CHAOTIC OFFSHORE WATERS: THE VALIDITY OF CONTRACTUAL INDEMNITY PROVISIONS PERTAINING TO INJURIES SUSTAINED OFFSHORE**

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I. Introduction

The growth of the offshore oil and natural gas industry has resulted in the rise of indemnity agreements in both maritime and oil-and-gas-related contracts. [FN1] Due to the nature of these industries, risk allocation is an omnipresent concern, and indemnity agreements serve the purpose of allocating risk so that one party assumes another's liability. [FN2] "[T]he rationale [is] that the party with the most control over the risk should be responsible for any loss," regardless of who is at fault. [FN3] Although indemnity agreements are generally valid under maritime law, some states, such as Louisiana, have enacted "anti-indemnity" statutes *178 intended to validate particular indemnity agreements. [FN4] "The purpose of these . . . statutes is to protect small contractors engaged in oil and gas service industries in the Gulf of Mexico against overreaching by more powerful oil companies." [FN5] These companies have the economic power to compel contractors to indemnify them, even when the larger companies are at fault themselves. [FN6] Although this indemnity system may seem reasonable, when assessed in conjunction with the Outer Continental Shelf Lands Act (OCSLA), Longshore and Harbor Workers' Compensation Act (LHWCA), and varying degrees of maritime and state law, this field of law is convoluted and unpredictable. [FN7]

Most of the litigation in this area arises as the result of injuries occurring offshore. [FN8] The injured employee sues the large oil company, which then claims defense indemnification against its contractor/employer pursuant to a Master Service Agreement (MSA). [FN9] Consequently, the contractor's only hope for escaping liability in the litigation is that some law invalidates the indemnity provision in the MSA. To the oil companies' dismay, enforcement of the indemnity provisions of an MSA is not an easy task. [FN10] The two issues principally raised are: (1) choice of law and (2) whether the provision can be enforced under the applicable law. [FN11]

"[I]n order to determine whether an indemnity agreement pertaining to an injury sustained on the [Outer Continental Shelf] is valid, a court must undertake several levels of analysis." [FN12] The court must first decide whether the OCSLA applies, and then determine what substantive law governs. [FN13] If the injury occurred on a vessel or in territorial waters, maritime law applies by its own force. [FN14] However, if the injury occurred *179 on a fixed platform or jack-up rig, the court must examine whether the agreement containing the indemnity provision is a maritime contract in order to determine which substantive law governs. [FN15] If the contract is not maritime, the OCSLA provides that the law of the adjacent state will apply as surrogate federal law. [FN16] On the other hand, if the court finds the contract to be maritime in nature, it then

must decide whether the LHWCA applies, possibly invalidating the provision. [FN17] Each step in this analysis involves various tests that result in a grueling examination of each situation on a case-by-case basis.

Consider this hypothetical situation: a contractor's employee is injured while working onboard a jack-up drilling rig owned by Gulf Drilling Co. (Gulf) and operating in the Gulf of Mexico off the coast of Louisiana. [FN18] The employee sues Gulf, which then files a third-party complaint against the contractor for defense and indemnity based on the parties' MSA. The indemnity provision requires the contractor to indemnify the rig-owner against any claims arising out of or in connection with the services and materials supplied by the contractor, whether caused by the contractor's or rig-owner's negligence. [FN19]

Gulf hopes to receive defense and indemnity from the contractor, and claims that the MSA is governed by general maritime law. However, the contractor asserts that the contractual indemnity provision is invalid because the Louisiana Oilfield Indemnity Act (LOIA) [FN20] applies via the OCSLA and therefore invalidates the indemnity provision at issue.

This Comment seeks to examine the dispositive issue: What is the validity of contractual indemnity provisions pertaining to injuries sustained offshore? This Comment is limited to providing an understanding of the analysis courts apply when determining whether indemnity provisions are applicable in these situations. It also discusses the attempts of vessel operators and oil companies to circumvent anti-indemnity statutes.

*180 Therefore, this Comment proceeds as follows: Part II discusses the applicability of the OCSLA. Part III explores the critical issue of whether a contract is maritime. Part IV discusses the implications of applying the LHWCA. Part V examines the applicability and effectiveness of the LOIA. Part VI examines attempts by vessel operators and oil companies to circumvent the effects of anti-indemnity statutes like the LOIA. Part VII looks at recent case law and how courts have recently been determining the validity of indemnity provisions. Finally, Part VIII provides an analysis of the possible outcomes in the hypothetical Gulf Drilling Co. and contractor indemnity dispute.

II. Outer Continental Shelf Lands Act

In 1953, Congress enacted the OCSLA [FN21] to protect U.S. interests in, and to encourage the exploration and development of, newly discovered oil and gas deposits located in the submerged lands of the outer continental shelf (OCS). [FN22] Congress passed the OCSLA to provide a body of law that would govern "the seabed, subsoil, and fixed structures, such as artificial island drilling rigs and platforms located on the OCS, for the purpose of exploring for, developing, removing and transporting resources therefrom." [FN23] When Congress drafted the OCSLA, it established that these fixed structures and the seabed are "an area of exclusive Federal jurisdiction located within a State." [FN24] Therefore, adjacent state law could be used as "surrogate federal law." [FN25] However, "state law would only be applied when it was 'applicable and not inconsistent with . . . other Federal laws.'" [FN26] Additionally, Congress integrated LHWCA benefits into the OCSLA for any nonseaman employee injured on the OCS while engaged in drilling activities. [FN27]

In deciding whether an indemnity provision in a contract is valid, a court must initially determine whether the OCSLA is applicable. [FN28] To make this determination, a court has to apply a situs test to an activity *181 occurring on the OCS. [FN29] Because the United States Supreme Court has never actually defined an OCSLA situs, the case law of the United States Court of Appeals for the Fifth Circuit comes closest to defining the requirements. "The OCSLA applies federal law to certain structures and devices on the OCS, incorporates state law into federal law on the OCS, and applies the LHWCA to certain injuries sustained by persons working on the OCS." [FN30] The OCSLA is considered a "gap-filling statute" because when fixed structures on the OCS are not covered by either maritime or state law, the OCSLA fills this gap and statutorily implements federal law. [FN31] "To determine whether the OCSLA applies, [the Fifth Circuit applies a test] first formulated in *Union Texas Petroleum Corp. v. PLT Engineering, Inc.* . . ." [FN32] The test requires a court to apply state law as surrogate federal law under the OCSLA if: (1) the controversy arises on a situs covered by the OCSLA, (2) federal maritime law does not apply of its own force, and (3) the state law is not inconsistent with federal law. [FN33]

“To satisfy the first PLT factor, a determination must be made whether the underlying injury or accident occurred on an OCSLA situs.” [FN34] The Supreme Court and the Fifth Circuit have determined that § 1333(a)(1) of the OCSLA defines the scope of the Act and sets forth the conditions necessary to meet the “situs” requirement. [FN35] Section 1333(a)(1) states:

The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer continental shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a *182 ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer continental shelf were an area of exclusive Federal jurisdiction located within a State. . . . [FN36] For example, if the injury was on a vessel, maritime law would apply. [FN37] However, if the injury occurred on a fixed platform or jack-up rig, the court would have to turn to the second prong of the PLT test to determine whether maritime law applies of its own force. [FN38] In analyzing this prong, a court must examine whether the contract that contains the disputed indemnity agreement is a maritime contract. [FN39]

III. Is the Contract Maritime?

“In *Davis & Sons, Inc. v. Gulf Oil Corp.*, the Fifth Circuit described a two-part test for determining whether a contract is maritime in nature.” [FN40] A court must first examine how similar contracts were construed in the past. Mindful of this precedent, the court must then inquire into the facts to determine whether it is a maritime contract. [FN41] The *Davis* court set forth six factors that a court must consider when inquiring into the facts of a contract. [FN42] The factors are:

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? and
6. what work was the injured worker actually doing at the time of the injury? [FN43]

Because the historical treatment of some contract categories is sufficiently clear, the *Davis* test is sometimes unnecessary. [FN44] However, “[i]f historical treatment is not dispositive, the court [will apply] the *183 [above] fact-specific inquiry to determine whether the contract has a sufficiently ‘salty flavor,’ for the court to deem it maritime.” [FN45]

A. Maritime Contracts

There are several types of contracts where “the jurisprudence is well-settled that the services involved constitute a maritime [contract].” [FN46] Contracts involving the vessel repair and contracts relating to jack-up rigs that have vessel status have been considered maritime as a matter of law. [FN47] These contracts relating to jack-up rigs have created an incongruity because the Fifth Circuit treats the vessel status “of a jack-up rig . . . for the second OCSLA element (whether the contract is maritime)” differently from its status “as a jacked-up platform attached to the OCS for the first OCSLA element (situs).” [FN48] Therefore, the Fifth Circuit treats jack-up rigs as devices “temporarily attached to the seabed” for purposes of applying OCSLA, but then classifies the same rig as a “vessel” in determining whether the contract is maritime. [FN49] The Fifth Circuit in *Demette v. Falcon Drilling Co.* [FN50] established that the majority of service contracts relating to offshore drilling have historically been found to be maritime in nature. [FN51] Similarly, if performance of the contract requires use of a vessel or vessels, it is also a maritime contract. [FN52]

B. Nonmaritime Contracts

On the other hand, there is still no well-defined test to determine whether a contract is not maritime. [FN53] It is well-settled that maritime law does not apply “to fixed platforms, or to piers, jetties, bridges, and ramps running into the sea.” [FN54] However, this does not imply “that service contracts relating to fixed platforms, or fixed platform workers, are historically nonmaritime.” [FN55] This is where the dilemma arises. Courts have the most trouble deciding whether a contract is maritime when it *184 pertains to services relating to fixed platforms, or fixed-platform workers. [FN56] If the contract is found to be maritime, federal maritime law will apply and the indemnity agreement will be held valid. [FN57] If the contract is not maritime, adjacent state law may apply as surrogate federal law and the indemnity agreement may not be valid under state statutes. [FN58] Therefore, if it is determined that OCSLA does apply and the contract is not maritime, the court would then proceed to determine whether the indemnity provision is valid under state law. [FN59] However, even if the contract is determined to be maritime, state law may still apply. [FN60] Because maritime law defers to a valid choice of law clause in a contract, state law will apply unless that law conflicts with the fundamental purposes of maritime law. [FN61] But, “[b]efore analyzing the contract pursuant to state law, [the court must make] a determination [of] whether the LHWCA will govern the contract under § 1333(b) of the OCSLA.” [FN62]

IV. Longshore and Harbor Workers' Compensation Act

“The LHWCA provides worker compensation coverage for employees engaged in maritime employment.” [FN63] “[E]mployee is defined as any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including the ship repairman, ship builder, and ship-breaker. . . .” [FN64] In determining whether the LHWCA is applicable, courts consider the following two-part inquiry: (1) the injury must have happened at a covered situs, and (2) the injured employee must have been engaged in maritime employment. [FN65] Because the LHWCA may possibly invalidate the enforceability of an indemnity provision, the next inquiry is whether the LHWCA can be applied to the injury under § 1333(b) of the OCSLA. [FN66]

*185 In 1972, Congress amended the LHWCA to provide that “the employer [of a longshoreman] shall not be liable to the vessel for . . . damages [of an injury to a longshoreman] directly or indirectly and any agreements or warranties to the contrary shall be void.” [FN67] Therefore, the LHWCA limits any remedy an employee may have against his employer; however, it does allow for an action by the employee against the vessel and the vessel owner. [FN68]

Section 1333(b) of the OCSLA not only implements state law as surrogate federal law, but it also applies the LHWCA when a worker engaged in oil and gas activity is injured on the OCS. [FN69] If the LHWCA is applicable via the OCSLA, the indemnity provision must then be analyzed under the LHWCA provisions. [FN70] When deciding whether an indemnity provision under the OCSLA is valid, there are two significant provisions: § 905(b) and (c). [FN71] “Section 905(b) bans employers from indemnifying themselves from LHWCA liability; however, § 905(c) provides an exception. . . .” [FN72] If the injured employee is entitled to LHWCA benefits via the OCSLA, [FN73] the indemnity provision between the employer and the vessel owner is valid as long as it is a reciprocal agreement. [FN74] Therefore, “the validity of an indemnity provision [depends on] the status of the injured employee under the LHWCA.” [FN75]

Under § 1333(a) of the OCSLA, platforms and structures attached to the OCS are treated as “artificial islands.” [FN76] Section 1333(b) expands LHWCA coverage to nonseaman workers employed on such “artificial islands.” [FN77] Therefore, for the LHWCA to apply through § 1333(b), an injured worker has to meet both the status requirement of § 1333(b) and the situs requirement of § 1333(a)(1). [FN78] “Section 1333(b) creates the following ‘status’ test: the LHWCA applies to injuries, ‘occurring as a result of operations conducted on the [OCS] for the purpose of exploring for, developing, removing, or transporting by pipeline the natural *186 resources, or involving rights to the natural resources, of the subsoil and seabed of the [OCS].’” [FN79] If situs [FN80] is satisfied under § 1333(a)(1), then the question of status depends on whether the oil and gas operations on the OCS caused the worker's injury. [FN81] The Fifth Circuit discussed the elements of § 1333(b) in *Diamond Offshore Co. v. A & B Builders, Inc.* [FN82] There the court “held that as long as the injury occurs ‘as a result’ of

oil and gas operations conducted on the OCS, status is satisfied.” [FN83]

Once it is settled that the LHWCA applies to the injury, § 905(b) and (c) may then apply to invalidate certain indemnity agreements. [FN84] However, “[s]ections 905(b) and (c) do not apply unless a vessel is involved, and do not prohibit indemnity agreements between other third parties and the LHWCA employer.” [FN85] Sections 905(b) and (c) simply deals with agreements made between the employer and the vessel owner. [FN86] Although the LHWCA does not allow an employee to sue his employer, there is an exception under § 905(b) for vessel-owner negligence. [FN87] According to this dual-capacity doctrine, if a vessel owner's negligence caused an employee's injuries, he may sue his employer. [FN88] Because the employer is only liable for negligence in its “owner” capacity, if the vessel owner is not the employer, § 905(b) will not allow the employer to indemnify the vessel for LHWCA liability. [FN89] Although *187 an agreement between an employer and a vessel owner to indemnify is not valid under § 905(b), a clause demanding insurance procurement is valid. [FN90] Therefore, a vessel owner still has the opportunity to recover from the employer for breach of contract if the employer does not procure the insurance coverage demanded in the contract. [FN91]

Section 905(c), however, allows an indemnity agreement between an employer and a vessel invalidated by § 905(b) to be saved. This section allows for a “reciprocal indemnity provision” between the vessel and employer, if the employee who was injured is entitled to receive LHWCA benefits “by virtue” of § 1333(b) of the OCSLA. [FN92]

V. Louisiana Oilfield Indemnity Act

If the LHWCA does not apply to invalidate the indemnity provision in the maritime contract, or if a nonmaritime contract is involved, the validity of the indemnity provision must be assessed under the applicable maritime or state law. [FN93] Because maritime law generally enforces express contractual indemnity agreements, parties are usually more concerned with whether the adjacent state law will apply to invalidate the provision. [FN94] “Most states place limitations on contractual indemnity agreements, particularly agreements that indemnify a party against the consequences of its own negligence. . . .” [FN95] These states prohibit such indemnity agreements in certain circumstances. [FN96] For instance, Louisiana law specifically prohibits “certain indemnity agreements contained in or related to oilfield contracts.” [FN97]

*188 Generally, Louisiana contract law allows for a principal to be indemnified against its own negligence as long as there is clear and unequivocal consent by both parties. [FN98] However, the LOIA is an exception to the general Louisiana rule allowing indemnity. [FN99] The legislature enacted the LOIA to avoid inequities “foisted on certain contractors and their employees” in the oil and gas industry. [FN100] The LOIA intends to protect oilfield contractors and their employees from the large oil companies who used their leverage to force contractors to enter into MSAs requiring the latter to provide defense and indemnification, even for the oil companies' own negligence. [FN101] The LOIA cancels the clauses that call for “defense and/or indemnification for negligence or fault on the part of the indemnitee,” as well as the “insurance requirements designed to circumvent the statutory prohibition.” [FN102]

Because the LOIA was enacted to protect contractors and their employees, it only applies to indemnity agreements for claims involving death or bodily injury rather than claims involving property damage. [FN103]

The LOIA states:

Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee. [FN104]

Under the LOIA, the term “agreement” means:

[A]ny agreement or understanding, written or oral, concerning any operations related to the exploration, development, production, or transportation of oil, gas, or water or . . . rendering services in or in connection with any well . . . or an agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidental transportation, and other *189 goods and services furnished in connection with any such service or operation. [FN105]

In *Transcontinental Gas Pipe Line Corp. v. Transportation Insurance Co.*, the Fifth Circuit set forth its own test to determine whether the LOIA applied to an indemnity agreement. [FN106] First, the court must decide whether the agreement “pertains to . . . [a] well”; [FN107] and if it does, the court must then ask whether the agreement involves “operations related to the exploration, development, production, or transportation of oil, gas, or water.” [FN108] Because the primary purpose of the LOIA is to protect contractors and their employees from big oil companies, it has been suggested that the Fifth Circuit’s adoption of the “pertaining to a well” requirement has nullified certain LOIA wording. This encompasses statements that the LOIA not only governs contracts for the construction of drilling structures, but also governs any rental equipment incidental to those contracts. [FN109]

VI. Retaliation Against Offshore Indemnity Agreements

A. Vessel Operators

Offshore indemnity agreements not only affect MSAs between oil companies and their contractors, but also Master Time Charter Agreements between oil companies and vessel operators. In a typical MSA, a labor contractor and an oil company will enter into an agreement, whereby the contractor will provide workers and services for the oil company’s rigs. [FN110] As part of this agreement, the oil company will often contract with a vessel owner/operator to transport equipment, supplies, and personnel to the rigs. [FN111] If an employee is injured while on the vessel, he will file suit against the vessel operator and the oil company because his employer/contractor is immune from liability due to the exclusive remedy provision of the LHWCA. [FN112] The oil company *190 will then call upon the vessel operator for defense and indemnity pursuant to the Master Time Charter. [FN113] Typically, these agreements are governed by general maritime law and are held valid. [FN114] Although the MSA between the oil company will often contain a provision requiring the contractor to indemnify the oil company, if the injury occurred on an OCS situs, the LOIA would apply to invalidate that provision. [FN115] Therefore, the vessel operator would be left shouldering the liability for itself and the oil company. [FN116]

Vessel operators have recognized these situations and have tried to find ways to protect themselves in cases where indemnity agreements are invalid so they can avoid footing the bill. [FN117] Nevertheless, the party that has no protection is still the vessel operator. [FN118] Vessel operators argue that the employer should be liable because the employer is in the best position to prevent its employees from accidental injury. [FN119] However, due to the rule of joint and several liability, if the vessel is only 1% at fault and the employer/contractor is 99% at fault, the employee is still able to recover 100% of his damages from the vessel. [FN120]

In the typical case, as described above, the vessel operator usually shoulders all the liability because vessel interests are not protected by the anti-indemnity statutes. [FN121] As a result, the offshore vessel operator may be liable for a third-party claim by an OCS worker it did not hire, train, or control. [FN122]

As one commentator suggests: “Although the OCS worker may sue other parties in addition to the vessel, due to the enforceability of indemnity provisions in Master Time Charter Agreements [FN123] and the unenforceability of and limitations on indemnity provisions in contracts between the [contractors] and the [oil companies], the vessel operator is left holding the proverbial bag for everyone.” [FN124]

*191 Additionally, in the majority of third-party claims, a vessel operator is not even cognizant of a claim against it until long after the chance to mitigate its damages is gone. [FN125]

In order to protect themselves from these “abuses,” vessel owners have developed vessel boarding agreements “aimed at

preventing spurious third party claims.” [FN126] A Vessel Boarding Agreement (VBA) is an agreement entered into by the vessel owner and the labor contractor. [FN127] The VBA is designed to provide the contractor access to vessels owned, chartered and/or operated by the vessel owner, to provide employees of the contractor with transportation, or operating support, and to allocate the risks and liabilities arising out of the vessel owner granting the contractor access to and services aboard the vessels. [FN128]

In *Johnson v. Seacor Marine Corp.*, a labor contractor entered into contracts with various oil companies to provide workers for the oil companies' rigs. [FN129] As part of their agreement with the contractor, the oil companies contracted with Seacor, a vessel operator on the Louisiana OCS, to deliver equipment, supplies, and personnel to the rigs. [FN130] Seacor directly contacted the labor contractor and insisted it would not transport any employees until the labor contractor signed a VBA. [FN131] “The VBA stated that, in exchange for . . . employees being ferried on SEACOR vessels, the [labor contractor] would name SEACOR as an additional insured under [the contractor's] comprehensive general liability (CGL) policy with waiver of subrogation rights. . . .” [FN132] Three employees later sued Seacor for injuries that occurred while the employees were transferring from an oilfield platform to a Seacor vessel. [FN133] Seacor in turn filed third-party complaints against both the labor contractor and its CGL insurer, seeking defense and indemnity based on the VBA. [FN134]

The most significant issue on appeal was whether Seacor could enforce the VBA. [FN135] The labor contractor argued that the VBA's *192 indemnity terms were not enforceable under the LOIA. [FN136] Seacor argued that the Louisiana statute did not apply to the VBA because it is a maritime contract. [FN137] The Fifth Circuit noted that this issue was clearly resolved by *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.* [FN138] In *Laredo*, the Fifth Circuit held that “[a]n agreement to transport people and supplies in a vessel to and from a well site on navigable waters is clearly a maritime contract.” [FN139] Because the agreements at issue in this case solely involved the transportation of employees to and from offshore platforms, the court held that *Laredo* controlled and therefore the VBA is a maritime contract, which status renders the indemnification provisions valid. [FN140]

This case portrays how vessel owners are using VBAs to circumvent unfavorable outcomes in the application of indemnity agreements in the realm of maritime and state law. Instead of potentially shouldering the entire burden of liability, the vessel owner separately contracts with the contractor, includes an indemnity provision in the agreement and is therefore not held liable for any injuries to the contractor's employees. [FN141]

B. Oil Companies

The application of maritime law rather than state law could possibly cost an oil contractor millions of dollars to defend and indemnify a large oil company against an employee action. Conversely, if state law is applied, a contractor may be able to get out of a negotiated contract under an oilfield anti-indemnity statute, and the oil company will in turn be held liable. Because so much is at stake in this type of litigation, it follows that oil companies seek to protect themselves from such state anti-indemnity statutes. As explained below, they may use a choice of law clause providing that the contract will be governed by general maritime law, or have the contractor “voluntarily” defend and indemnify before adjudication of fault.

*193 In *American Home Assurance Co. v. Chevron, USA, Inc.*, the Fifth Circuit addressed whether an oil company may enforce an indemnity clause that would require its oilfield service contractor to indemnify the oil company against its own negligence without affording the contractor an opportunity to show that the indemnity clause is invalid under the LOIA. [FN142] Because the LOIA prohibits the enforcement of such provisions when the oil company's negligence contributes to the third party's injury, a finding of fault is crucial to the contractor and its insurer. [FN143]

In *American Home*, Blackmon, an offshore worker, was injured on an offshore rig off the Louisiana coast. [FN144] Blackmon then filed suit against Chevron and Halliburton, the oil companies with which he was working at the time of his injury. [FN145] Chevron requested defense and indemnity from M-I (Blackmon's employer) pursuant to their MSA. [FN146] M-I's insurance company, American Home, did not agree that M-I owed Chevron defense and indemnity. [FN147] However, M-I and American Home subsequently reached a settlement whereby American Home agreed to negotiate and fund a settle-

ment in exchange for M-I assigning American Home its right to seek reimbursement of the cost of defense and indemnity from the oil companies. [FN148] American Home claimed that the defense and indemnity provisions in the MSA were unenforceable under Louisiana law because the oil companies had not been adjudicated free from fault. [FN149] The Fifth Circuit held that a settling indemnitor may relitigate the issue of the indemnitee's fault such that the LOIA might void the contractual indemnity agreement. [FN150]

In *Meloy v. Conoco, Inc.*, the Louisiana Supreme Court noted that “[p]rior to a judicial determination, it is not known whether the [oil company] is or is not at fault; therefore, the [LOIA] would prohibit a provision requiring an ‘up-front’ defense.” [FN151] Accordingly, under *Meloy*, an oil company cannot bind a contractor to provide it with a defense *194 before adjudication on the merits. [FN152] In *American Home*, the oil company simply requested a defense from the contractor. [FN153] Therefore, the contractor's insurance company asserted that a request that the contractor provide a defense is indistinguishable from a contractual requirement that the contractor provide an up-front defense. [FN154] The court did not agree with the insurance company's contention that the LOIA bars indemnitees from requesting that an indemnitor provide a defense. [FN155] In *American Home*, the Fifth Circuit essentially held that parties are not free to contractually agree to an up-front defense before the injury. However, they are free to do so after the injury. [FN156]

This case essentially made it easier for oil companies to be defended and indemnified by their contractors. When a defense and indemnity clause is covered by the LOIA, it is invalid unless the indemnitee is free from fault. [FN157] After *American Home*, a powerful oil company can effectively force a smaller indemnitor to provide a defense by threatening not to engage in future business with the indemnitor. Then, any settlement is subject to wide open full relitigation of the oil company's negligence or fault if the contractor wants to try to recoup the settlement amounts. [FN158] In short, the LOIA has now “lost some of its teeth.” [FN159]

The clear intent of the LOIA is to protect oil field contractors and their employees from contracts requiring contractors to indemnify oil companies for their negligence or fault. [FN160] “[T]he LOIA ‘arose out of a concern about the unequal bargaining power of oil companies and contractors and was an attempt to avoid adhesion contracts under which contractors would have no choice but to agree to indemnify the oil company, lest they risk losing the contract.’” [FN161] Thus, “[t]he purpose of the legislature, and thus the policy interest of the state, is to protect certain contractors . . . from being forced through indemnity provisions to bear the risk of their principal's negligence.” [FN162] The *American Home* decision is essentially a retaliation against the effects of the LOIA. This decision allows oil companies to bully contractors into spending money *195 up front for a defense, then spending more money to relitigate the fault issue. This practice seems to contradict the LOIA's purpose.

VII. Analysis

Analyzing the validity of indemnity agreements in offshore contracts is obviously an arduous and “Herculean task of sorting, sifting and applying various tests of situs, status, applicability of maritime or another state's law, various state anti-indemnity statutes, [and] the [LHWCA].” [FN163] Practitioners have even commented that no matter how well lawyers may apply the tests and guidelines described above, one out of every two will end up with a different answer as to the applicable law and enforceability of the indemnity provision. [FN164]

The application of law to an indemnity provision is not the only headache a practitioner must battle. As discussed above, vessel operators and oil companies attempt to employ various tactics in order to circumvent anti-indemnity statutes. Therefore, practitioners must also look at indemnity provisions in vessel boarding agreements and choice of law provisions and be wary of voluntary arrangements to defend and indemnify oil companies before the adjudication of fault.

However, although this analysis is daunting, it is crucial that a practitioner carefully comb through the facts of the case and apply each step carefully and concisely. The Fifth Circuit did just that in two recent decisions.

A. *Hoda v. Rowan Cos.*

In *Hoda v. Rowan Cos.*, decided on July 29, 2005, Hoda, an oil and gas employee, was injured while working offshore on a jack-up rig owned by Rowan, a drilling company. [FN165] Hoda sued Rowan, which then filed a third-party complaint against Hoda's employer seeking defense and indemnity pursuant to the MSA. [FN166]

Judge Edith H. Jones, writing for the Fifth Circuit, acknowledged that “[t]his appeal requir[ed] [the court] to sort once more through the authorities distinguishing maritime and non-maritime contracts in the offshore exploration and production industry.” [FN167] She went on to state, *196 “[a]s is typical, the final result turns on a minute parsing of the facts.” [FN168] Judge Jones clearly voiced her disdain for the current analysis employed by the Circuit when she commented: “Whether this is the soundest jurisprudential approach may be doubted, inasmuch as it creates uncertainty, spawns litigation, and hinders the rational calculation of costs and risks by companies participating in this industry. Nevertheless, we are bound by the approach this court has followed for more than two decades.” [FN169]

The opinion focused only on whether the contract was maritime. [FN170] The court noted that “[n]o Fifth Circuit case had previously addressed whether torquing bolts on a blow-out preventer from a jack-up drilling rig used as a work platform constitutes a maritime contract.” [FN171] It concluded that the case law presented leaned strongly toward finding a maritime contract. [FN172] That conclusion was confirmed by application of the specific Davis factors. [FN173]

This case illustrates the fact-specific nature of these types of situations. Thus, courts will always have to engage in an exhausting analysis to apply the facts of the case in order to determine the validity of the indemnity provision.

B. *Shaw v. International Boat Rentals, Inc.*

In *Shaw v. International Boat Rentals, Inc.*, decided on October 31, 2005, a judge for the Southern District of Texas denied both parties' motions for partial summary judgment. [FN174] In this case, an employee was working on a vessel in navigable waters off the Texas shore when he was injured adjacent to one of Forest Oil's fixed platforms. [FN175] The employee sued Forest Oil (in addition to other named defendants), which argued it was entitled to contractual indemnification by the employer/contractor pursuant to their MSA. [FN176]

The court found that the contractor was hired to operate a stationary platform, and a review of the relevant jurisprudence indicated that the contract at issue did not fit into any historical maritime contract areas. [FN177] *197 After applying the Davis factors, the court held that the MSA was a blanket agreement and was drafted to cover all circumstances that might arise. [FN178] In this case, Forest Oil was asking the court to speculate as to the nature of the work order to support its contention that it was “extremely likely” that the employer was involved in maritime operations. [FN179]

The court denied the motion for partial summary judgment because the contractor raised a genuine issue of material fact regarding the maritime nature of the MSA at issue. [FN180]

These two cases demonstrate the importance of the fact situation for a court when determining the law that will be applied to indemnity provisions.

VIII. Conclusion

Returning to the scenario illustrated in Part I, what type of result could Gulf expect when it tries to receive defense and indemnity from its contractor? Because the injury occurred while the worker was onboard a jack-up rig and this is a covered OCSLA situs, the OCSLA will apply. [FN181] Therefore, it must be determined whether the MSA is a maritime contract. [FN182] If it is, whether the LHWCA applies via § 1333(b) is the next step in the analysis. [FN183] In this situation, because the injury was on an OCSLA situs and the injury was most likely a result of oil and gas operations, the indemnity provision in the MSA will only be valid if it is reciprocal. [FN184]

On the other hand, if the contract is not maritime, the LOIA will apply as surrogate federal law if the employee is injured in Louisiana territorial waters. [FN185] If the contract pertains to a well and relates to oil and gas operations, the LOIA will invalidate the indemnity provision. Unfortunately, the analysis still is not complete. [FN186]

Consideration must then be given to the recent tactics that are being employed to circumvent the applicability of anti-indemnity statutes such as § 905(b) and the LOIA. [FN187] For instance, if the employee was injured while transferring from a transportation vessel to the rig, the next step in *198 the analysis is to examine whether the vessel boarding agreement is valid and whether it will apply to validate the indemnity provision against the contractor. Similarly, it must also be determined whether the contractor “voluntarily” agreed to spend large sums of money to defend the oil companies upfront, thereby agreeing to a follow-up relitigation on the fault issue, rather than being fraudulently induced into the defense by the oil companies threatening not to work with the contractor anymore.

The analysis to determine the validity of a contractual indemnity provision pertaining to offshore injuries is a chaotic mess of statutes, legal tests, and facts. Because facts are so important in these cases, it seems that almost every dispute is likely to see the inside of a courtroom, and will almost certainly be appealed. The best approach for any party in this type of dispute is to know the applicable law when entering into an agreement and be cognizant of the fact that there are no definitive answers regarding the enforceability of offshore indemnity provisions.

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[FN1]. See Julia M. Adams & Karen K. Milhollin, Indemnity on the Outer Continental Shelf--A Practical Primer, 27 Tul. Mar. L.J. 43, 48 (2002).

[FN2]. See *id.* (citing Henry v. A/S Ocean, 512 F.2d 401, 406, 1975 AMC 162, 167 (2d Cir. 1975)).

[FN3]. *Id.* (emphasis added).

[FN4]. 1 Robert Force & Martin J. Norris, The Law of Maritime Personal Injuries §13:9, at 13-41 (5th ed. 2004).

[FN5]. *Id.*

[FN6]. *Id.*

[FN7]. Adams & Milhollin, *supra* note 1, at 45, 49.

[FN8]. See generally *id.*

[FN9]. See generally 1 Force & Norris, *supra* note 4, §13:9.

[FN10]. Edward S. Johnson & Cindy T. Matherne, Statutory and Contractual Indemnification and Forum Section, Including the Oil Patch, 24 Tul. Mar. L.J. 85, 86 (1999).

[FN11]. *Id.*

[FN12]. Ellie T. Schilling, Demette v. Falcon Drilling Co.: The Sinking Ship of Fifth Circuit Precedent Construing the Outer Continental Shelf Lands Act and Maritime Law, 76 Tul. L. Rev. 1785, 1786 (2002).

[FN13]. See *id.* at 1786-88. The determination of whether OCSLA applies may be confusing because work can be performed on (1) a platform located on the OCS, (2) a platform located in state territorial waters, (3) a combination of platform and vessel on the OCS, (4) a combination of platform and vessel in state territorial waters, or (5) a vessel in either federal or state waters. Johnson & Matherne, *supra* note 10, at 88.

[FN14]. See Adams & Milhollin, *supra* note 1, at 59.

[FN15]. See *id.*

[FN16]. See *id.*; William E. O'Neil, Insuring Contractual Indemnity Agreements under CGL, MGL & P&I Policies, 21 Tul. Mar. L.J. 359, 366 (1997) (“Because OCSLA is silent on indemnity, the law of the state adjacent to the place of performance of the contract (e.g., the platform site) governs the enforceability and scope of indemnity agreements.”).

[FN17]. See Adams & Milhollin, *supra* note 1, at 49; Johnson & Matherne, *supra* note 10, at 96 (“Sections 905(b) and 905(c) of LHWCA contain certain prohibitions to defense and indemnity obligations owed by an employer to a vessel owner.”).

[FN18]. See generally Hoda v. Rowan Cos., 419 F.3d 379, 2005 AMC 1958 (5th Cir. 2005) (similar fact scenario).

[FN19]. See generally *id.*

[FN20]. La. Rev. Stat. Ann. §9:2780 (2002).

[FN21]. Pub. L. No. 83-212, 67 Stat. 462 (codified as amended at 43 U.S.C. §§1331-1356 (2000)).

[FN22]. See Adams & Milhollin, *supra* note 1, at 46 (citing 43 U.S.C. §1332(3)); see also E. Stewart Spielman, Drilling Through the Mudded Waters on the Outer Continental Shelf: An Examination of the Fifth Circuit's Recent Decision in Demette v. Falcon Drilling Co., 26 Tul. Mar. L.J. 683, 684 (2002).

[FN23]. Adams & Milhollin, *supra* note 1, at 46; see also Schilling, *supra* note 12, at 1786.

[FN24]. Spielman, *supra* note 22, at 685 (quoting Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 357, 1969 AMC 1082, 1086 (1969)).

[FN25]. *Id.*

[FN26]. 42 U.S.C. §1333(a)(2)(A).

[FN27]. Spielman, *supra* note 22, at 685.

[FN28]. See Schilling, *supra* note 12, at 1786.

[FN29]. *Id.* at 1786-87; 43 U.S.C. §1333(a)(1) (2000) (“The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the [OCS] and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State....”).

[FN30]. Adams & Milhollin, *supra* note 1, at 52 (citing 43 U.S.C. §1333).

[FN31]. See *id.* (citing Mills v. Dir., OWCP, 877 F.2d 356, 358, 1990 AMC 218, 220-21 (5th Cir. 1989) (en banc)).

[FN32]. Adams & Milhollin, *supra* note 1, at 52; 895 F.2d 1043 (5th Cir. 1990) (en banc).

[FN33]. Union Tex. Petroleum, 895 F.2d at 1047.

[FN34]. Adams & Milhollin, *supra* note 1, at 52 (emphasis added).

[FN35]. *Id.* at 52-53; see also Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 219 n.2, 1986 AMC 2113, 2123 n.2 (1986); Mills, 877 F.2d at 361-62, 1990 AMC at 226 (holding that the OCSLA could not apply to injuries that do not occur over the OCS).

[FN36]. 43 U.S.C. §1333(a)(1) (2000).

[FN37]. See generally *id.*

[FN38]. See Schilling, *supra* note 12, at 1788.

[FN39]. *Id.*

[FN40]. *Id.* (citing 919 F.2d 313, 315-16, 1994 AMC 1519 (5th Cir. 1990) (AMC reporter summarizing case)).

[FN41]. *Id.* at 1788-89 (citing Davis, 919 F.2d at 316).

[FN42]. Davis, 919 F.2d at 316.

[FN43]. *Id.*

[FN44]. Adams & Milhollin, *supra* note 1, at 62.

[FN45]. *Id.* (citing Davis, 919 F.2d at 316).

[FN46]. See *id.*

[FN47]. *Id.* (citing Kossick v. United Fruit Co., 365 U.S. 731, 735, 1961 AMC 833, 837 (1961)).

[FN48]. See *id.* at 62-63 (citing Demette v. Falcon Drilling Co., 280 F.3d 492, 498-501, 2002 AMC 686, 690-96 (5th Cir. 2002)).

[FN49]. See *id.*

[FN50]. 280 F.3d 492, 2002 AMC 686.

[FN51]. *Id.* at 500 n.35, 2002 AMC at 695 n.35.

[FN52]. Adams & Milhollin, *supra* note 1, at 63.

[FN53]. See *id.*

[FN54]. *Id.* (citing Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 363, 1969 AMC 1082, 1090 (1969); Hufnagel v. Omega Serv. Indus., Inc., 182 F.3d 340, 351 (5th Cir. 1999)).

[FN55]. *Id.* (emphasis added).

[FN56]. See *id.* at 65-67. For a chart outlining Fifth Circuit opinions on different types of contracts, see *id.*

[FN57]. See Hardy v. Gulf Oil Corp., 949 F.2d 826, 834 (5th Cir. 1992) (stating that express contractual indemnity agreements are generally enforceable under maritime law); see also Diamond Offshore Co. v. A&B Builders, Inc., 75 F. Supp. 2d 676, 678 (S.D. Tex. 1999) (recognizing that if a contract is governed by maritime law, a reciprocal indemnity provision in an agreement between the owner of an offshore oil rig and a service contractor is valid).

[FN58]. See, e.g., La. Rev. Stat. Ann. §9:2780(G) (2005).

[FN59]. See Adams & Milhollin, *supra* note 1, at 67-68.

[FN60]. *Id.* at 68.

[FN61]. *Id.*

[FN62]. *Id.*

[FN63]. 33 U.S.C. §903 (1994).

[FN64]. *Id.* §902(3).

[FN65]. O'Neil, *supra* note 16, at 368.

[FN66]. Adams & Milhollin, *supra* note 1, at 68.

[FN67]. 33 U.S.C. §905(b).

[FN68]. Adams & Milhollin, *supra* note 1, at 68-69 (citing 33 U.S.C. §905(a)-(b)).

[FN69]. Schilling, *supra* note 12, at 1790-91.

[FN70]. *Id.* at 1791.

[FN71]. *Id.*; 33 U.S.C. §905(b)-(c).

[FN72]. Schilling, *supra* note 12, at 1791 (citing 33 U.S.C. §905(b)-(c)).

[FN73]. In Demette v. Falcon Drilling Co., the court found that “[t]he most obvious meaning of ‘by virtue of section 1333’ is simply that the worker is covered by section 1333.” 280 F.3d 492, 502, 2002 AMC 686, 697-98 (5th Cir. 2002); see also 1

Force & Norris, *supra* note 4, §13:9, at 13-45.

[FN74]. Schilling, *supra* note 12, at 1791 (citing 33 U.S.C. §905(b)-(c)).

[FN75]. *Id.* (citing 33 U.S.C. §905(b)-(c)).

[FN76]. 43 U.S.C. §1333(a) (2000).

[FN77]. Schilling, *supra* note 12, at 1791 (citing 43 U.S.C. §1333(b)).

[FN78]. Demette, 280 F.3d at 501, 2002 AMC at 696.

[FN79]. Adams & Milhollin, *supra* note 1, at 69 (citing 43 U.S.C. §1333(b); Demette, 280 F.3d at 501, 2002 AMC at 696).

[FN80]. Situs is defined as “the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon.” 43 U.S.C. §1333(a)(1).

[FN81]. Adams & Milhollin, *supra* note 1, at 69 (citing 43 U.S.C. §1333(a)(1)).

[FN82]. 302 F.3d 531, 2002 AMC 2289 (5th Cir. 2002).

[FN83]. *Id.* at 546-47, 2002 AMC at 2304-05.

[FN84]. *Id.*

[FN85]. *Id.* (citing Fontenot v. Dual Drilling Co., 179 F.3d 969, 974 (5th Cir. 1999)).

[FN86]. Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this chapter by virtue of section 1333 of Title 43 and the vessel [including the vessel owner] agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

33 U.S.C. §905(c) (2000) (emphasis added); see also O’Neil, *supra* note 16, at 369-70 (stating that the reciprocal indemnity exception is limited to an agreement between a vessel owner and an LHWCA employer).

[FN87]. 33 U.S.C. §905(b).

[FN88]. Longmire v. Sea Drilling Corp., 610 F.2d 1342, 1351, 1980 AMC 2625, 2634 (5th Cir. 1980).

[FN89]. Adams & Milhollin, *supra* note 1, at 70 (citing Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 172, 1981 AMC 601, 613-14 (1981), for the proposition that following the amendments to the LHWCA, an injured longshoreman may not assert a claim for unseaworthiness against a vessel owner).

[FN90]. *Id.* (citing Sumrall v. Ensco Offshore Co., 291 F.3d 316, 325 n.12, 2002 AMC 1420, 1430 n.12 (5th Cir. 2002) (holding that differing insurance obligations do not create additional indirect liability sufficient to implicate the prohibitions of §905(b)); Voisin v. ODECO Drilling Co., 744 F.2d 1174, 1176, 1985 AMC 635, 640 (5th Cir. 1984) (holding that §905(b) does not prohibit an additional insured provision)).

[FN91]. Diamond Offshore Co. v. A & B Builders, Inc., 302 F.3d 531, 550, 2002 AMC 2289, 2311 (5th Cir. 2002) (holding that insurance provisions in an indemnity contract described as “supplementary” to indemnity obligations are not a contingent obligation designed to assure performance of the indemnity, but are independent contractual obligations).

[FN92]. Adams & Milhollin, *supra* note 1, at 7; see also 33 U.S.C. §905(c).

[FN93]. Adams & Milhollin, *supra* note 1, at 74.

[FN94]. See *id.*

[FN95]. Robert Redfearn, Jr., *Oilfield Anti-Indemnity Acts and Their Impact on Insurance Coverage: A Comparative Analysis*, Insurance J., Aug. 22, 2005, <http://www.insurancejournal.com/magazines/west/2005/08/22/features/59608.htm>.

[FN96]. *Id.*

[FN97]. *Id.*

[FN98]. Adams & Milhollin, *supra* note 1, at 88.

[FN99]. *Id.* at 89.

[FN100]. La. Rev. Stat. Ann. §9:2780 (2002).

[FN101]. *Id.*

[FN102]. *Id.* (citing La. Rev. Stat. Ann. §9:2780 (G)).

[FN103]. *Id.* (citing La. Rev. Stat. Ann. §9:2780(A)).

[FN104]. La. Rev. Stat. Ann. §9:2780(B).

[FN105]. *Id.* §9:2780(C).

[FN106]. 953 F.2d 985, 991 (5th Cir. 1992). However, the Louisiana Supreme Court has never expressly adopted the Fifth Circuit's test. See Adams & Milhollin, *supra* note 1, at 90.

[FN107]. 953 F.2d at 990-91.

[FN108]. Transcon. Gas, 953 F.2d at 991.

[FN109]. Adams & Milhollin, *supra* note 1, at 93; see also Johnson & Matherne, *supra* note 10, at 114.

[FN110]. See generally Johnson v. Seacor Marine Corp., 404 F.3d 871, 2005 AMC 998 (5th Cir. 2005).

[FN111]. *Id.*

[FN112]. John Peuler, *New Vessel Boarding Agreement Recommended To Prevent Third Party Claims*, OMSA Online, Spring 2004, http://offshoremarine.org/old_newsletters/spring_2004newsletter.htm.

[FN113]. Id.

[FN114]. See Laredo Offshore Constructors, Inc. v. Hunt Oil Co., 754 F.2d 1223, 1231, 1986 AMC 237, 249 (5th Cir. 1985) (holding that “[a]n agreement to transport people and supplies in a vessel to and from a well site on navigable waters is clearly a maritime contract”).

[FN115]. See Peuler, *supra* note 112.

[FN116]. Id.

[FN117]. See *id.*

[FN118]. Id.

[FN119]. Id.

[FN120]. Id.

[FN121]. See generally *id.*

[FN122]. Id.

[FN123]. Master Time Charter Agreements are used when the oil company is the vessel operator.

[FN124]. See Peuler, *supra* note 112.

[FN125]. See *id.*

[FN126]. Id.

[FN127]. See Vessel Boarding and Utilization Agreement Reciprocal Hold Harmless, sample form, available at <http://www.offshoremarine.org/downloads> (follow “Vessel Boarding and ...>” link) (last visited Nov. 7, 2006).

[FN128]. Id.

[FN129]. 404 F.3d 871, 873, 2005 AMC 998, 998 (5th Cir. 2005).

[FN130]. Id. at 873, 2005 AMC at 999.

[FN131]. Id.

[FN132]. Id. at 874, 2005 AMC at 999.

[FN133]. Id., 2005 AMC at 1000.

[FN134]. Id.

[FN135]. *Id.*

[FN136]. *Id.* at 877, 2005 AMC at 1004.

[FN137]. *Id.*

[FN138]. *Id.*; Laredo Offshore Constructors, Inc. v. Hunt Oil Co., 754 F.2d 1223, 1231, 1986 AMC 237, 249 (5th Cir. 1985).

[FN139]. Laredo, 754 F.2d at 1231, 1986 AMC at 249 (citing Hale v. Co-Mar Offshore Corp., 588 F. Supp. 1212, 1215, 1986 AMC 1620, 1624 (W.D. La. 1984)).

[FN140]. Johnson, 404 F.3d at 877, 2005 AMC at 1004 (citing Hollier v. Union Tex. Petroleum Corp., 972 F.2d 662, 664, 1993 AMC 1366, 1369 (5th Cir. 1992)).

[FN141]. See generally Vessel Boarding and Utilization Agreement Reciprocal Hold Harmless, *supra* note 127 (sample VBA).

[FN142]. 400 F.3d 265, 266 (5th Cir. 2005).

[FN143]. See *id.*

[FN144]. *Id.* at 267.

[FN145]. See *id.*

[FN146]. See *id.*

[FN147]. See *id.*

[FN148]. See *id.*

[FN149]. *Id.* at 268; see also Michael A. Orlando, Taking Some Teeth Out of the Louisiana Oilfield Indemnity Statute, <http://www.irmi.com/expert/articles/2005/orlando05.aspx> (last visited Mar. 23, 2006).

[FN150]. *Id.* at 270. In reaching its conclusion, the Fifth Circuit discussed two key cases dealing with indemnification under the LOIA: Meloy v. Conoco, Inc., 504 So. 2d 833 (La. 1987) and Tanksley v. Gulf Oil Corp., 848 F.2d 515, 1989 AMC 2377 (5th Cir. 1988).

[FN151]. 504 So. 2d 833, 839 n.11 (La. 1987).

[FN152]. Am. Home, 400 F.3d at 271.

[FN153]. *Id.* at 267 (emphasis added).

[FN154]. *Id.* at 271.

[FN155]. *Id.*

[FN156]. Orlando, *supra* note 149.

[FN157]. See *id.*

[FN158]. See *id.*

[FN159]. *Id.*

[FN160]. American Home, 400 F.3d at 269.

[FN161]. *Id.* (citing Fontenot v. Chevron, 676 So. 2d 557, 563 (La. 1996)).

[FN162]. *Id.* (citing Rodrigue v. LeGros, 563 So. 2d 248, 254 (La. 1990)).

[FN163]. Adams & Milhollin, *supra* note 1, at 46.

[FN164]. See *id.* at 101; see also Johnson & Matherne, *supra* note 10, at 123 (stating that the analysis often used to determine which law applies and the results produced can be confusing).

[FN165]. 419 F.3d 379, 380, 2005 AMC 1958, 1958 (5th Cir. 2005).

[FN166]. *Id.*, 2005 AMC at 1959.

[FN167]. *Id.*, 2005 AMC at 1958.

[FN168]. *Id.*

[FN169]. *Id.*

[FN170]. See generally *id.*

[FN171]. *Id.* at 381, 2005 AMC at 1960.

[FN172]. *Id.* at 383, 2005 AMC at 1962.

[FN173]. *Id.* at 383, 2005 AMC at 1962.

[FN174]. No. Civ. A. G-04-545, 2005 WL 2850100, at *1 (S.D. Tex. Oct. 31, 2005).

[FN175]. *Id.*

[FN176]. See generally *id.* at *1-2.

[FN177]. *Id.* at *5.

[FN178]. *Id.*

[FN179]. Id.

[FN180]. Id. at *6.

[FN181]. See Adams & Milhollin, *supra* note 1, at 55.

[FN182]. See id.

[FN183]. See id.

[FN184]. See id.

[FN185]. See id. at 46.

[FN186]. See id.

[FN187]. See *supra* text accompanying notes 106-159.

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