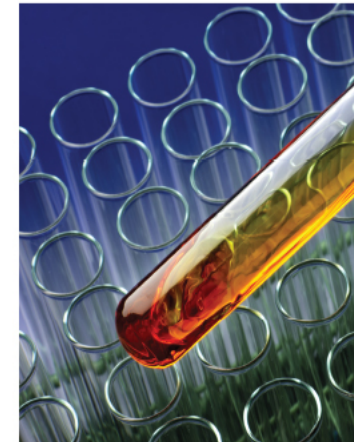


# On Land and Sea: A Practical Guide to Indemnity in the Energy Sector.



**Presented By:**  
Ken Bullock & Lee Wertz  
Munsch Hardt Kopf & Harr, P.C.

 #IRMI2017



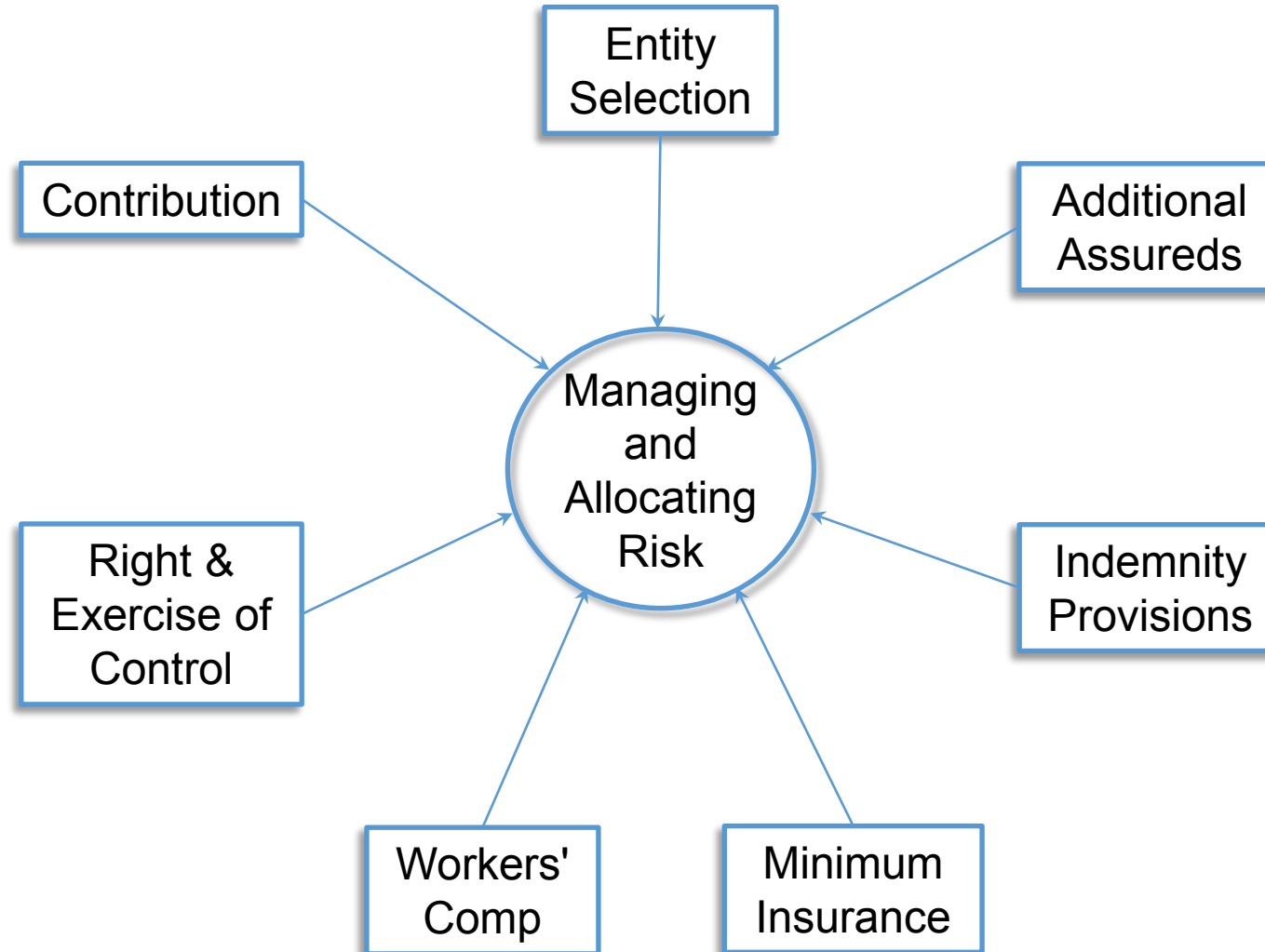
# Risk Shifting

- **Goals:**
  - Proactive allocation of risk.
  - Gain certainty of financial responsibility.



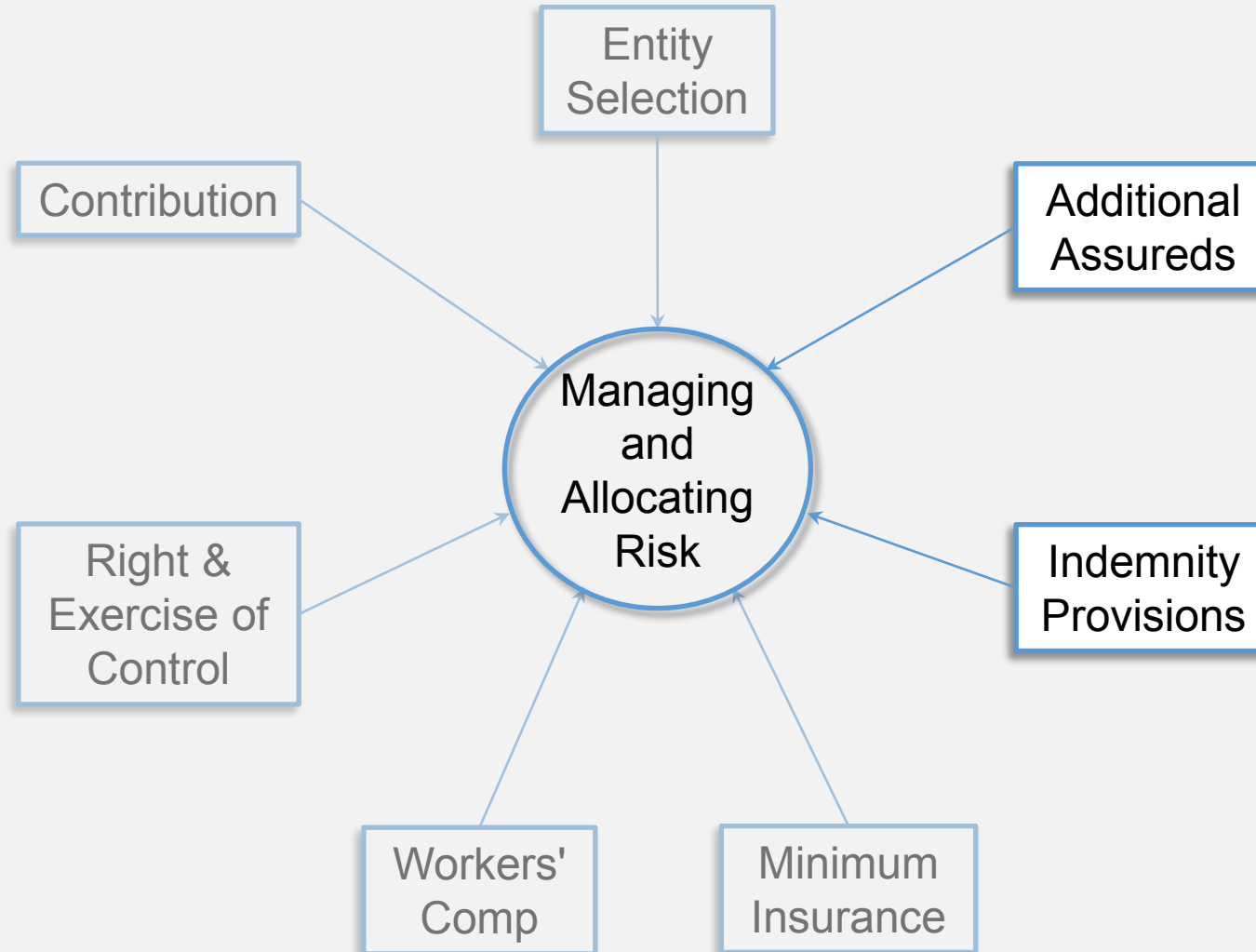
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# Risk Shifting



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# Risk Shifting



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# Risk Shifting

- ***Narrow*** Form:  
Indemnify only to extent indemnitor is at fault.
- ***Intermediate*** Form:  
Indemnify, except for indemnitee's sole negligence.
- ***Broad*** Form:  
Indemnify ***regardless of fault.***



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# Maritime Law/Outer Continental Shelf Lands Act



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# Indemnification: Maritime Law

- **Maritime Law Applicable?**

- Nature, subject-matter and judicial precedent control.
- ***Davis & Sons, Inc. v. Gulf Oil Corp.*** six-factor test:
  - What does agreement provide?
  - What work did the crew actually do?
  - Was crew assigned to vessel in navigable waters?
  - Work relate to mission of vessel?
  - Principal job of worker?
  - What was worker doing?



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# Indemnification: Maritime Law

- **Examples:**

- Building a ship is *not* a maritime contract, but ...
- Repairing a ship *is* a maritime contract.
  
- Drilling on a fixed platform is *not* maritime, but ...
- Transporting crew to a fixed platform *is* maritime.
  
- Wireline services on jack-up rig is *not* maritime, but ...
- Wireline services on special purpose barge *is* maritime.



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# Indemnification: Maritime Law

- Generally enforceable under Maritime Law.
- Broad-Form enforceable if "*clear and unequivocal.*"
- Strict liability and unseaworthiness, if express.
- Gross negligence allowed, but *not* punitive damages.



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# Indemnification: Maritime Law

- **Exception: §905(b) LHWCA.**
  - Employer *not* liable to the "vessel," directly or indirectly, and "any agreements or warranties to the contrary shall be void."
  
- **Exception to the Exception: §905(c) LHWCA.**
  - *Does* allow reciprocal indemnification for work on the Outer Continental Shelf.

# Indemnification: OCSLA

- Outer Continental Shelf Lands Act
  - **43 U.S.C. §1331, *et seq.***
- Applicable to seabed, subsoil and fixed structures engaged in exploration, development, production and transportation of resources found in OCS.



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# OCSLA: Boundaries

3 NM to 200 NM from Shore



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# OCSLA: Boundaries

Of course, Texas is different! 3 Leagues, or 9 NM



# Indemnification: OCSLA

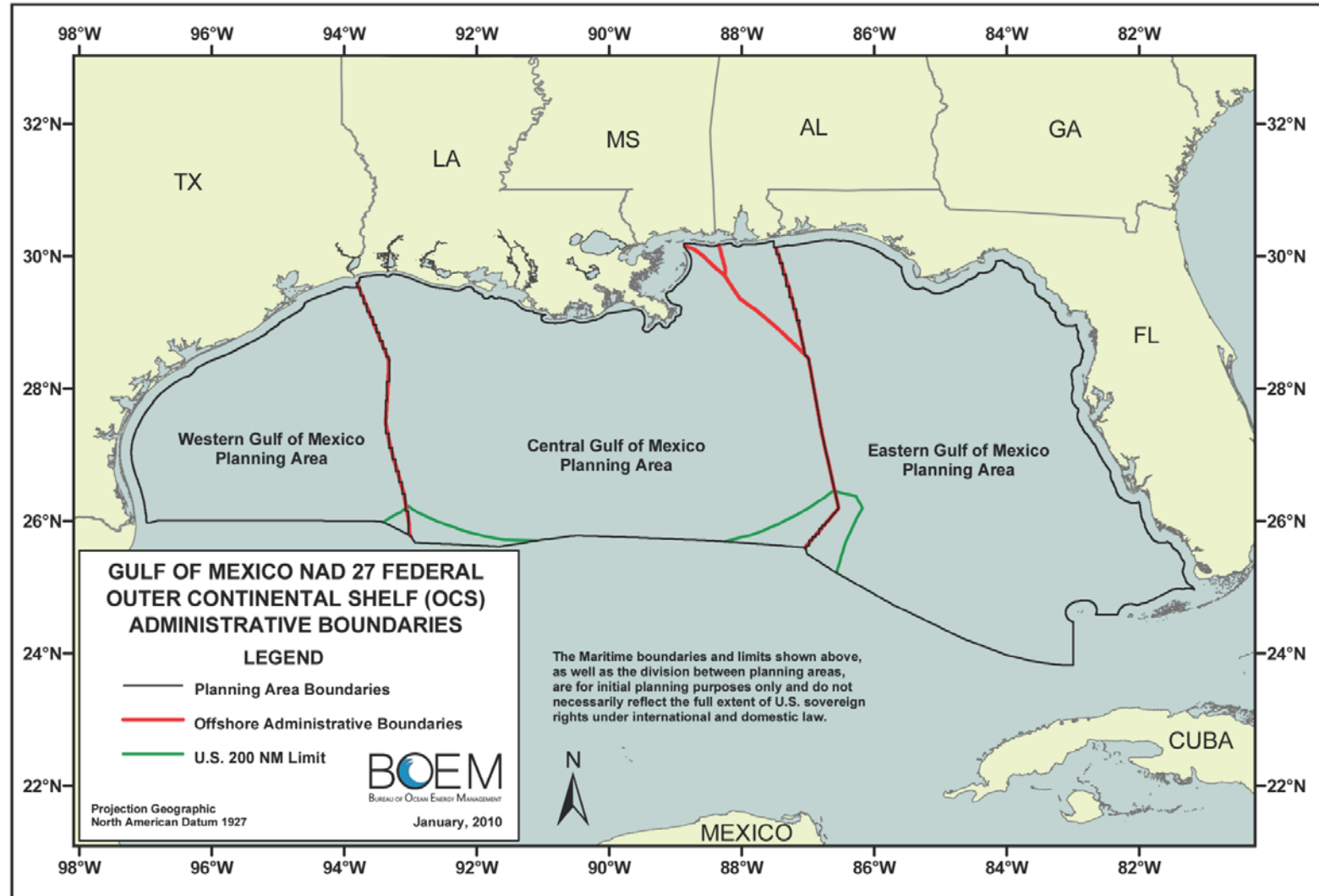
- Applies law of "*adjacent state*" where:
  - Controversy arises on OCS;
  - Federal maritime law does not apply of its own force; and
  - Adjacent state's law not inconsistent with federal law.



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# OCSLA: Adjacent State



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# Indemnification: OCSLA

- OCS "*situs*"?
  - Artificial islands, installations and other devices, permanently or temporarily attached to seabed.
  - For exploring, developing, producing or transporting.
  - ***Excludes*** "vessels."
    - Jack-up or Semi-Submersible vs. Platform or Spar.



# Indemnification: OCSLA

- For indemnification agreements, apply the *"Focus of the contract"* test:
  - Not where the underlying tort occurred.
  - Instead, the type of work the contemplated and where a *majority of the work* took place.



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# Indemnification: OCSLA

- **Maritime Law Applicable?**
  - Historical treatment of similar contracts; and
  - ***Davis & Sons, Inc. v. Gulf Oil Corp.*** six-factor test:
    - What does agreement provide?
    - What work did the crew actually do?
    - Was crew assigned to vessel in navigable waters?
    - Work relate to mission of vessel?
    - Principal job of worker?
    - What was worker doing?

# Indemnification: OCSLA

- What is an "adjacent state"?
- Closer *does not* necessarily mean adjacent:
  - Geographic proximity;
  - Which coast federal agencies consider to be adjacent;
  - Prior court determinations; and
  - Projected boundaries.



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# Indemnification: OCSLA

- **Adjacent state's law not inconsistent?**
  - ***Includes*** state Anti-Indemnity Acts.
    - Texas Oilfield Indemnity Act
    - Louisiana Oilfield Indemnity Act
  - Applies ***without regard*** to Parties' choice of law provision in contract.



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# Introducing The Construction Anti-Indemnity Act: The Baby And The Bathwater



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# Majority: No Indemnity in Construction

- Arizona
- California
- Colorado
- Connecticut
- Delaware
- Florida
- Illinois
- Iowa
- Kansas
- Kentucky
- Louisiana
- Massachusetts
- Minnesota
- Mississippi
- Missouri
- Montana
- Nebraska
- New Hampshire
- New Mexico
- New York
- North Carolina
- Ohio
- Oklahoma
- Oregon
- Rhode Island
- Texas
- Utah
- Washington



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# Other Jurisdictions

- **No Indemnity: 28 States, including Texas.**
- **Sole Negligence Exclusion: 14 States.**
- **No Limitations: 8 States.**



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# Construction Project? 151.001

- Construction contracts for a construction project for which an indemnitor is provided or procures insurance subject to Chapter 151 or Title 10 (general liability and worker's compensation insurance)
- The effective date for Chapter 151 is ***original contracts*** with owner of an improvement entered into on or after January 1, 2012.



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# Construction Project? 151.001

- **"Construction project"** means construction, remodeling, maintenance, or repair of improvements to real property.



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# Pipeline

- Pipeline became an improvement to the oil company's real property. Statute of limitations case. ***U. S. Fire Ins. Co. v. E. D. Wesley Co.***, 105 Wis. 2d 305, 309, 313 N.W.2d 833, 835 (1982).
- Pipeline is an improvement to the real property under which it lies for purposes of limitations. ***S. Carolina Pipeline Corp. v. Lone Star Steel Co.***, 345 S.C. 151, 155, 546 S.E.2d 654, 657 (2001).



# Pipeline

- Under the Tax Code, (2) **"Real property"** means:
  - (F) an estate or interest, other than a mortgage or deed of trust creating a lien on property or an interest securing payment or performance of an obligation, in a property enumerated in Paragraphs (A) through (E) of this subdivision.
- An easement is an **"estate or interest."**



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# Pipeline

- The Tax Code designates “***real property repair and remodeling***” as a taxable service. Tex. Tax Code 151.0101(a)(13) (West 2002).
- The Austin Court of Appeals held that excavation and backfilling services purchased by pipeline companies in conjunction with pipeline anti-corrosion repair services were subject to this sales tax. ***Chevron Pipeline Co. v. Strayhorn***, 212 S.W.3d 779, 784 (Tex. App.—Austin 2006, pet. denied)



# Pipeline

## *BUT...*

- Where contract provided for removal of buried pipeline, pipeline remained personal property. ***Lingleville Independent School District v. Valero Transportation Company***, 763 S.W.2d 616 (Tex. App.-Eastland 1989, writ denied). For purposes of taxing personal property, so may be outcome-determinative analysis.



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# Construction Project? 151.001

- The term includes the immediate construction location and areas incidental and necessary to the work as defined in the construction contract documents.
- ***Defined in the Construction Documents:*** Better read the construction documents! Staging area?



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# Anti-Indemnity: 151.102

- A provision in a construction contract, or in an agreement collateral to or affecting a construction contract is void and unenforceable as against public policy to the extent that it requires an indemnitor to indemnify, hold harmless, or defend a party, including a third party...
- If the claim arises out of the alleged negligence of the person **SEEKING** indemnity then the Act applies.



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# Exception: 151.103

- *Does not include injury to employees*...so can get indemnity and additional insurance for that.



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# Anti-Add'l Insurance: 151.104

- *Section 151.104*
- No additional insurance, except for injury to employee.



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# Exclusions: 151.105

- "This subchapter does not affect..."
- **NOT REALLY EXCLUSIONS**
- An owner – or contractor – controlled or sponsored insurance program



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# OCIPS and Workers' Compensation

- Texas courts have held that under Texas Worker's Compensation Act (the "Act"), a general contractor is deemed the employer of a subcontractor and the subcontractor's employees if the general contractor provides, ***in accordance with a written agreement***, workers' compensation insurance coverage to the subcontractor and its employees.



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# Texas Oilfield Anti-Indemnity Act: Tex. Civ. Prac. & Rem. Code Ch. 127



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# CPRC § 127.002. Findings; Certain Agreements Against Public Policy

- The legislature finds that an inequity is fostered on certain contractors by the *indemnity provisions* in certain agreements pertaining to wells for oil, gas, or water or to mines for other minerals.
- Certain agreements that provide for indemnification are against public policy.
- ***BUT*** Joint Operating Agreements are just dandy!



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# CPRC § 127.003. Agreement Void & Unenforceable

- Except as otherwise provided...[An agreement] pertaining to a well for oil, gas, or water or to a mine for a mineral is **VOID** if it purports to indemnify a person against loss or liability for damage that...
  - Is caused by sole or concurrent negligence of the indemnitee or his folks...



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# CPRC § 127.003. Agreement Void & Unenforceable

- "Agreement pertaining to a well for oil, gas, or water or to a mine for a mineral"
  - Means:
    - A written or oral agreement or understanding concerning the rendering of well or mine services; or
    - [It ***includes*** furnishing or renting equipment, incidental transportation, or other goods and services furnished in connection with the services]; but
  - Does not include a joint operating agreement.



# "Well or Mine Service"

- **Includes** *[EVERYTHING RELATED TO A WELL]* drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, purchasing, gathering, storing...
  - **Transporting** oil, brine water, fresh water, produced water, condensate, petroleum products, or other liquid commodities;
  - Otherwise rendering services in connection with a well drilled to produce or dispose of oil, gas, other minerals or water;
  - Designing, excavating, constructing, improving, or otherwise rendering services in connection with a mine shaft, drift, or other structure intended for use in exploring for or producing a mineral;

**BUT...**



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# "Well or Mine Service"

## CPRC § 127.001(4)(B)

- ***DOES NOT INCLUDE:***

- Purchasing, selling, gathering, storing, or transporting gas or natural gas liquids by ***pipeline*** or fixed associated facilities; or
- Construction, maintenance, or repair of oil, natural gas liquids, or gas ***pipelines*** or fixed associated equipment



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# CPRC § 127.004. Exclusions

- This chapter does not apply to loss or liability for damages or an expense arising from:
  - 1) Personal injury, death, or property damage from *radioactivity*;
  - 2) Property damage from *pollution*, including cleanup and control of the pollutant;
  - 3) Property damage from *reservoir or underground damage*, including loss of oil, gas, other mineral substance, or water or the well bore itself;
  - 4) Personal injury, death, or property injury that results from the performance of *services to control a wild well* to protect the safety of the general public or to prevent depletion of vital natural resources; or
  - 5) The *cost of control of a wild well*, underground or above the surface.



# Insurance Coverage: CPRC § 127.005

- **Allows indemnity where indemnity obligation will be supported by insurance coverage to be furnished by the indemnitor.**
  - ***Unilateral Indemnity:*** Limited \$500,000.
  - ***Mutual Indemnity:* [KNOCK FOR KNOCK]** 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.



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# Other Oilfield Anti-Indemnity Statutes

- **Louisiana Act**

- Personal injury, not property damage.
- Absolute.
- Prohibits additional insurance and subrogation waiver requirements.
- Exceptions: Radioactivity, oil cleanup and containment, wild wells.
- “Unequivocal terms” broader than express negligence.



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# Other Oilfield Anti-Indemnity Statutes

- **Wyoming Act**

- Character of work performed important to application of Act.
- Personal injury and property damage.
- Applies to unit operating agreements.

- **New Mexico Act**

- Limited to production activities at the well head.
- Prohibits waivers of subrogation requirements.



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# Drafting Checklist:

- **Who is covered?**
  - How broadly worded are "Company Group" and "Contractor Group"?
- **Pass-Through Indemnity?**
  - Does the language include coverage for contractual liabilities?
- **Defense? Indemnity? Both?**
  - Does the language require "defend and indemnify" or simply "indemnify"?



# Drafting Checklist:

- **Survival?**

- When does the Agreement terminate, and does the indemnity survive?

- **Insurance?**

- Insurance to support the indemnity?
- Separate and apart from additional insured obligations?

- **Notice and Enforcement?**

- When is notice required and who selects counsel?
- Attorneys' fees for enforcement?



# Demand Checklist:

- **Documents?**
  - Master Service Agreement? Work Orders? Invoices?
- **Defense? Indemnity? Both?**
  - Does your demand "tender" defense of the claim and demand indemnification?
- **Additional Insured Coverage?**
  - Does your demand seek coverage as an additional insured?



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# THANK YOU!



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