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## **RISK SHIFTING IN THE OIL PATCH**

Texas Lawyer Energy Summit  
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## Agenda:

- Maritime Law/Outer Continental Shelf Lands Act
- Texas Construction Anti-Indemnity Act
- Texas Oilfield Anti-Indemnity Act

- Goals:
  - Proactive allocation of risk.
  - Gain certainty of financial responsibility.
- ***Show me the money!***

- ***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.***



# Maritime Law/Outer Continental Shelf Lands Act

- 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?

- 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.

- Generally enforceable under Maritime Law.
- Broad-Form or without fault enforceable where *"clear and unequivocal."*
- Strict liability and unseaworthiness, if express.
- Gross negligence allowed, but *not* punitive damages.



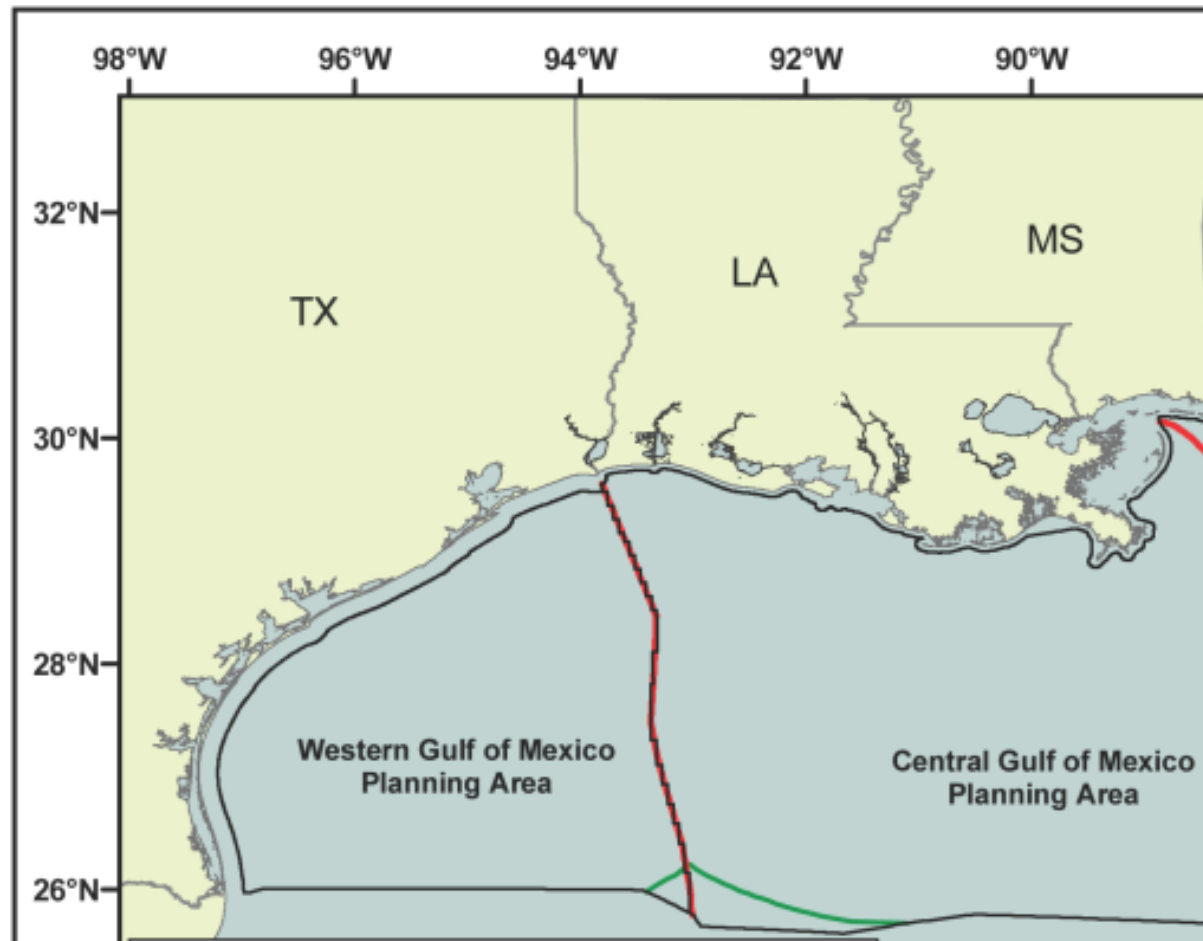
- Exception: § 905(b) LHWCA.
  - Employer **not** liable to the "vessel," directly or indirectly, and "any agreements or warranties to the contrary shall be void."
  
- Exception to the Exception: § 905(c) LHWCA.
  - **Does** allow reciprocal indemnification for work on the Outer Continental Shelf.

- 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.

## 3NM to 200 NM from Shore

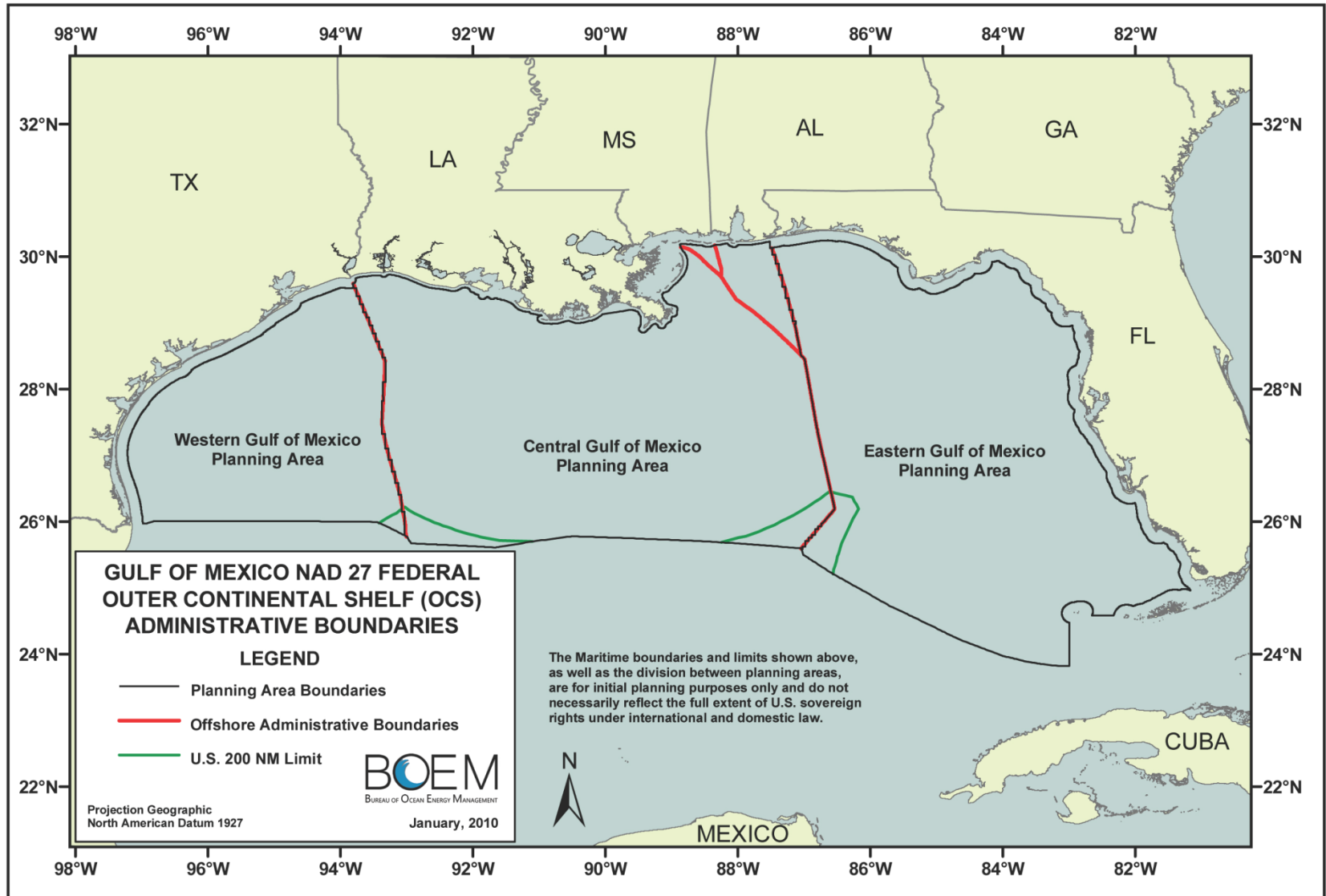


## Of course, Texas is different! 3 Leagues, or 9 NM



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

# OCSLA: ADJACENT STATE



- 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.

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



- 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?

- 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.

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



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

# 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

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

- 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.

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



- 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).

- 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."**

- 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)

## ***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.

- 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?

- 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.

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



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

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

- 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.



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

- 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!

- 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...

- **"Agreement pertaining to a well for oil, gas, or water or to a mine for a mineral"**
  - a) 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
  - b) 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...***



- ***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

- 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.

- **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.

- ***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.

- ***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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