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Exploring the Reach of the Texas Oilfield Anti-Indemnity Act

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I. INTRODUCTION

In Texas, natural gas exploration and production is often a multi-party endeavor. Oilfield operators typically enter into form drilling contracts (i.e. IADC onshore drilling contracts) or Master Service Agreements ("MSAs") with contractors under which the contractors agree to provide services and materials for the operators. These agreements can include indemnity provisions that dramatically shift the risks and liabilities of the parties. However, many oilfield indemnity agreements in Texas must be specially tailored to satisfy Texas' anti-indemnity statute, the Texas Oilfield Anti-Indemnity Act ("TOAIA"). As such, it is incumbent on drafting parties to understand the purpose and reach of TOAIA. In its current form set forth at Texas Civil Practice & Remedies Code at §§ 127.001 *et seq.*, TOAIA includes a web of definitions and exclusions that establish a universe of agreements to which the statute applies. This article shall endeavor to explore the reach of TOAIA and discuss Texas case law specifically addressing the types and forms of agreements to which the statute applies.

II. TOAIA: HISTORY AND APPLICATION

The Texas Oilfield Anti-Indemnity Act was promulgated in 1973 and later codified as Chapter 127 of the Texas Civil Practice and Remedies Code.[1] The Legislature passed the law because there was "an inequity fostered on contractors by the indemnity provisions in certain agreements pertaining to wells for oil, gas, or water or to mines for other minerals."[2]

Prior to the enactment of TOAIA, many oil companies and oil well operators had "hold harmless" agreements with oil well drilling and service contractors.[3] These agreements generally required the contractors to indemnify the operators for losses caused by the negligence of the contractor, and often for the negligence of the operator and third parties as well.[4] Many believed that such agreements placed an undue financial burden on those perceived to be small contractors with less bargaining power.[5] These contractors had agreed to indemnify operators, but they were unable to obtain insurance at a reasonable cost to cover liability that might arise from such indemnity obligations.[6] Therefore, contractors were subjected to significant liability with no feasible means of insuring against those obligations.[7]

The most recent iteration of TOAIA is provided in the Texas Civil Practice & Remedies Code at §§ 127.001–007. In its current form, TOAIA provides that "an agreement pertaining to a well for oil, gas, or water, or to a mine for a mineral" is void as a matter of public policy if it purports to

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[1] *See* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3319–20 (amended 1989, 1991, 1995, 1999) (current version at TEX. CIV. PRAC. & REM. CODE §§ 127.001–007).
[2] Act of May 19, 1973, 63rd Leg. R.S., ch. 646 § 1, 1973 Tex. Gn. Laws 1767 (amended 1985, 1991).
[3] Getty Oil Co. v. Ins. Co. of N. Am., 845 S.W.2d 794, 803 (Tex. 1992).
[4] *Id.*
[5] *Id.*
[6] *See* Ken Petrol. Corp. v. Questor Drilling Corp., 24 S.W.3d 344, 348 (Tex. 2000); *see also Ranger Ins. Co.*, 78 S.W.3d at 659, 661 (Tex. App.—Houston [1st Dist.] no pet.).
[7] *Ken Petrol. Corp.*, 24 S.W.3d at 348.

indemnify an entity against liability for its own negligence.[8] As such, the reach and application of TOAIA turns on the nature of the subject agreement.

III. WHAT AGREEMENTS ARE SUBJECT TO TOAIA?

A. Agreements Concerning "Well or Mine Services"

In determining whether an agreement at issue is "an agreement pertaining to a well for oil, gas, or water, or to a mine for a mineral," one may turn to the plain language of the statute wherein the term "agreement" is broadly defined to mean:

> "(i) a written or oral agreement or understanding concerning the rendering of **well or mine services**; or
>
> (ii) an agreement to perform a part of those services or an act collateral to those services, including furnishing or renting equipment, incidental transportation, or other goods and services furnished in connection with the services; ...."[9]

The Legislature lists no less than fifteen (15) specific activities that fall within the definition of "well or mine services," including:

> (i) drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, purchasing, gathering, storing, or transporting oil, brine water, fresh water, produced water, condensate, petroleum products, or other liquid commodities….[10]

These activities range from general maintenance tasks ("repairing" or "improving") to completion tasks ("drilling") to post-completion work ("deepening" and "reworking").[11] The Act further defines "well or mine service" to include:

> (ii) 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.

In addition to the enumerated activities set forth at Tex. Civ. Prac. & Rem. Code §127.001(4)(a)(1), the Legislature also includes in the definition of "well or mine service" a "catch-all" provision that broadly defines the term to include "otherwise rendering services in connection with a well drilled to produce oil, gas, other minerals, or water."[12] In the Fifth Circuit case *In re Complaint of John E. Graham & Sons,* the court interpreted this "catch-all" provision as an indicator of the Legislature's "intent to expand the scope of activity constituting well or mine service to other types

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[8] TEX. CIV. PRAC. & REM. CODE ANN. § 127.003 (West 2016); The Texas Supreme Court has counseled that TOAIA is to be strictly construed to permit parties to contract freely with regard to agreements not covered by the statute's language. *Getty Oil Co.,* 845 S.W.2d at 805.
[9] *Id.* § 127.001(1).
[10] *Id.* § 127.001(4).
[11] *Id.*
[12] *Id.*

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