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Oilfield Anti-Indemnity: When Does an Agreement "Pertain" to a "Well"?

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In *Tetra Techs., Inc. v. Continental Ins. Co.*, No. 15-30446, currently before the Fifth Circuit, the lower court's decision hinges on an interpretation of the phrase "pertaining to a well" to determine if the Louisiana Oilfield Anti-Indemnity Act ("LOAIA") bars a recovery by Tetra of $784,202.76. The District Court held that the decommissioning of a platform in a salvage operation did not come under the LOAIA, and, thus, Tetra's claim for indemnity *was* enforceable. In opposition, appellant Continental contends that the trial court too restrictively interpreted the LOAIA.

At stake is a critical concept: *When will an anti-indemnity statute bar an often well-crafted legal indemnity term in a master-service agreement ("MSA")?*

Much like pads on a linebacker, indemnity clauses are often among the heavy-duty legal clauses appended to MSAs. Through indemnity, one company or both seek some kind of commercial coverage from the other, should the unthinkable accident or tragedy happen.

Few things conjure dread in the hearts of companies like the potential of high-stakes litigation. And risk is multiplied, of course, in terms of oilfield work, which presents, it seems, as many *potential* (theoretical) risks, as it can produce lucrative results. One shudders at the thought of a catastrophic loss of any kind – for example, in human injury or death, or in destruction of oil rig property or equipment, not to mention peripheral losses to third parties. The hypothetical list is long, and so it seems are the contracts designed to protect against the diverse and sometimes dangerous activity required to bring energy from the earth.

That's why indemnity is often enlisted in MSAs, among other damage or liability limitation clauses.

Yet, certain states, including Texas and Louisiana, have "oilfield anti-indemnity" statutes that act like a "King's X" on such commercial indemnity clauses. The statutes limit such indemnity protection because of the legislative recognition that the larger players in the industry should not have, as a matter of public policy, an untoward advantage in protecting themselves against smaller players with less commercial leverage.

In *Tetra*, the commercial fight was between Tetra, which sought to enforce an indemnity clause against its subcontractor, Vertex Services. Continental, Vertex's insurer, tried to block any indemnity payment, relying, in large part, on the LOAIA.

What led to the commercial fight was an accident that occurred during the decommissioning of a platform in the Gulf of Mexico, off the Louisiana coast. A few workers – employees of Tetra, of a welding subcontractor, and of Vertex – were injured when a bridge partially collapsed, resulting in the workers plunging 70 to 80 feet into the Gulf. The injured workers sued both Tetra and Maritech, the owner of the platform, on the basis of maritime law, and these companies in turn sued Vertex and Continental for indemnity under the MSA. Tetra eventually resolved the workers' claims and sought from Vertex/Continental $784,202.76 as the cost of defending and settling those personal injury claims.

Continental defended the claim based on both the LOAIA and on various exclusionary clauses under the insurance policy. On appeal, the issue is focused mostly on the LOAIA, which states as follows:

> B. 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.
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> C. The term "agreement," **as it pertains to a well for oil, gas, or water, or drilling for minerals** which occur in a solid, liquid, gaseous, or other state, as used in this Section, means any agreement or understanding, written or oral, concerning any operations related to the exploration, development, production, or transportation of oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, including but not limited to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging, or otherwise rendering services in or in connection with any well drilled for the purpose of producing or excavating, constructing, improving, or otherwise rendering services in connection with any mine shaft, drift, or other structure intended for use in the exploration for or production of any mineral, 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 goods and services furnished in connection with any such service or operation.

La. Rev. Stat. Ann.§ 9:2780(B) & (C) (2005) (emphasis added).

The district court, after first finding that Louisiana law applied, then concluded that the “pertains to” language in connection with the term “oil, gas, or water well” did not reach the platform in question. Following Tetra’s argument, the court found that a “salvage operation” had already begun and that, therefore, the platform did not have the required “nexus to a well.” *See Armijo v. Tetra Techs., Inc*., 936 F.Supp.2d 675, 683-85 (E.D. La. 2013).

The court discounted Continental’s reliance on *Dennis v. Fluid Crane Constr., Inc*., 823 F. Supp. 2d 415 (E.D. La. 2011), which interpreted the Texas version of the oilfield indemnity statute and found that the Texas statute *did* apply to the dismantling of a platform. *See id.* at 685.

Zeroing in on the Louisiana “nexus to a well” requirement, the *Tetra* court concluded that the platform in question did not “pertain to a well” because it was decommissioned and because all that was on-going was salvage work – thus, the work did not concern the “goal of obtaining or maintaining production from a well.” *See id. (*quoting *In re Complaint of John E. Graham & Sons*, 210 F.3D 333, 343 (5th Cir. 2000)).

The district court specifically found that Continental had not presented any evidence of a “functional or geographic nexus between any well and the platforms in question.” 936 F. Supp. 2d at 685. Hence, in the end, the court ordered that Vertex and Continental were liable to Tetra for the entire $784,202.76. *See Tetra Techs., Inc. v. Vertex Services, LLC*, 2015 WL 1810453, at *6 (E.D. La. Apr. 20, 2015).

Continental argues on appeal that the LOAIA broadly covers all services in connection with a well, and, thus, that the Vertex services fall within that broader concept under the Act. Continental points out that Tetra and Maritech’s work was not a separate maritime adventure, but that it was salvage work specifically performed on a platform that was designed for oil and gas exploration. Thus, Continental believes that the LOAIA is broad enough to encompass the Tetra/Vertex project.

While Continental has also pointed to an exclusionary clause in the insurance contract as another bar to recovery, it appears that the interpretation of the LOAIA will take center stage at the Fifth Circuit and likely be the determinative question. Oral argument is next to be scheduled, with the ultimate decision from the appellate court probably being several months away.

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