OILFIELD LITIGATION

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OILFIELD LITIGATION

I. SCOPE OF PAPER

This paper attempts to summarize recent case law developments with significance in the area of oilfield litigation. Special problems and resources to consider are also included.

II. BASIC DOCUMENTS; MASTER SERVICE AGREEMENTS AND DRILLING CONTRACTS

The Master Service Agreement is typically entered into between larger entities, and covers a number of operations throughout the United States. There is much litigation construing sections of the Master Service Agreement, which can entail risk-shifting agreements, waivers of workers' compensation subrogation rights, limits on the rights of control, and a number of other issues. *See*, for example, *Nabors Corporate Services, Inc. v. Northfield Insurance Co.*, 132 S.W.3d 90, 92 (Tex. App.—Houston [14th Dist., no pet.] 2004). You may wish to review the Master Service Agreement and read it with an eye toward the issues which are developing in your case. As Master Service Agreements change from time-to-time, you may wish to obtain copies of the Master Service Agreement from all parties subject to the Agreement to make sure that there are no material changes among the various versions in circulation.

Drilling contracts come in different forms including "Turnkey," "Day Work," "Footage," and a few other variations. The most common examples of these contracts are contained in various International Association of Drilling Contractor (IADC) forms. "Turnkey" drilling is an oilfield term for drilling a well for a fixed price. Much of the risk is allocated to the driller, as it is responsible for reaching a certain depth/formation regardless of the time and resources spent on the effort. "Day Work" contracts and "Footage" contracts, on the other hand, typically allocate much of the risk to the developer of the well, as it can be in more control of the pace of drilling and activities involved in drilling. Again, both "Turnkey" and "Day Work" contracts have been discussed in published case law and are probably worth reviewing in any oilfield litigation relating to drilling. A good description of the differences in these different drilling contracts are found in *Mohican Oil & Gas, LLC v. Scorpion Exploration & Production, Inc.*, 337 S.W.3d 310 (Tex. App.—Corpus Christi 2011, no pet.) and *Melvin Green, Inc. v. Questor Drilling Corp.*, 946 S.W.2d 907 (Tex. App.—Amarillo 1997, pet. denied).

III. INDEMNITY AGREEMENTS

Many Master Service Agreements contain indemnity agreements — some are found in pre-printed form; others are added by lawyers working for one or both of the parties. The indemnity provisions must be carefully read and understood, especially in light of Texas Civil Practice & Remedies Code, §§127-001-007, the Texas Oilfield Anti-Indemnity Statue.

The Oilfield Anti-Indemnity Statute arises in many contexts. For instance, in *Ex-Pro*

Americus, LLC v. Sanguine Exploration, LLC, 351 S.W.3d 915 (Houston App.—14th Dist. 2011, pet. dismissed) – Sanguine operated an oil and gas lease, and its contractor hired Ex-Pro to perform downhole services. Once the services had been provided, and Ex-Pro gave Sanguine's contractor a ticket which included an indemnity agreement by which the parties agreed to indemnify each other and procure insurance. Sometime later, Ex-Pro was named as a defendant in a lawsuit for a fatal incident which occurred at the wellsite. Ex Pro demanded indemnity from Sanguine. Both sides sought summary judgment. The Court of Appeals reversed the partial summary judgments below and held that issues of conspicuity and authority/apparent authority precluded summary judgment.

For the interplay between the Texas Workers' Compensation system and the Texas Oilfield Anti-Indemnity Act, consider *Energy Service Co. of Bowie, Inc. v. Superior Snubbing Services, Inc.*, 236 S.W.3d 190 (Tex. 2007). Energy Service Co. and Superior Snubbing both provided services for Mitchell Energy Corporation, and each signed agreements with Mitchell which included indemnity agreements. Each party agreed to support its obligation with liability insurance so that, to the extent of coverage, the indemnification obligations would not be voided by Texas Oilfield Anti-Indemnity Act. Superior Snubbing's employee sued Mitchell and Energy Service Co. for injuries he suffered while working at a Mitchell site. Energy Service Co. settled with the Superior employee, and then sued Superior on the indemnity agreement. Superior claimed that because it was covered by a workers' compensation policy, Energy's claim was barred by Section 417.004 of the Labor Code. The trial court disagreed and granted summary judgment for Energy. The court of appeals reversed and rendered judgment for Superior. On appeal to the Supreme Court, Superior argued that a contractor working in the oilfield should not be economically pressured into surrendering its statutory immunity from liability for indemnity of an employee's personal injury claims. The court held that the Texas Oilfield Anti-Indemnity Act was not overridden by amendments to the Workers' Compensation Act of 1989.

A complication caused by an insurance carrier's insolvency was the subject of *Nabors Corporate Services, Inc. v. Northfield Insurance Co.*, 132 S.W.3d 90 (Tex. App.—Houston [14th Dist.] 2004, no pet). Abraxas hired Pool to perform work on its oil and gas lease. The agreement between Abraxas and Pool contained an indemnity clause by which the parties agreed to indemnify one another for claims arising from the death or injury of their employees. The parties also agreed to acquire and maintain adequate insurance consistent with the Safe Harbor provisions of the Texas Oilfield Anti-Indemnity Act. A Pool employee was fatally injured at the drilling site, and his estate file suit against Abraxas which in turn demanded defense and indemnity from Pool. Pool's insurance carrier agreed to indemnify Abraxas and later agreed to settle the case. Unfortunately, the insurance carrier became insolvent before the case was funded. Pool itself contributed $1,000,000.00 to settle the case post-insolvency and sought reimbursement from Abraxas' insurance carrier, Northfield. After another lawsuit, summary judgment was granted against Pool on its claim that the Anti-Indemnity statute applied. The court of appeals affirmed the summary judgment, holding that Pool's indemnity obligations were not altered because of the insolvency; Abraxas and its carrier were not required to reimburse Pool for the money paid to settle the underlying claim.

IV. CHAPTER 95

Texas Civil Practice & Remedies Code, Chapter 95, covers a property owner's availability for independent contractors. This is an evolving area, and practitioners need to pay close attention as it is casting a long shadow in oilfield litigation.

Covarrubias v. Diamond Shamrock Fining Company, L.P., 359 S.W.3d 298 (Tex. App.—San Antonio 2012, no pet.) affirmed the summary judgment in favor of a property owner who had been assigned a portion of work on a large contract. The subcontractor was hired by Diamond Shamrock's general contractor to install some new piping in a plant. An employee of the subcontractor was attempting to inspect welds on the pipe when a piece of equipment he was using struck a portion of a nearby, unrelated pressured line. The Court of Appeals affirmed a summary judgment in favor of Diamond Shamrock even though the employee was not injured by the equipment which is company was hired to repair. The Court of Appeals held that the injured worker could not recover from the employer for any "unsafe part of his workplace" even though it was not the object of his work.

Unfortunately, the *Diamond Shamrock* case is not the only one which seems to stand Chapter 95 on its head. In *Gorman v. Meng*, 335 S.W.3d. 797 (Tex. App.—Dallas 2011, no pet.) affirmed a take-nothing judgment in favor of a property owner under Chapter 95 of the Civil Practices & Remedies Code. The owner of a convenience store hired an air conditioning contractor to repair a walk-in cooler. The Court of Appeals affirmed the trial court's finding that a condensing unit was "an improvement to real property," and that the contractor had been hired to diagnose and repair the condenser.

A possible solution to some of the Chapter 95 issues is given in *GSF Energy, LLC v. Padron*, 355 S.W.3d 700 (Tex. App.—Houston [1st Dist.], 2011, pet. denied), affirmed a jury verdict against the operator of a processing-plant tank. The worker's family sued the plant operator asserting that it retained both the right to control the details of the work and that it actually controlled the details of the work that led to the fatal incident. The Court of Appeals affirmed the jury's verdict, as there was evidence that the plant operator's employees had expanded the scope of the project, controlled the permits to enter the tanks, gave directions on how to carry out the work, and that the subcontractor's employees felt that they could, "Not say 'no' to the plant operator." Nevertheless, careful consideration to Chapter 95 should be given at all steps of the litigation.

V. IMMIGRATION STATUS

There seemed to be a number of instances in which undocumented workers obtain jobs in the oilfield. These workers wind up being plaintiffs and witnesses, and special consideration should be given to how to handle evidence of their immigration status. *TXI Transportation v. Hughes*, 306 S.W3d 230 (Tex. 2010), reversed a trial court's decision to admit evidence that a tractor-trailer driver was an undocumented worker. The survivors of a truck wreck filed suit against the commercial vehicle operator contending that its driver caused the collision. The plaintiffs produced evidence that the truck driver was not a legal U.S. resident (and referred to this fact on numerous occasions). The Supreme

Court of Texas concluded that the probative value of the evidence was far outweighed by its prejudicial effect.

In *Grocer's Supply, Inc. v. Cabello*, 390 S.W.3d 707 (Tex. App.—Dallas 2012, no pet.), consider the effect of the Immigration Reform and Control Act of 1986 (IRCA) on an undocumented worker's ability to seek damages for future wage loss/earning capacity. In defending against a claim arising from an incident in which Mr. Cabello was injured while changing a tire on the side of the road, Grocer's Supply claimed that federal law prohibited undocumented workers from receiving wages in this country and thus, pre-empted state law tort claims seeking that element of damages. The Court of Appeals declined to find that federal labor law pre-empted state court tort law in this area.

VI. EXPERTS AND DAUBERT

For instance, in *Valance Operating Co. v. Anadarko Petroleum Corp.*, 303 S.W.3d 435 (Tex. App.—Texarkana 2010, no pet.), the appellate court determined that a landman expert could testify about the common understanding of the phrase "commence work on a proposed operation" in the oil and gas industry. The testimony on this issue did not involve science or any scientific causation, but rather was about actual practice and the general understanding of a term within the oil and gas industry. As such, a drilling expert was not necessary to explain the meaning of the term, because such knowledge was within the scope of the landman's expertise.

With regard to some of the complicated causation issues which arise in oilfield litigation, consider *Control Solutions, Inc. v. Gharda USA, Inc.*, 394 S.W.3d 127 (Tex. App. – Houston [1st Dist.] 2012, n.p.h.) (August 15, 2012) which involves "complicated scientific evidence" relating to the cause of a fire. There is an extensive discussion of whether the experts properly followed NFPA 21 given their investigation and whether the presence of multiple experts with expertise in different areas was sufficient. As with *Scott's Marina at Lake Grapevine, Ltd. v. Brown*, 365 S.W.3d 146 (Tex. App. - Amarillo 2012, no pet.), the Court deferred to the trial court's discretion and essentially deferred to the jury's decision regarding very complicated issues. These cases are not oilfield cases, but demonstrate some different approaches that can be taken in order to secure admission of reliable expert testimony.

On the other hand, *Occidental Permian, Ltd. v. The Helen Jones Foundation*, 333 S.W.3d 392 (Tex. App.—Amarillo 2011, no pet.), held that an expert did not meet *Daubert/ Robertson* standards where the expert's evaluation of royalties was based on the market value of a percentage of the proceeds. The court held that without evidence of the downstream prices, it was not possible to reach any true conclusion about the market value of the field, and because the expert never resolved her findings to a market value "stated in dollars and cents," her opinions were excluded. This is consistent with a non-oilfield holding regarding lost profits, *University General Hospital, L.P. v. Prexus Health Consultants, LLC*, 403 S.W.3d 547 (Tex. App.—Houston [14th Dist.] 2013, pet. granted). Here, the court of appeals discussed the proof necessary in order to support a finding of lost profits in a health consulting business. The CEO of the company was allowed to testify about various components of lost profits (revenue, income and expenses), but was unable to provide a single complete calculation of lost profits reflecting revenue from lost business

activity less expenses, which would have been attributed to that activity. In this case, the court of appeals held that there was legally insufficient evidence of the components comprising the profit calculation.

On the other hand, *Cabot Oil & Gas Corp. v. Healey, L.P.*, 12-11-00236-CV, 2013 WL 1282007 (Tex. App.—Tyler 2013, pet. denied (mem. op.), reviewed proof of losses caused by the failure to adequately develop a field. The court of appeals affirmed the trial court's decision allowing various charts and publications showing production costs. The trial lawyer successful argued that the charts which were created and admitted into evidence were business records and summaries of voluminous records.

An excellent example of how to prove complicated concepts in the oilfield is contained in *Southwestern Energy Production Co. v. Berry-Helford*, 12-11-00370-CV, 2013 WL 3461644 (Tex. App.—Tyler 2013, pet. denied) which affirmed a jury verdict for lost profits in a trade secrets case related to the oilfield.

VII. OTHER RESOURCES

There are a number of industry publications which can help get up to speed in oilfield cases. Consider U.T.'s Petroleum Extension Service's publication of "A Primer of Oilwell Service, Workover and Completion" published in 1997. The International Association of Drilling Contractors (IADC) publishes its own Health, Safety and Environmental Reference Guide, which sets out a number of standards and practices which should be followed. The American Petroleum Institute (API) has recommend practices for contractor safety management for oil and gas drilling and production operations, as well as specific recommendations for safety in onshore oil and gas production and well drilling and servicing operations.