CONFLICTS BETWEEN TEXAS & LOUISIANA OIL INDEMNITIES: HOW TRANSPORTATION CAN SOLVED THE FEUD

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I. INTRODUCTION

Louisiana and Texas have a great deal in common—they are both known for crawfish, country music, and oil. However similar the two states are, their choice of law analyses is creating friction between the Lone Star and Pelican states. The state-specific rules for determining the applicable law a court will apply to a given case create uncertainty for oilfield and oil-related businesses by constructing a situation in which agreements will be upheld under one state's oilfield indemnity act and invalidated under the other's.

Subsequent to oilfield exploration corporations—Exxon Mobile, BP, and others—forcing their contractors to indemnify them in the case of an employee injury, both Texas and Louisiana passed Oilfield Anti-Indemnity Acts (respectively the Texas Oilfield Anti-Indemnity Act (TOAIA) and the Louisiana Oilfield Anti-Indemnity Act (LOAIA)).[1] Neither Act facially rejects indemnity agreements. Instead, they allow indemnity agreements under varying factors: Texas requires that indemnity agreements be supported by insurance while Louisiana invalidates indemnity clauses where "the party seeking indemnity was negligent or strictly liable."[2]

The uncertainty of whether a contract will be upheld or voided as unconscionable has created forum shopping. Exploration companies are choosing to sue in Texas courts under Texas law so that their agreements will be upheld.[3] Additionally, courts have noted that Louisiana contractors may agree to a contract with a Texas choice of law provision only to claim that the indemnity agreement is void under the LOAIA.[4]

Under Louisiana and Texas's dueling suite of laws, businesses are forced to draft Master Service Agreements (MSAs) hoping that their

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1. *See generally* G. Roth Kehoe II, *The Louisiana Oilfield Indemnity Act: A Necessary Limit to Contract Freedom or Paternalism for Roughneck Contracts?*, 70 TUL. L. REV. 1097 (1996) (identifying the differences between the Texas and Louisiana Indemnity Acts); Gerald F. Slattery, Jr., *Indemnity and Insurance in the Texas Oil Pitch*, 10 TEX. J. OIL, GAS, & ENERGY L. 99 (2014-2015) (citing cases where the Court determined which State's law should be applied by weighing several factors including the State's interest in the outcome of the case).

2. Sonat Expl. Co. v. Cudd Pressure Control, Inc., 271 S.W.3d 228, 231 (Tex. 2008) (citations omitted).

3. *See*, *e.g.*, Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc., 94 S.W.3d 163, 179 (Tex. App. 2002, no pet.) (en banc); *Sonat*, 271 S.W.3d at 231; Ken Petroleum Corp. v. Questor Drilling Corp., 24 S.W.3d 344, 346, 348 (Tex. 2000); Roberts v. Energy Dev. Corp., 235 F.3d 935, 937 (5th Cir. 2000) (finding that Texas law cannot be applied where no relevant work was performed in Texas, the contractor was domiciled in Louisiana, and the accident occurred in Louisiana).

4. *See, e.g., Chesapeake*, 94 S.W.3d at 179 (citing Verdine v. Ensco Offshore Co., 255 F.3d 246, 254 (5th Cir. 2001)); *Roberts*, 235 F.3d at 942–44; Matte v. Zapata Offshore Co., 784 F.2d 628, 631 (5th Cir. 1986); Meloy v. Conoco, Inc., 504 So. 2d 833, 839 (La. 1987); Amoco Prod. Co. v. Lexington Ins. Co., 745 So. 2d 676, 679-80 (La. Ct. App. 1999); Patterson v. Conoco, Inc., 670 F. Supp. 182, 183-84 (W.D. La. 1987) (applying Louisiana law in the face of a contractual choice of law provision selecting Delaware law).

choice of law is upheld, include an additional provision if another state's law is applied, and potentially expend resources litigating exactly what their agreements sought to prevent.[5] Uncertainty is inherently bad for business,[6] and business certainty has recently been a primary driver of legal harmonization.[7] To resolve this uncertainty, Louisiana should act to prevent the growing abuse of forum shopping,[8] and to effectively protect oilfield and oil-related service contractors, by reforming its oilfield anti-indemnity statute.[9] Louisiana should reform the LOAIA based off of the Texas Transportation Anti-Indemnity Act (TTAIA) to encourage contractor safety and fair business practices.[10]

Alternatively, Texas could increase oilfield contractor protection in a number of ways. First, the Texas Supreme Court could address the question of whether the fundamental policies of both states contravene each other. Second, the court could either reverse or limit *Dresser Industries, Inc. v. Page Petroleum, Inc.*,[11] or adopt a pro-freedom of contract interpretation of the LOAIA that limits the court's policy view.[12] Third, the Texas legislature could adopt a more stringent anti-indemnification oilfield act that more effectively protects contractors from mandatory mutual indemnification clauses.

In Section II, this Comment will begin by looking at the background of MSAs, the TOAIA and LOAIA, the express negligence doctrine, and each states' conflicts of law articles. In Section III, this Comment will compare the Houston Court of Appeals' en banc opinion and dissent with the Fifth Circuit's *Roberts* opinion. In Section IV, this Comment will argue that the TOAIA is, at best, ineffective and, at worst, creating conflicts. Furthermore, Section IV will argue that the Texas Supreme Court's skirting of the issue in *Sonat* has created further tension. Section V will conclude with possible solutions, looking at their potential benefits and harms to the business community.

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5. *See* Harold J. Flanagan & Stephen M. Pesce, *How Master Service Agreements and Risk Allocation Provisions Work*, *in* OIL & GAS AGREEMENTS: THE EXPLORATION PHASE, at 5-21–22 (2010 Min. L. Series, no. 2).

6. *See The 5 Most Common Legal Risks That Can Impact Your Business*, WOLTERS KLUWER, https://s3.amazonaws.com/documents.lexology.com/15e63eb2-3799-44ef-aa68-e49e8e8dadc4.pdf?AWSAccessKeyId=AKIAVYILUYJ754JTDY6T&Expires=1612375136&Signature=iJIXQbLtc15a27Ep%2BpifhSPLtd8%3D (last visited Feb. 3, 2021).

7. *See generally*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (harmonizing federal statutes to create business certainty regarding the validity of arbitration agreements, as purposed by the Federal Arbitration Act).

8. *See*, *e.g.*, *Verdine*, 255 F.3d at 254; *Roberts*, 235 F.3d at 943–44; *Matte*, 784 F.2d at 631.

9. The proposed solution in this paper would have the benefits of limiting forum shopping and more closely aligning the results of the stated policies between the LOAIA and the TOAIA.

10. TEX. TRANSP. CODE ANN. § 623.0155 (explaining how the TTAIA encourages contractor safety and fair business practices).

11. Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 507 (Tex. 1993) (upholding the companies' contract that included an express negligence provision, applying the express negligence doctrine under the TOAIA).

12. *See* Kehoe, *supra* note 1, at 1098–1100, 1116–17.

II. BACKGROUND

This initial Section will focus on providing a background for this Comment. As such, it will start by first explaining what MSAs and mutual indemnities are, and how they function in the oilfield and oil-related services industry. This Section will then continue on to address the TOAIA and LOAIA and how they affect MSAs and mutual indemnifications. This portion of the paper will also briefly compare the public policies giving rise to both statutes. In Part C, this Comment surveys and briefly compares how Louisiana and Texas treat contractual choice of law provisions. In Part D of this Section, this Comment looks to the express negligence doctrine, how Texas allows it under the TOAIA, and how Louisiana expressly does not permit it. The Background will conclude with Part E of this Section by addressing Louisiana's exception to the LOAIA, the federally created Marcel Exception.

A. *Master Service Agreements & Mutual Indemnifications*

In contracting for oilfield or oil-related services, an exploration company will often require a contractor to sign an MSA or agreement, requiring parties to mutually indemnify each other for any incidents and claims that may occur.[13] Several major purposes served by mutual indemnity agreements are (1) the prevention of litigation over any burden from settlement agreement or judgement if an employee is injured and (2) the allocation of fault.[14] Companies achieve this by pre-allocating fault and any financial burden to the company who hired the injured employee.[15] Mutual indemnity agreements also limit an exploration company's liability by requiring that the company who hired the injured employee (most likely the contractor) pay for any financial burden caused by the injury.[16] Further, MSAs are more closely related to contracts of adhesion than a mutually negotiated agreement.[17] MSAs also frequently include a choice of law provision, selecting the state law that will apply to any litigation arising from the agreement.[18] Including a choice of law provision creates certainty and

13. *See* Slattery, *supra* note 1, at 100.

14. *Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, 94 S.W.3d 163, 168 (Tex. App. 2002) (en banc).

15. *Id.*

16. *Id.* at 179.

17. *See generally* Kehoe, *supra* note 1, at 1101 (comparing the anti-indemnity legislation passed in Texas and in Louisiana).

18. *See* Flanagan & Pesce, *supra* note 5.

"justified expectations" between the parties if a conflict should arise relating to the services being performed.[19]

B. *Texas & Louisiana Oilfield Anti-Indemnity Acts*

Both States' legislatures took the unusual step of explicitly stating the policies behind their oilfield indemnity acts.[20] The TOAIA states, in part, that "[t]he [Texas] legislature finds that an inequity is fostered [sic] on certain contractors by the indemnity provisions in certain agreements pertaining to wells for oil, gas, or water or to mines for their minerals."[21] Similarly, the LOAIA states, in part, "[t]he [Louisiana] legislature finds that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions, either or both, contained in some agreements pertaining to wells for oil, gas, or water, or [sic] drilling for minerals."[22] Even though the policy statements of both statutes are near-identical, well-established case law has developed these policies in different directions.[23] For example, Texas retains an Express Negligence Doctrine disclaimer,[24] whereas Louisiana rejects it.[25] Texas also has a fundamental policy for enforcing parties' justified expectations.[26] Louisiana, however, has a public policy against indemnity agreements in their totality.[27] Louisiana has also created an exception to the LOAIA—termed the "Marcel Exception"—whereby an indemnity provision may be upheld if the principal purchases insurance coverage under the contractor's insurance policy.[28] Adding to these conflicts, the Texas Supreme Court has not weighed in on whether the fundamental policy in Texas's statute contravenes Louisiana's.[29] As a

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19. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (Am. Law Inst. 1969); *see generally* Imran Naeemullah, *Strong Headwinds: Statutes, Responsibility-Shifting, and Public Policy Continue to Frustrate Indemnity Agreements in the Offshore Oil and Gas Industry*, 38 TUL. MAR. L.J. 267, 269 (2013) (discussing choice of law as the first inquiry when ascertaining an indemnity provision's validity).

20. TEX. CIV. PRAC. & REM. CODE ANN. § 127.002(a); LA. STAT. ANN. § 9:2780(A).

21. TEX. CIV. PRAC. & REM. CODE ANN. § 127.002(a).

22. LA. STAT. ANN. § 9:2780(A).

23. *Compare* Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc., 94 S.W.3d 163, 168 (Tex. App. 2002) (en banc) (illustrating the Texas view), *with* Roberts v. Energy Dev. Corp., 235 F.3d 935 (5th Cir. 2000) (illustrating the Louisiana view).

24. Texas' express negligence doctrine allows companies to contract around any future negligence that may occur. *See* Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 507 (Tex. 1993).

25. Sonat Expl. Co. v. Cudd Pressure Control, Inc., 271 S.W.3d 228, 231 (Tex. 2008).

26. *Id.* at 234–35 (ignoring all but the justified expectations factor under Section 6 of the Restatement of Conflicts of Law).

27. *See Roberts*, 235 F.3d at 940.

28. Amoco Prod. Co. COG-EPCO 1992 Ltd. P'ship v. Lexington Ins. Co., 745 So.2d 676, 680 (La. Ct. App. 1999) (citing Marcel v. Placid Oil Co., 11 F.3d 563, 459 (5th Cir. 1994)).

29. *See* Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc., 94 S.W.3d 163, 170–71, 178–79 (Tex. App. 2002) (en banc) (stating that "because both states' policies are identical, if the Texas approach thwarts Louisiana public policy, then it must also thwart its own"). *Contra Roberts*, 235

result, federal district courts sitting in diversity are left to make *Erie* educated guesses.[30]

C. *Choice of Law*

In order to deal with the uncertainty and friction between the indemnity acts of Texas and Louisiana, most contracts include a choice of law provision.[31] However, the existence of a contractual choice of law does not necessarily mean a court will use that law.[32]

In addressing conflicts of law, Texas has adopted the Restatement approach.[33] Within this approach, Texas courts have created a pivotal test asking "whether the law in question is a part of a state policy so fundamental that the courts of the state will refuse to enforce an agreement contrary to that law, despite the parties' original intentions" even though another state's courts, connected with the transaction, would enforce the agreement.[34] Louisiana, like other civil law legal systems, takes a different approach.[35] Louisiana merges steps and factors from the Restatement in its conflicts of law analysis, muddying the Restatement's formal, stepped process.[36]

D. *Express Negligence Doctrine (Texas)*

The Texas Supreme Court first upheld the application of the express negligence doctrine to an oilfield-related indemnity agreement in *Dressler Industries, Inc. v. Page Petroleum, Inc.*[37] The Court explained

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F.3d at 943 (holding that under a Louisiana conflict of laws analysis, the TOAIA contravened Louisiana public policy).

30. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 80-81 (1938). The Erie doctrine establishes the order in which a federal court, adjudicating a case amongst parties of diverse state citizenship, will look to other sources of law after federal jurisprudence. If there is no controlling federal law, courts can apply various tests to determine which state's law to use or how to rule. As a final matter, the court will use the standards of the Erie test, essentially making what has been termed an "Erie educated guess."

31. Flanagan & Pesce, *supra* note 5.

32. *See* Cardoni v. Prosperity Bank, 805 F.3d 573, 581 (5th Cir. 2015) ("Thus, although Texas courts permit choice-of-law agreements and the default position is that they are enforceable, it is not uncommon for a party to overcome them.").

33. *Id.*

34. Barnett v. DynCorp Int'l, LLC, 831 F.3d 296, 306 (5th Cir. 2016) (citing DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 680 (Tex. 1990)).

35. *See* Piyali Syam, *What is the Difference between Common Law and Civil Law*, WASH. U. SCH. L. (Jan. 28, 2014), https://onlinelaw.wustl.edu/blog/common-law-vs-civil-law/.

36. *Compare* Roberts v. Energy Dev. Corp., 235 F.3d 935, 938-39 (5th Cir. 2000) (discussing Louisiana's conflict of law statutes which consider public policy of the alternative source of law, the contacts of each state to the parties and transaction, the type of agreement, and the relevant policies of all involved states), *with Cardoni*, 805 F.3d at 581 (using the Restatement approach, which applies the state law chosen by the parties in determining contractual rights and duties unless the state has no substantial relationship to the parties or application of the chosen law would be contrary to a fundamental policy of another state).

37. 853 S.W.2d 505, 509 (Tex. 1993).

that Texas' "express negligence doctrine states that a party seeking indemnity from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract."[38] The express negligence doctrine is further subject to a conspicuousness requirement so that it provides fair notice to the non-drafting party.[39] Additionally, the court explained that conspicuousness is a question of law, subject to the Texas Business and Commerce Code.[40]

It is worth noting that Louisiana does not permit parties to indemnify themselves for their own negligence.[41] This is not a matter of stated fundamental public policy, but a matter of law.[42]

E. *The Marcel Exception*

In *Marcel v. Placid Oil Co.*, the Fifth Circuit adopted an exception to the LOIA that was first formulated in *Patterson v. Conoco, Inc.*[43] Under the exception, "[i]f the indemnitee pays the full cost of utilizing the indemnitor's insurance to cover the indemnitee[']s liability allocated by law, then there has not been any risk transfer" and the indemnification is deemed to be acceptable under the LOIA.[44] The Fifth Circuit reasoned that "the LOIA is aimed at preventing the shifting of the economic burden of insurance coverage or liability onto an independent contractor."[45] However, the court also noted that "[i]f the principal pays for its own liability coverage, however, no shifting occurs."[46]

III. CHESAPEAKE VS. ROBERTS

This Section will compare the Texas Fourteenth District Court of Appeals' contentious *en banc* decision in *Chesapeake Operating* against the Fifth Circuit's decision in *Roberts*. The Section will first address *Chesapeake Operating*. It will provide a case-summary, looking at the case's key facts, procedural posture, reasoning, and dissents. This Section will then turn to *Roberts*, addressing the same factors. This

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38. *Id.* at 508 (citing Enserch Corp. v. Parker, 794 S.W.2d 2, 8 (Tex. 1990); Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 707–08 (Tex. 1987)).

39. *Id.* at 509.

40. *Id.*; TEX. BUS. & COM. CODE ANN. § 1.201(b)(10) (including the following methods of making text conspicuous: different colors, varying fonts, all capital letters, larger type than surrounding font, and symbols).

41. Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc., 94 S.W.3d 163, 193 (Tex. App. 2002) (en banc) (Frost, J., dissenting).

42. *Id.*

43. Marcel v. Placid Oil Co., 11 F.3d 563, 569 (5th Cir. 1994).

44. Richard C. Beu & Donald P. Butler, *Stress Test for Upstream Contractual Risk Management: Indemnities, Insurance, and Limitation of Liability Clauses After Deepwater Horizon*, *in* PROCEEDINGS OF THE ROCKY MOUNTAIN LAW FIFTY-SEVENTH ANNUAL INSTITUTE 12-1, 12-25 (2011).

45. *Marcel*, 11 F.3d at 569.

46. *Id.*

Section will conclude by asking whether either case was correctly decided. The concluding portion will explain that because *Roberts* was spun-off from Louisiana's case law, it is fundamentally different from *Chesapeake*. Both decisions ultimately follow their respective state's conflicts of law articles and thus are inherently opposite in outcome.

A. *Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*

1. Factual Background

In *Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, a split, *en banc* Fourteenth District Court of Appeals in Houston applied Texas law to uphold a mutual indemnification agreement.[47] The case arose out of two personal injury claims, stemming from oilfield services in Louisiana.[48] *Chesapeake Operating* was a contentious case, decided by a 6-5 majority, spawning three dissenting opinions.[49]

In 1996, Chesapeake Operating, Inc. (Chesapeake) contracted with Nicklos-Hinton Drilling Company (subsequently acquired by the Texas corporation, Nabors Drilling USA, Inc.) to drill an oil well in western Louisiana.[50] The parties agreed to mutually indemnify each other and that their contract would be governed by Texas law.[51] Chesapeake additionally hired multiple subcontractors including Reeled Tubing, Inc. (RTI), a Louisiana company, and Quality Pressure Testing (QPT), a Texas company.[52] Subsequently, two Texas residents, Danny Alms (an employee of RTI) and Denny Fitz (an employee of QPT), were injured at the well.[53]

2. Procedural Posture

Both Alms and Fitz separately brought suits against Chesapeake and Nabors, as well as individuals in Brazoria County and Harris County respectively.[54] Because both suits had plaintiffs who were employed by Chesapeake's subcontractors, "Nabors filed cross-actions against Chesapeake in both suits seeking indemnification for all liability and defense costs incurred . . . [and] Nabors moved for summary judgment

47. Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc., 94 S.W.3d 163, 173-180 (Tex. App. 2002) (en banc).
48. *Id.* at 166.
49. *See id.*
50. *Id.*
51. *Id.*
52. *Id.* at 166-67.
53. *Chesapeake*, 94 S.W.3d at 167.
54. *Id.*

on the cross-claims."[55] At the trial court level leading to *Chesapeake Operating*, the two trial courts reached differing conclusions:

The *Alms* court applied Texas law, granting Nabors' indemnity claim and severed that claim from the rest of the suit for the appeal. The *Fritz* court first tried the underlying claims (resulting in a take-nothing judgment against Fritz), then applied Louisiana law, and denied Nabors' indemnity claim for defense costs.[56]

On appeal, the *Alms* court was reversed by a panel of judges from Texas' Fourteenth Court of Appeals.[57] As the *Fritz* case was submitted to a different panel and Nabors moved for rehearing on the *Alms* case, the Fourteenth Court of Appeals consolidated both claims, withdrew the prior panel opinion, and issued an *en banc* opinion.[58]

3. Reasoning

The court held that Texas law applied to the case because it found that sections 6, 187(2), 188, and 188(2) of the Restatement (Second) of Conflict of Laws supported that: (1) Texas law would apply absent a choice of law provision, (2) Texas had a stronger interest in deciding the claim between two Texas residents, and (3) TOAIA did not contravene the fundamental policies of LOAIA.[59] Many of the factors in determining which law to apply are highly fact specific. However, one of Restatement section 187(2)'s determinative factors is whether the law of the chosen state contravenes the fundamental policies of the state whose law would apply absent a choice of law provision.[60] Despite finding that Texas has the materially greater interest, the court continued its analysis, stating that "we believe the result would be the same if Louisiana were awarded that distinction."[61]

The court relied heavily on the plain text policy statements of both LOAIA and TOAIA. It additionally stated that:

> Louisiana law is not absolute or unqualified—non-negligent parties can enforce indemnities to their hearts' content, and settling parties may attempt to do the same. The only difference between Texas and Louisiana law is how best to limit the abuse of indemnities. Arguments can be made

55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Chesapeake*, 94 S.W.3d at 175–80; *see generally* DeSantis v Wackenhut Corp., 793 S.W.2d 670 (Tex. 1990) (providing Texas Conflict of Law articles).
60. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187 (AM. LAW INST. 1969) (requiring the parties' choice of law to govern unless the default law of the state contravenes a fundamental public policy of that state where the state has a materially greater interest in the determination of the issue).
61. *Chesapeake*, 94 S.W.3d at 177.

> about which state's approach is best. But because both states' policies are identical, if the Texas approach thwarts Louisiana public policy, then it must also thwart its own. We decline to hold that the Texas Legislature was either mistaken or disingenuous in the approach it selected to address the stated policy.[62]

Here, the court pointed out several crucial reasons as to why both statutes' public policy cannot contravene each other. This statement and analysis are in stark contrast to both the Fifth Circuit's opinion in *Roberts* and the dissenters' arguments.

4. Dissent

The dissenters collectively argued for a more predictable choice of law analysis, that Louisiana law applied to the transaction, and believed that the issue was previously decided by the Texas Supreme Court in *Maxus Exploration Co.*[63] Justice Edelman succinctly points out:

> Of what use is a principle of law if no one can be certain, or even confident, of its meaning? How can people obey it? How can businesses enter into contracts to which the law applies with any expectation that they will be enforceable, let alone profitable? If the meaning of a law is uncertain, is it law at all?[64]

This statement is largely symbolic of the issues that are present within this field. Several of the other dissenting justices' opinions embody how fact-specific Texas' Restatement approach is pertaining to conflicts of law.[65] The mere fact that the case produced four different appellate opinions supports the difficulty of the subject.

B. *Roberts v. Energy Development Corporation*

Roberts v. Energy Development Corp. is an important case because it sets current Fifth Circuit precedent on the conflicts between the LOAIA and TOAIA, as approached from Louisiana's choice of law analysis.[66]

1. Factual Summary

An employee, Roberts, was killed when he fell through the top of an oil storage tank during a time when the owners had actual and

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62. *Id.* at 178-79.

63. *Compare id.* at 172, *with id*. at 180–88 (Edelman, J., dissenting).

64. *Id.* at 200 (Edelman, J., dissenting).

65. *See generally id*. at 180–201 (providing examples of dissenting opinions pertaining to Texas' Restatement approach to conflicts of law).

66. Roberts v. Energy Dev. Corp., 235 F.3d 935, 937–38 (5th Cir. 2000).

constructive knowledge of defects in the roofs of the tanks.[67] The employee's family subsequently sued all relevant parties, who in turn sought indemnification from the employer under the MSA which selected Texas law to apply.[68]

2. Procedural Posture

This case was brought in the Eastern District of Louisiana.[69] The district court concluded that "the choice of law provision in the MSA, selecting Texas law, was enforceable and that as a result, the [LOAIA] did not apply."[70]

3. Reasoning

The Fifth Circuit reversed and remanded the case, holding that Louisiana law applied because the application of Texas law would create a result against Louisiana's public policy.[71]

C. *Was Either Case Correctly Decided?*

Under the different conflicts-of-law articles between Texas and Louisiana, and their different weights and surrounding case law, both cases were decided correctly. A major difference between both states' conflicts articles is their fundamental policy test: Texas asks whether a fundamental policy is contravened whereas Louisiana focuses on the results of the policy.[72] For example, if an oilfield accident was to occur in Texas and the parties had selected Louisiana law in their choice of law provision within their contract, Texas would analyze whether enforcing the LOAIA within its jurisdiction would run counter to its fundamental policies and, thus, ultimately refuse to apply that law to the conflict.[73] *Chesapeake* already answered this question by implying that Texas would not view the LOAIA as counter to its own fundamental public

67. *Id.* at 936.

68. *Id.*

69. *Id.*

70. *Id.* at 937.

71. *Id.* at 943 ("[W]e conclude that the strength of Louisiana's policy of preventing the adverse consequences which would fall upon its sub-contractors by application of the laws of Texas tips the scales which might otherwise be balanced with respect to each state's policies noted above."); *but see* Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc., 94 S.W.3d 163, 178 (Tex. App. 2002) (en banc) (citation omitted) ("The test is whether the chosen law contravenes a state *policy*, not the *outcome* in a particular case. A choice-of-law clause is relevant only if it *will* result in a different outcome; if that difference alone is enough to make policies contravene, then choice-of-law clauses will *never* be enforced.") (emphasis in original).

72. *See Roberts*, 235 F.3d at 938–40, 943.

73. *See* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990); *see also Chesapeake*, 94 S.W.3d at 178–79; Cardoni v. Prosperity Bank, 805 F.3d 573, 581 (5th Cir. 2015) (applying Texas choice of law articles).

policies.[74] In comparison, Louisiana focuses on whether the result of upholding the TOAIA is counter to their own policy.[75] Because Louisiana's anti-indemnity statute invalidates indemnity agreements except for those which fall into the narrow Marcel Exception,[76] Louisiana would refuse to enforce the TOAIA since it only invalidates an indemnity agreement if it is not supported by insurance.[77]

A great deal of uncertainty can be ascribed to this asymmetry, despite the near-identical policy statements of both the TOAIA and the LOAIA.[78] *Roberts* notably did not address the plain text policy statements of both the TOAIA and the LOAIA.[79] However, this is not a deficiency in the opinion; the court was focused on the outcome of the agreement, as required by Louisiana law.

IV. THE TEXAS SUPREME COURT'S AMBIVALENCE TO LOUISIANA'S POLICY GRAB

This Section addresses how the TOAIA and LOAIA came to be the statutes that they are today, and whether there is a middle ground between them. This Section begins by addressing Texas' substantial history as a business-friendly state, attempting to find the best laissez-faire solution to encourage economic growth and business development. Subsequently, it compares this view to Louisiana's contractor friendly view, addressing how the LOAIA has grown from "not a 'clear and unambiguous'" statute to a clear statute.[80] This Section then progresses to address *Sonat v. Cudd Oil Pressure* and the Texas Supreme Court's lost opportunity to address the conflict between Texas and Louisiana. Finally, this Section compares the TTAIA to both the TOAIA and LOAIA, arguing that the TTAIA acts as a pre-existing middle ground between both statutes that encourages rational and beneficial business decisions more efficiently than the LOAIA, which arguably encourages problematic business choices.

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74. *Chesapeake*, 94 S.W.3d at 178–79.

75. *Roberts*, 235 F.3d at 939.

76. *See* Marcel v. Placid Oil Co., 11 F.3d 563, 569–70 (5th Cir. 1994).

77. *Roberts*, 235 F.3d at 939.

78. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. §§ 127.001-007, *with* LA. STAT. ANN. § 9:2780(A)-(B).

79. *Roberts*, 235 F.3d at 943 ("Both parties have agreed that under Louisiana law, the [LOAIA] would void the indemnity provision in the MSA, and the parties agree that application of Texas law permitting indemnification through an additional insured provision . . . would contravene Louisiana's explicit and unambiguous public policy against indemnification agreements . . . .").

80. Transcon. Gas Pipe Line Corp. v. Lloyds, London, 734 F. Supp. 708, 713 (M.D. La. 1990); *see* Silverman v. Mike Rogers Drilling Co., 34 So. 3d 1099, 1103 (La. Ct. App. 2010) ("Because we are unable to construe the wording of the statute as being ambiguous and susceptible of different meanings in the instant case, we do not reach the legislative intent of the LOAIA.").

A. *Texas: A Business' Best Friend*

Texas has a long and well known history of maintaining its reputation as being a business friendly state—albeit often at the cost of consumer and contractor protection.[81] Although the TOAIA forbids indemnity agreements relating to oilfield services, it is not as far reaching or limiting as the LOAIA.[82] While the TOAIA might decrease contractor exposure by requiring that indemnity agreements be supported by appropriate insurance, it nevertheless permits large exploration and production companies to foist indemnity agreements upon contractors.[83] The only price is proper insurance.[84] While it is not uncommon for states to use favorable legislation to attract corporations and businesses,[85] the TOAIA and its accompanying case law have had the additional effect of creating forum shopping and business uncertainty.[86] However, the TOAIA and its living, common law history have remained consistent. Not only has the interpretation of the TOAIA remained unchanged, but its stated public policy, against the inequity fostered by indemnity clauses, has been readily upheld.[87] Peculiarly, especially in this circumstance, while Texas may act to protect contractors from the inequities of indemnities, Texas does not protect contractors from principals.[88] In doing so, Texas respects an inherent (and some would argue fundamental) right to contract.[89] This is a notable distinction from the LOAIA. The question becomes, when both the LOAIA and TOAIA are nearly identical—from their stated policy to provisions—why are they so different? Why does Louisiana's statute grasp farther?[90]

While the TOAIA has had a relatively stable history, and an unchanging interpretation, the LOAIA has ranged from being considered "not [a] 'clear and unambiguous statute'" to being considered "clear and

81. *See*, *e.g.*, St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 525–27 (Tex. 2002) (requiring a "community of pecuniary interest" to establish a joint venture); Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 507 (Tex. 1993) (holding that "fair notice requirements apply to both indemnity agreements and releases.").

82. *See* Kehoe, *supra* note 1, at 1116, 1118-19.

83. *See* Getty Oil Co. v. Ins. Co. of N. Am., 845 S.W.2d 794, 803 (Tex. 1992) (explaining that the TOAIA should be construed so as not to impinge on the right to contract).

84. TEX. CIV. PRAC. & REM. CODE ANN. §§ 127.001–007.

85. *See* Daniel J.H. Greenwood, *Democracy and Delaware: The Mysterious Race to the Bottom/Top*, 23 Yale L. & Pol'y Rev. 381, 381 (2005).

86. *See* Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc., 94 S.W.3d 163, 200-01 (Tex. 2002) (en banc) (Edelman, J., dissenting); *see also,* Verdine v. Ensco Offshore Co., 255 F.3d 246, 254 (5th Cir. 2001); Roberts v. Energy Dev. Corp., 235 F.3d 935, 943-44 (5th Cir. 2000).

87. *See, e.g.*, Sonat Expl. Co. v. Cudd Pressure Control, Inc., 271 S.W.3d 228, 231 (Tex. 2008).

88. *See* Kehoe, *supra* note 1, at 1098–1103.

89. *See* Getty Oil Co. v. Ins. Co. of N. Am., 845 S.W.2d 794, 803-06 (Tex. 1992).

90. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 127.001–007, *with* LA. STAT. ANN. § 9:2780(A).

unambiguous" within decades.[91] G. Roth Kehoe examined this evolution, asking whether the LOAIA acts as a necessary limit to the freedom to contract.[92] He attributed the tension to the LOAIA's ambiguity and to Louisiana courts reaching beyond the stated policy of the statute.[93]

While Texas law protects contractors from the inequities of indemnity clauses (unless the agreement is supported by insurance),[94] Louisiana's statute expands to protect contractors from the inequities foisted upon them by principals.[95] This evolution is largely attributed to both the LOAIA's ambiguity and to judicial activism following the policy of the statute instead of its plain text meaning.[96] As such, the LOAIA has evolved past its purpose and blanketly governs relationships between contractors and principals.[97] Texas law, in comparison, has remained stable.[98] This stability is likely largely attributable to the TOAIA's relatively simple requirement: that mutual indemnification agreements must be supported by insurance.[99]

B. *Sonat v. Cudd Oil Pressure and the Texas Supreme Court's Lost Opportunity*

Unfortunately for most businesses, the disparity between Texas' and Louisiana's oilfield indemnity statutes has led to litigation, inherently decreasing funds that an injured employee may pursue to be made whole.[100] This is especially an issue "in the oil and gas industry, [where] broad-form indemnity provisions known as 'knock-for-knock' provisions are often used" to shift liability and reduce duplicative litigation.[101] Additionally, the conflict between the TOAIA and LOAIA

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91. *See* Transcon. Gas Pipe Line v. Lloyds, London, 734 F. Supp. 708, 713 (M.D. La. 1990)("[I]t is apparent that the law is not 'clear and unambiguous' . . . ."); Silverman v. Mike Rogers Drilling Co., 34 So. 3d 1099, 1103 (La. Ct. App. 2010); *see also* Griffin v. Tenneco Oil Co., 519 So. 2d 1194, 1195 (La. Ct. App. 1988) ("[T]he recurring reference to wells and drilling combined with the rather general language . . . makes the statute ambiguous."); H. Alston Johnson III, *1981 Legislative Developments Affecting Torts and Workers' Compensation*, 29 LA. BAR J. 105, 107 (1981) (noting that the LOIA "was a measure which was well lobbied"); Diogenis C. Panagiotis, *Offshore Update–Five Years After Passage: Contractual Indemnity, Defense and Insurance Under the Louisiana Oilfield Indemnity Act*, 10 MAR. LAW. 203, 207 (1985).

92. Kehoe, *supra* note 1, at 1099–1100.

93. *Transcon. Gas Pipe Line*, 734 F. Supp. at 715-16.

94. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 127.005(a).

95. *Transcon. Gas Pipe Line*, 734 F. Supp. at 712-13.

96. Kehoe, *supra* note 1 at 1101.

97. *Id.* at 1103-04.

98. *Compare* Maxus Expl. Co. v. Moran Bros., 817 S.W.2d 50, 54-56 (Tex. 1991), *with* Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc., 94 S.W.3d 163, 183-86 (Tex. App. 2002) (en banc) (comparing the application of Texas law to a Kansas dispute with the application of Texas Law to a Louisiana dispute).

99. TEX. CIV. PRAC. & REM. CODE ANN. § 127.005(a).

100. *See Chesapeake*, 94 S.W.3d at 168.

101. B. Lee Wertz, Jr. & Stephan D. Selinidis, *Risk Shifting in the Oil Patch: A Guide to Extraordinary Risk Shifting*, 33 CORP. COUNS. REV. 147, 152 (2014).

stood before the Texas Supreme Court as a near-primary issue in *Sonat v. Cudd Oil Pressure.*[102]

In *Sonat*, two sophisticated parties—a contractor and an exploration company—litigated over whether their choice of Texas law for operations in New Mexico and Texas upheld their indemnification agreement for an accident that occurred in Louisiana, where they had not specified a state's law to apply.[103] This case seemed to set up a conflict between both state's anti-indemnity statutes. The Texas Supreme Court even acknowledged this by stating, before its conflict of law analysis, "[t]he parties all agree, as do we, that these laws conflict."[104] The court further hinted that the laws are not binary opposites when it compared the application of Texas law against Louisiana law, stating "Louisana [sic] law would invalidate Sonat's indemnity only if Sonat was negligent or strictly liable, an issue that has never been decided."[105]

The Court further accosted the Fifth Circuit's internal rules that contributed to its decision in *Roberts v. Energy Development Corp*.[106] Even as dicta, the Texas Supreme Court was in a prime position to issue an opinion with greater guidance on the question of whether the TOAIA is contrary to Louisiana's public policy. As *Sonat* stands, it merely hints at a position, skirting the issue for another case.[107]

How can this issue be reconciled, if at all? Kehoe notably argued for an elaborate, tiered test.[108] While tiered tests sound nice, they often times end up looking more like a print by M.C. Escher,[109] two steps up, cross reference a faraway section, all to return at one section past the start.[110] As this Comment has shown, conflict of laws analyses—which under the Restatement are tiered tests—can be unpredictable if there are soft questions such as those related to public policy. This question begs a more brutal and simple answer since Texas has historically

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102. Sonat Expl. Co. v. Cudd Pressure Control, Inc., 271 S.W.3d 228, 230-31 (Tex. 2008).

103. *Id.*

104. *Id.* at 231.

105. *Id*. at 235 (citing LA. REV. STAT. § 9:2780).

106. *Id.* at 238 (citing Roberts v. Energy Dev. Corp., 235 F.3d 935, 944 (5th Cir. 2000)).

107. Sonat Expl. Co. v. Cudd Pressure Control, Inc., 271 S.W.3d 228, 237–38 (Tex. 2008).

108. Kehoe, *supra* note 1, at 1133–37.

109. Steven Poole, *The Impossible World of MC Escher*, GUARDIAN (June 20, 2015, 5:00 AM), https://www.theguardian.com/artanddesign/2015/jun/20/the-impossible-world-of-mc-escher (explaining that Escher was a celebrated artist known for his illusions and fascination with "the contrast between the two-dimensional flatness of a sheet of paper and the illusion of three-dimensional volume that can be created with certain marks").

110. *See* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990) (establishing Texas's conflict of laws analysis, starting at § 186 of the Restatement of Conflict of Laws, cross referencing § 6, then ending at § 187).

refused to impinge on its residents' ability to contract without some serious policy reason.[111]

C. *How Has the TTAIA Successfully Limited Indemnifications—Impinging on the Right to Contract—In Comparison to the TOAIA?*

The TTAIA represents a notable intrusion into both Texans' right to contract and their contracts.[112] The statute expressly provides that:

> A person may not require indemnification from a motor carrier as a condition to: (1) the transportation of property for compensation or hire by the carrier; (2) entrance on property by the carrier for the purpose of loading, unloading, or transporting property for compensation or hire; or (3) a service incidental to an activity described by Subdivision (1) or (2), including storage of property.[113]

The statute further proceeds to declare all contrary provisions unenforceable.[114] This provision is far-reaching and almost acts to dictate that—as a matter of public policy—Texas will not allow principals to require indemnifications from motor carriers. While there may be sparse case law and even fewer legal articles on the subject, the statute's bright-line characteristics almost create a non-issue, except for cases and comparisons like this.[115]

In the context of both the TOAIA and LOAIA, the TTAIA leans closer to the LOAIA. The TTAIA is similar to the LOAIA because both create a hardline rule against indemnity provisions.[116] Both statutes also recognize an inherent inequity in certain principle-contractor relationships and are aimed at curing those defects.[117] Further, in choice of laws analyses, the TTAIA has voided choices for other states' laws on the basis of public policy.[118]

Additionally, in transporting water from an oil-producing well to a water well across the Texas-Louisiana border, it is entirely possible that both statutes could bring about the same result if a non-negligent

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111. Cf. Flynn Bros. v. First Med. Assocs., 715 S.W.2d 782 (Tex. App. 1986) (indicating that under Texas' Corporate Practice of Medicine Doctrine, only doctors can hire and manage other doctors. Lay persons may not contract with doctors so as to manage their practice).

112. TEX. TRANSP. CODE ANN. § 623.0155(a).

113. *Id*.

114. *Id*.

115. Arguably, by having such strong language in the statute, Texas highly encourages settlements before litigation can go to trial.

116. *See* TEX. TRANSP. CODE ANN. § 623.0155.

117. *Compare* TEX. TRANSP. CODE ANN. § 623.0155, *with* LA. STAT. ANN. § 9:2780(A).

118. CMA-CGM (Am.), Inc. v. Empire Truck Lines, Inc., 416 S.W.3d 495, 516 (Tex. App. 2013).

accident were to occur on either side.[119] Though an indemnification agreement could be upheld under the TOAIA, it would still be voided under the TTAIA if it was a condition of the contract.[120] In so doing, Texas' statutes would proclaim a public policy against the inequitable treatment of one class of contractors but not another.

Louisiana produces a relatively similar outcome. However, Kehoe's article makes a point of stating that the LOAIA was "passed in response to intense lobbying by the oilfield services industries."[121] Surprisingly, however, the TOAIA was enacted roughly eight years prior to the LOAIA under similar circumstances.[122]

The TTAIA surprisingly continues Texas' first-mover trend, containing smaller exceptions to the TOAIA's mere insurance requirement.[123] It takes a step further than the TOAIA by actively limiting the right to contract, in contrast to the Texas Supreme Court's counsel that it will not impinge on parties' freedom of contract.[124] Despite Texas' historically pervasive reputation as being "business-friendly,"[125] the state has passed legislation on behalf of independent contractors against their principals.[126]

The next logical step might be to conclude the TOAIA should be more like its transportation counterpart or to weigh in that the LOAIA is better than the TOAIA. Both are unfavorable for the same core reason; the LOAIA is the more problematic statute. Invalidating all oilfield indemnity provisions—as LOAIA requires—disincentivizes safe business conduct and invariably increases exploration companies' costs of operating in Louisiana, which in turn incentivizes large companies to build indemnity costs into their contract, further hurting contractors by paying them lower rates.[127] Louisiana has gone too far in its contractor protections, to the extent that the state has foisted its own inequity upon

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119. *See The Crucial Importance of Water Handling in Oilfield Operations*, OIL & GAS 360 (Nov. 13, 2017), https://www.oilandgas360.com/water-handling-in-oilfield-operations/ (noting the prevalent use of trucks in transporting well water to and from oil wells).

120. *Compare* TEX. TRANSP. CODE ANN. § 623.0155, *with* TEX. CIV. PRAC. & REM. CODE ANN. § 127.001-007.

121. Kehoe, *supra* note 1, at 1101.

122. *See* Getty Oil Co. v. Ins. Co. of N. Am., 845 S.W.2d 794, 803 (Tex. 1992); Act of May 19, 1973, 63rd Leg., R.S., ch. 646, §1, 1973 Tex. Gen. Laws 1767 (amended 1985, 1991).

123. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 127.001-007, *with* TEX. TRANSP. CODE ANN. § 623.0155.

124. *Compare* TEX. TRANSP. CODE ANN. § 623.0155 (2011), *with Getty Oil Co.*, 845 S.W.2d at 805.

125. *Why Texas?* TEX. ECON. DEV., https://gov.texas.gov/business/page/why-texas#:~:text=As%20the%209th%20largest%20economy,robust%20infrastructure%20and%20predictable%20regulations (last visited Feb. 22, 2021).

126. *See* TEX. TRANSP. CODE ANN. § 623.0155.

127. *See* Kenneth G. Engerrand, *Indemnity For Gross Negligence in Maritime Oilfield Contracts*, 10 LOY. MAR. L.J. 319, 341–42 ("[T]he reciprocal nature of these indemnity clauses arguably created an incentive . . . to avoid grossly negligent conduct.") (quoting In re Oil Spill, 841 F. Supp. 2d 988, 1001 (E.D. La. 2012)).

contractors. And so, Louisiana and its courts should adopt a less expansive statute that creates greater opportunities to contract for indemnity.

The TTAIA acts as a middle ground, and potential compromise for Louisiana and its contractors since it allows parties to require indemnification for "a claim arising from damage or loss from a wrongful or negligent act or omission of the carrier."[128] Highways, much like oilfields, are inherently dangerous places.[129] And yet, indemnifications are only allowed when negligence is involved.[130] "Under the [LOAIA], such clauses are invalid if the party seeking indemnity was negligent or strictly liable."[131]

Louisiana, according to Kehoe, enacted such a statute for the purpose of oilfield safety.[132] If Texas was concerned with the safety of its citizens and contractors—which is fair to assume from a policy perspective—then the TTAIA's negligence carve-out seems antithetical in comparison with Louisiana's statute.[133] But from a company's perspective, the TTAIA provides a greater incentive for companies to enforce safety standards on a day-to-day basis and engage in less risky behavior if it is liable for its own negligence, including accidents that are not a result of the nature of a profession.[134]

Consider the hypothetical wherein an MSA between Exploration Company A and Contractor B is governed by the LOAIA, under which there may be no mutual indemnification for negligence. Exploration Company A would always be a source of recovery for any injured employee from Contractor B if the individual was injured as a result of negligence. As such, assuming that both Exploration Company A and Contractor B are rational businesses that are sensitive to economic and legal incentives, neither company has an incentive to enforce stricter safety standards that prevent negligence. This is the case because Exploration Company A can be sued and may be held liable for its portion of negligence, yet cannot claim indemnification against Contractor B. Additionally, Contractor B will never have to indemnify Exploration Company A for any negligent injury, even if it is due to Contractor B's negligence. While this may seem unfair, Contractor B is

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128. TEX. TRANSP. CODE ANN. § 623.0155.

129. *See* Chesapeake Operating, Inc v. Nabors Drilling USA, Inc., 94 S.W.3d 163, 168 (Tex. App. 2002) (en banc).

130. TEX. TRANSP. CODE ANN. § 623.0155.

131. Sonat Expl. Co. v. Cudd Pressure Control, Inc., 271 S.W.3d 228, 231 (Tex. 2008) (citations omitted).

132. Kehoe, supra note 1, at 1131.

133. *Compare* TEX. TRANSP. CODE ANN. § 623.0155, *with* LA. STAT. ANN. § 9:2780(A).

134. *See* Engerrand, *supra* note 127, at 341–42 (quoting In re Oil Spill, 841 F. Supp. 2d 988, 1001 (E.D. La. 2012) ("[A] grossly negligent act by Transocean could result in liability to Transocean as easily as it could have resulted in liability to BP. . . . [T]he reciprocal nature of these indemnity clauses . . . created an incentive for Transocean to avoid grossly negligent conduct.")).

in a far better position to police its employees than Exploration Company A.

In a scenario with the same actors, governed by a law analogous to the TTAIA, Exploration Company A could not require that Contractor B indemnify it from accidents that are caused by the nature of the environment, or even mere happenstance. However, it could require indemnification for those accidents which occur as a result of Contractor B's negligence. As such, Contractor B would have every incentive to heavily police its employees to prevent negligence, since it will ultimately be held liable.[135]

V. CONCLUSION

Louisiana's oilfield anti-indemnity statute has gone past the point of being a useful limitation on sophisticated parties' freedom to contract. It serves as an anachronistic piece of legislation that decreases contractor payments, incentivizes dangerous workplace conditions, and generally increases the cost of doing business between Texas and Louisiana since there is a legitimate fear that Louisiana contractors may agree to a contract to potentially sue in Louisiana to invalidate the contract.[136] As such, this Section of the paper will discuss potential benefits and harms created by leaving the statutory schemes as they were found, Louisiana revising the LOAIA, and Texas revising the TOAIA.

A. *Judicial Solutions*

A notable and interesting possibility would be if the Texas Supreme Court were to rule on a case that squarely presented the issue of whether the TOAIA was against Louisiana's fundamental public policy. Any decision, however, would inherently promote forum shopping and business uncertainty. Further, this would not assuredly alter Fifth Circuit precedent. While it may be the most academically satisfying solution, a legislative enactment on Louisiana's behalf is the best way to handle this issue.

B. *Legislative Solutions, Business Costs of the TOAIA, LOAIA, and*

135. The TOAIA is suboptimal from a risk-incentive relationship to the TTAIA, but it is still superior to the LOAIA because of its insurance requirement that ensures contractor's ability to recover damages. Additionally, while it does allow exploration companies to be indemnified for their own negligence, it also permits general mutual indemnities which promote greater workplace safety.

136. *See*, *e.g.*, Verdine v. Ensco Offshore Co., 255 F.3d 246, 254 (5th Cir. 2001); Roberts v. Energy Dev. Corp., 235 F.3d 935, 943–44.

the TTAIA

1. Should Both State's Statutory Schemes Be Left as They Stand?

Leaving both state's statutory schemes as they stand is the worst-case scenario. Currently, the different outcomes that result from the LOAIA and the TOAIA encourage contractors to forum shop in Louisiana, and exploration and production companies to forum shop in Texas. Additionally, litigating over what may have been initially agreed to in a choice of law provision defeats the purpose of the contract provision. Ultimately, uncertainty and revocations are costly.[137] Either exploration and production companies will pay less to contractors, reserving sums to pay claims or litigation, or this lack of mutual indemnifications could even have an activity level effect on smaller companies' expansion into Louisiana's oilfield industry. Additionally, as shown above, the LOAIA currently disincentivizes contractors to manage their employees safely. Ultimately, the LOAIA may have been passed by a strong contractor lobby, but it is counterproductive at this point.[138]

2. How Successful Could the TTAIA Be?

The TTAIA's principles offer a viable alternative to the LOAIA. From its enactment, it has produced relatively little litigation and acts as an objectively fair statute which allows indemnification to be conditioned only on a party's own negligence while allowing mutual indemnification (assuming they are not conditions to the contract) and without adopting the express negligence doctrine.[139] As such, it could prevent production and exploration companies from foisting inequities upon contractors.[140] Opponents of this statute could argue that it might lead to litigation regarding whether the action was caused by negligence, but the TTAIA has yet to have that effect in the transportation industry. Additionally, the statute is already presumably active within the oil and gas industry given the prevalence of transporting wastewater from oil-producing wells to water wells.

The largest issue with recommending that Louisiana should loosen its restrictions is that Louisiana's statute has a retrenched establishment. Despite any potential abuse of Louisiana's statutory regime, the law within Louisiana's policy statement for the LOAIA favors

137. Chesapeake Operating, Inc v. Nabors Drilling USA, Inc., 94 S.W.3d 163, 168.
138. Kehoe, *supra* note 1, at 1138–39.
139. *See* TEX. TRANSP. CODE ANN. § 623.0155.
140. *See id.*

contractors because Louisiana's statute has failed under judicial activism.[141]

141. *See id.*