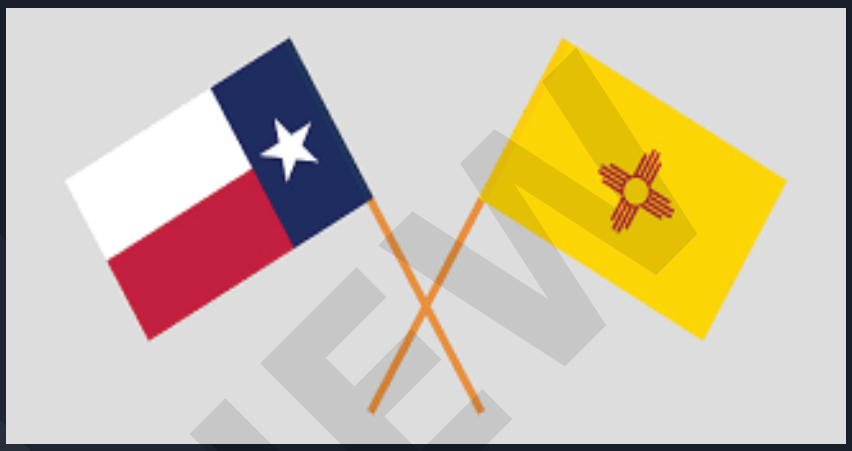
The New Mexico Oilfield Anti-Indemnity Act and The Texas Oilfield Anti-Indemnity Act



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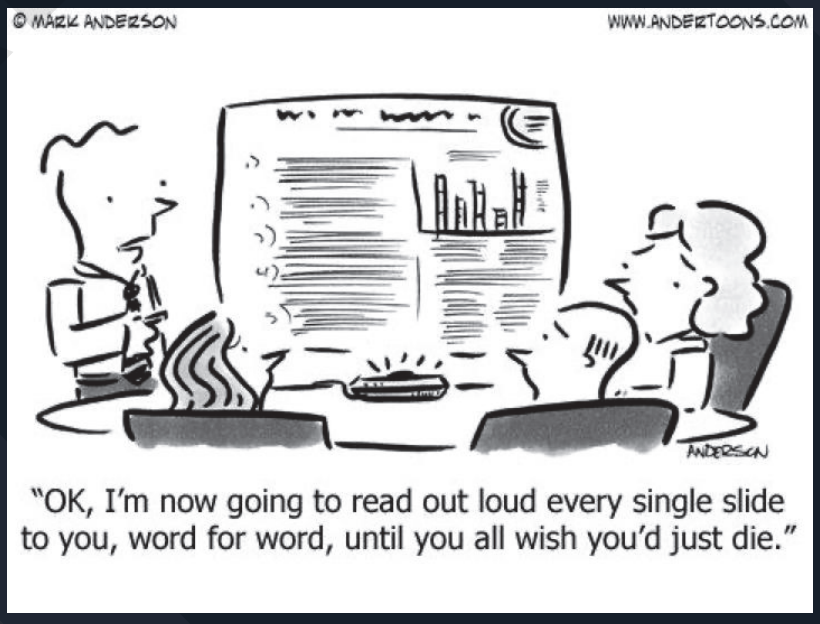

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Both acts seek to nullify "unilateral" indemnification provisions, a type of broad form indemnification which asks the indemnitor to indemnify the indemnitee for all losses regardless of fault, even if caused by the sole or concurrent negligence of the indemnitee.

CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY AND HOLD HARMLESS OPERATOR FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LIABILITIES, LOSSES, DAMAGES, PROCEEDINGS, CAUSES OF ACTION AND EXPENSES (INCLUDING COURT COSTS, ATTORNEY'S FEES AND OTHER LITIGATION COSTS), SUFFERED WITH RESPECT TO PERSONAL INJURY OF MEMBERS OF THE CONTRACTOR GROUP … **THE PARTIES INTEND THIS INDEMNITY TO APPLY TO ALL SUCH CLAIMS AND LOSSES BASED ON ANY THEORY OF LIABILITY, INCLUDING BUT NOT LIMITED TO, NEGLIGENCE, GROSS NEGLIGENCE, NEGLIGENCE PER SE….**

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Both states found that these unilateral indemnification provisions led to bad outcomes, such as small contractors being unable to pay for defense and indemnification costs and that the indemnified party would ignore safety protocols. The TOAIA and the NMOAIA will both nullify such clauses if the clause meets certain requirements under the Statutes

However, Texas and New Mexico have approached these issues very differently…

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However, both Statutes share similar tests in determining if they will nullify an indemnification clause.

First, the Statutes ask whether the contract containing the clause "pertains to a well for oil, gas, or water, or to mine for a mineral."

The TOAIA has a very broad definition of what agreements might pertain to a well. The Fifth Circuit once formulated a rule, stating that an agreement would fall under the TOAIA if it bore "a close nexus to a well and are directed toward the goal of obtaining or maintaining production from a well" However, by its own language, the TOAIA does not include transporting, selling, or purchasing natural gas via pipeline, and does not cover maintenance and construction of pipelines.

On the other hand, the NMOAIA has been ruled to only apply to activities "at the well head."

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Next, the Statutes asks whether the indemnification clause being examined is a unilateral indemnification provision.

There are no magic words to determine if the clause is a unilateral indemnification provision. It really is a case by case basis. By now most contracting parties will all use fairly similar forms, however you can never be too sure!

It is all about determining whether the clause asks one party to indemnify another in all situations, even if the first party was at fault.

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Title search: Indemnity Provisions in MSAs: Texas vs. New Mexico

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