

Louisiana and Texas: Oil Companies Face Significant Choice of Law Considerations Concerning Anti-Indemnity Statutes in Negotiating Indemnity and Defense Provisions¹

Elizabeth “Libby” McDonnell
Hedrick Kring Bailey PLLC

In *Federal Insurance Company v. Select Energy Services, LLC*, No. 54,161, 2022 WL 107984 (La. App. 2d Cir. Jan. 12, 2022), the Louisiana Second Circuit Court of Appeals’ recent opinion highlights the importance of contemplating choice of law issues and anti-indemnity statutes when negotiating mutual indemnity and defense clauses in oilfield contracts in Texas and Louisiana.

In *Select*, Exco Operating Company, LP and Exco Resources, Inc. (collectively “Exco”) drafted, negotiated, and executed a service agreement in Texas with drilling contractor, Select Energy Services (“Select”). Unfortunately, three workers sustained severe injuries on a Select oil rig when it collapsed while servicing an Exco drilling site in DeSoto Parish, Louisiana. One worker brought suit in Texas, and the other two sued in Louisiana.

In the Texas suit, Select accepted Exco’s demand for defense and indemnity and then Select’s primary insurer, Zurich, defended and eventually settled the case for \$31 million. Meanwhile, in the Louisiana case, the parties’ roles were reversed, with Exco being the indemnitor and Select being the indemnitee. Exco’s primary insurer, Federal, initially agreed to defend Select, subject to a reservation of rights; however, after the Texas settlement, Exco withdrew its defense in the Louisiana suit and filed suit in Louisiana seeking a declaratory judgment against Select and asserting a claim for unjust enrichment to recover the cost of Select’s defense. Exco alleged that the agreement’s indemnity clause was unenforceable under Louisiana Oilfield Anti-Indemnity Act.

The Louisiana Oilfield Anti-Indemnity Act declares “null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.” *Id.* at *6-*7 (quoting La. R.S. 9:2780). In contrast, the Texas Oilfield Anti-Indemnity Act generally invalidates oilfield indemnity agreements subject to an important exception. That exception allows enforcement of mutual indemnity obligations that are limited to the scope and amount of contractual indemnity insurance that each party as the indemnitor agrees to provide to the other as indemnitee. Thus, a mutual obligation is only enforceable when the indemnitor’s obligation is limited to the extent of the coverage and monetary limits of the contractual indemnity insurance.

Exco and Select’s agreement would fall within the exception to the Texas Act if Texas law applied. In other words, under Texas law, the indemnity obligation was enforceable because the

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Texas Act would not invalidate the mutual indemnity provision at issue. But if Louisiana law applied, the Louisiana statute would invalidate Exco's defense and indemnity obligations to Select. Thus, the primary issue was which state's law applied.

Select filed an answer and asserted a reconventional demand to recoup the \$31 million Texas settlement from Exco. Both parties moved for summary judgment. The trial court applied Louisiana law and granted Exco's motion for summary judgment. Select then appealed.

The Relevant Contractual Provisions and Choice of Law

The choice of law provision in the contract drafted by Exco called for Texas law to apply without regard to choice or conflict of law provisions that would direct application of the laws of another jurisdiction. But the agreement also recognized that, in the event Louisiana law and specifically the Louisiana Oilfield Anti-Indemnity Act were applied, the following, substitute indemnity provision would apply:

Company [Exco] shall defend, indemnify, hold harmless, and release contractor group [Select] from and against any and all claims, losses, damages, demands, causes of action, suits, and liability of every kind, including all expenses of litigation, court costs and attorney fees which may be incurred by contractor group as a result of such claims, demands, or suits brought or asserted against contractor group by any party whomsoever arising from any claim of loss, damage, injury, illness, or death described in subparagraphs (a) through (h) below, regardless (except as expressly provided herein) of who may be at fault or otherwise responsible under any other contract, or any statute, rule or theory of law.

The contract also provided that the parties agree that the indemnity and insurance obligations were separate and apart from each other, such that a failure to fulfill the indemnity obligations did not impact the insurance obligations or vice versa. Notably, the agreement also limited each party's indemnity obligations "for the other party's sole or concurrent negligence shall be limited to the [contractual indemnity] insurance carried by such party pursuant to [the mutual indemnity agreement]" the Texas Oilfield Anti-Indemnity Act applied.

Analysis of the Louisiana Second Circuit Court of Appeal

The Louisiana Second Circuit Court of Appeal conducted a choice of law analysis. It first looked to Louisiana Civil Code Article 3515, which sets forth the general framework of conflict of laws analysis in Louisiana and provides that an issue is "governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue." The court also looked to Louisiana Civil Code Article 3537, which specifically addresses conflict of law in contractual disputes. That provision provides that the state whose law is to be applied is "determined by evaluating the strength and pertinence of the relevant policies of the involved states in light of: (1) the pertinent contacts of each state to the parties and the transaction, including the place of negotiation, formation and performance of the contract, the location of the object of the

contract, and the domicile or residence of the parties; (2) the nature, type and purpose of the contract; and (3) the policies referred to in Article 3515 as well as policies of facilitating the orderly planning of transactions, of promoting multistate commercial intercourse, and protecting one party from undue imposition by the other.”

The court relied on a Louisiana Third Circuit case where the court faced a choice of law issue and held that Texas law applied in a personal injury case where the parties’ agreed with a Texas choice of law provision. There, the court observed the conflict of law between the Texas policy of allowing freedom of contract (embodied in the Texas Oilfield Anti-Indemnity Act) and the Louisiana Oilfield Anti-Indemnity Act’s policy of protecting oilfield contractors from adhesiary indemnity obligations. The Louisiana Third Circuit therefore found that, while Louisiana had a stronger relationship to the parties, the parties negotiated and agreed to the application of Texas law in their contract. Thus, there was a justified expectation that the indemnification provision would apply under Texas law.

The Louisiana Second Circuit held that Texas law applied. The court concluded that it would be a grave injustice and undue imposition on Select to allow Exco to avoid honoring its obligation under the mutual indemnity provision. The court noted that the dispute was between Texas companies who agreed to the application of Texas law. The court found that applying Louisiana law and invalidating the indemnity provision and thereby relieving Select of its obligation to perform would severely impair Texas’ interest in freedom of contract and outweigh any impairment to Louisiana policy that could result from failure to uphold Exco’s indemnity obligation. Louisiana’s policy to protect contractors from adhesiary indemnity obligations would not be impaired by enforcing Exco’s indemnity obligations to its contractor, especially when Select had already satisfied its indemnity obligations to Exco. Finally, the three injured workers had been paid substantially to settle the claims. As a result, Louisiana’s policy of compensating injured oilfield workers would not be impaired by application of Texas law. Because Texas law applied, the mutual indemnity obligation was enforceable. The court held that, by refusing to honor its indemnity obligations in the Louisiana litigation, Exco (and its insurers) breached the contract.