



# THE **Energy Dispatch**

A PUBLICATION OF THE  
IEL YOUNG ENERGY  
PROFESSIONALS' COMMITTEE

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**Interested in writing for *The Energy Dispatch*?** Young energy professionals may submit articles or ideas for our next issue to IEL's Director, Jay Ray ([jray@cailaw.org](mailto:jray@cailaw.org)).

## Upcoming IEL Events

### [9th Law of Shale Plays Conference](#)

September 5-6 in Pittsburgh, PA

### [11th Annual YEP General Counsel Forum](#)

September 20 in Houston, TX

### [4th Rockies YEP General Counsel Forum](#)

October 16 in Denver, CO

### [8th Oilfield Services Law Conference](#)

October 23 in Houston, TX

### [Energy Litigation 101 Conference](#)

November 7 in Houston, TX

### [17th Annual Energy Litigation Conference](#)

November 8 in Houston, TX

Visit our [website](#) for our full calendar and a list of our online offerings!

## IEL Announces Inaugural Leadership Class

The Institute for Energy Law (IEL) is honored to announce the thirty-five unique and accomplished individuals selected for its inaugural Leadership Class. IEL received an overwhelming number of outstanding applications for this first class, which made it very difficult for the selection committee. The class consists of attorneys from seven states and the District of Columbia and their experience ranges from three to twelve years of practice. The class includes a former military officer, business owners, a top scorer on the Texas bar exam, first generation immigrants, and even someone that can read and write in hieroglyphics. Members of the class have in-depth

experience not just in oil and gas, but also in environmental, health and safety, power, mining, bankruptcy, cybersecurity, construction and much more! Multiple members teach as adjunct professors in their spare time and the class as a whole is incredibly involved in their communities and are dedicated to pro bono efforts.

The class will meet in September for a day and a half leadership retreat geared specifically towards energy attorneys. The class will continue through April 2019 with webinars, networking events, programming at IEL's 70th Annual Oil and Gas Law Conference, culminating with graduation at the 3rd National Young Energy Professionals' Law Conference in San Antonio, Texas.

The inaugural class consists of the following individuals:

- Erich Almonte, King & Spalding LLP, Houston, Texas
- Brian Anderson, Chevron North America Exploration & Production Company, Coraopolis, Pennsylvania
- Nadège Assalé, Bradley Murchison Kelly & Shea LLC, New Orleans, Louisiana
- Lisa Butler, Squire Patton Boggs (US) LLP, Houston, Texas
- Eric Camp, Decker Jones, P.C., Fort Worth, Texas
- Aaron Friess, Stinson Leonard Street LLP, Bismark, North Dakota
- Amanda Hanks, Plains All American Pipeline, L.P., Houston, Texas
- Jackie Hickman, Liskow & Lewis, New Orleans, Louisiana
- Jeffrey Johnson, BHP Billiton Petroleum, Houston, Texas
- Jennifer Johnson, Willkie Farr & Gallagher LLP, Houston, Texas
- Benedict Kirchner, Steptoe & Johnson PLLC, Meadville, Pennsylvania
- Brad Knapp, Locke Lord LLP, New Orleans, Louisiana
- Lucas Liben, Reed Smith LLP, Pittsburgh, Pennsylvania
- Jesse Lotay, Jackson Walker LLP, San Antonio, Texas
- Jillian Marullo, Liskow & Lewis, Houston, Texas
- Luis Miranda, Miranda Law Firm, Houston, Texas
- Nick Morrell, Katten Muchin Rosenman LLP, Houston, Texas
- Christopher L. Morrow, The Williams Companies, Inc., Tulsa, Oklahoma
- Cristina Mulcahy, Stein & Brockmann, P.A., Santa Fe, New Mexico
- Sarah Nealis, Shearman & Sterling LLP, Houston, Texas
- Tina Nguyen, Baker Botts LLP, Houston, Texas
- Kelly O'Bryan da Mota, Cimmaron Land, Inc., Bridgeville, Pennsylvania

- Bryon Rice, Beck Redden LLP, Houston, Texas
- Tracey Rice, Copeland & Rice LLP, Houston, Texas
- Betty Richmond, Baker Donelson Bearman Caldwell & Berkowitz, PC, Houston, Texas
- Bianca Roberson, Shell Oil Company, Houston, Texas
- Jay Rothrock, Vinson & Elkins LLP, Washington, D.C.
- Brittany Salup, Chevron Upstream Law, Covington, Louisiana
- Rachel Scarafia, Kelly Hart & Pitre, New Orleans, Louisiana
- Jessica Schmidt, Holland & Hart LLP, Denver, Colorado
- Meghan Smith, Jones Walker, LLP, New Orleans, Louisiana
- Trevor Smith, The Williams Companies, Inc., Tulsa, Oklahoma
- Aditi Suresh, SunPower Corporation, Austin, Texas
- Justin Tschoepe, Norton Rose Fulbright US LLP, Houston, Texas
- Lauren Woodard, Shell Oil Company, Houston, Texas

## Interview with T. Lane Wilson

By: Erin Potter Sullenger, Crowe & Dunlevy

T. Lane Wilson is the General Counsel and Senior Vice President of The Williams Companies, Inc., based out of Tulsa, Oklahoma. He joined Williams in April 2017 after serving eight years on the bench as a federal magistrate judge in the U.S. District Court for the Northern District of Oklahoma. Lane received his law degree from The University of Tulsa College of Law. Before taking the bench, Lane was in private practice for fourteen years at the law firm of Hall Estill in Tulsa, focusing on complex commercial litigation, including both trial and appellate work representing energy, telecommunications, technology and construction companies. During my second year of law school, I had the opportunity to work in Lane's chambers as a law student extern and benefited from his guidance during those early years of my career. He remains one of my professional mentors. I was able to sit down with him and capture a little bit about his career path, how he approached the transition into his role as General Counsel at Williams, and his advice to young lawyers.

**EPS:** You started in the energy industry as an engineer. Did you plan to practice in the field of energy law when you went back to law school?

**TLW:** I knew when I graduated from undergrad that I did not want to be a true engineer. I wanted to be around people. Exxon offered me that opportunity in the upper Midwest as a part of their specialty products sales force (specialty products at Exxon included everything you could refine from crude oil except gasoline). When I accepted the job, Exxon was one of

the largest employers in the world, so even though I was in a small group within the company, I was still one of 90,000 employees. And I knew Exxon would relocate me before too long, likely to Houston where I could not avoid the massive size of the company. I had taken the LSAT in college and realized in late 1990 that my score was about to expire. I had performed well on the exam and had no interest in taking it again, so I applied to the The University of Tulsa College of Law, and when I received a full scholarship, I decided to give it a shot. When I started, I did plan to go into energy law, but then I took almost no energy law classes. Instead, I focused on the core courses and advanced levels of those courses. I absolutely fell in love with the law. That did not change when I started at Hall Estill. The firm threw me into energy law head first. On my second day, Jim Hardwick, one of the country's preeminent oil and gas attorneys, called me into his office, gave me *Wood v. TXO Production Corp.*, and told me to figure out what the Oklahoma Supreme Court meant when it used the phrase "duty to market" in the context of an oil and gas lease. As far as I know, the Oklahoma Supreme Court still has not answered that question.

**EPS:** Your career path is quite unique, garnering the perspective of private practice, the federal bench, and now general counsel. What has this journey taught you about the practice of law?

**TLW:** At Hall Estill, Jim Hardwick taught me that there is a fabric to the law. For the most part, it all fits together and has common roots, so if you truly understand the core subject matter, you can usually figure out the answer before you do any research. You could walk into Jim's office, ask him a question in an area of law he knew nothing about, but because he understood the "fabric" of the law, he could give you an answer that was pretty close to being right almost every time. I had a lot of fun in private practice and enjoyed the competitive nature of litigation, but in many ways it is merely an extension of law school, except that I got paid to do it. Then, as a judge, I was able to develop and hone an ability to view things from a neutral standpoint. My only purpose was to try to get to the right answer – I didn't care whether the plaintiff or the defendant won. There were only a few questions and one task, what does the law say? What do the facts look like? Now let's get to the right answer. I didn't have a client I needed to please. That has really benefited me here at Williams. Alan Armstrong, our CEO, places a premium on getting it right. So the ability to sit back and take a fresh look at issues without a pre-conceived bias and without letting personalities cloud my judgment is extremely helpful. To the extent I was a good judge, I would not have been one absent my 14 years in private practice. To the extent I am a good GC, I would not be without my time on the bench.

**EPS:** When you came to Williams, what resources did you turn to during the transition and once you arrived?

**TLW:** Of course my team and my colleagues at Williams provided me with all the information and support I needed. In terms of what I relied upon, I'm not sure it's a resource, but I have a number of mantras that have always served me well. The first is "learn to love learning." My first goal was just to learn. I told my team that I would be in the weeds and would ask a ton of questions and I prepared myself to learn in a new environment (the headquarters of a Fortune 500 company) and to resist the urge to pre-judge processes that were already in place. The second was transparency. I promised my team I would be transparent and that I expected the same. The third is honest debate. I told my team that they must be willing to push back on my ideas and tell me when they think I'm wrong. One thing that I do not tolerate well is people agreeing with me just to be agreeable. Fourth is the idea that most people are happy and the most productive when they are challenged. I want my team to challenge themselves and to push themselves to get better every day. If people sense that you are honest and transparent, then they are happy to give you their best. Finally, and maybe most importantly, I always try to have fun and I expect my team to do the same.

I shouldn't forget observation either. I did a lot of observing.

**EPS:** You've always devoted time out of your schedule to giving back to the Tulsa community. Why is this important to you?

**TLW:** I've got a pretty strong belief that we all have an obligation to give back to the community – whether that is money or time. I wanted to be involved in my kids' lives while they were and are in school and so I volunteered, and still do, in the schools. There is no better place for our resources than our schools. Look, anybody in this country who is willing to work hard and is willing to do what they say they are going to do and does it; they are going to have success. That may not mean rich or wealthy but they will have success and be able to support their family and enjoy their lives. A lot of kids do not get to see that fact modeled in their day-to-day lives. So everything I do at the schools is to show students the value of working hard and the importance of following through on commitments. If you make a commitment and follow through, you are going to do really well. That is irrespective of any characteristic that you have no control over, such as skin color or gender. Every kid needs to hear this message. Do not believe the narrative that you cannot be successful. If anyone around you is telling you that, you need to find someone else to be around.

**EPS:** You've been a mentor for numerous law students and

young attorneys and you've mentioned some mentors of your own. What piece of advice from your mentors has stuck with you along the way?

**TLW:** There are three things. First, Judge Claire Eagan has always been a mentor of mine, both at Hall Estill and when I joined the bench. She advised me to protect my reputation above all else. You can lose your reputation so fast. Attorneys with a good reputation get things done quicker, are more successful, and judges and colleagues have more respect for them. Second, good work finds good attorneys. That is just the fact. Finally, this comes from my dad, and I probably did not fully appreciate this or internalize it until later in my career: the worst form of communicating a problem is in writing, including email or texting. The telephone is only marginally better. We do not communicate nearly enough in-person and face-to-face. Especially when the situation is difficult or touchy, sit down and talk with the other person and do it in a respectful way.

**EPS:** Ok, this is a lightning round of questions and I am looking for short answers. First question, advice to outside counsel when working with in-house counsel.

**TLW:** Communicate.

**EPS:** Most memorable career moment.

**TLW:** There are two. One was my first jury trial victory, listening to the jury read the verdict was an amazing experience. Second, would be conducting my first naturalization ceremony as a judge, equally amazing to welcome new citizens to this country.

**EPS:** Morning run or afternoon tennis match?

**TLW:** Morning tennis match.

**EPS:** Travel via car or plane.

**TLW:** Depends, but probably plane.

**EPS:** This may be the toughest question of them all – cookies, cake, or pie.

**TLW:** (after much thought) I'll have to go with pie.

## YEP Member Highlight

Nadège A. Assalé ([Bio](#))

Special Counsel at Bradley Murchison Kelly & Shea LLC



### Inspiring Success Story

At age 18 and speaking only French, Nadège left her home in West Africa to learn English and become the first member of her family to obtain a secondary education. After successfully graduating from the University of Oklahoma in Energy Management and Finance, she began working for Shell Oil Company. Nadège's success story does not end there.

While working at Shell, strengthening her English, and supporting her family in Africa, Nadège attended night classes at Loyola University College of Law—where she graduated magna cum laude. Now, as a transactional attorney, she specializes in helping energy companies with their offshore operations and regulatory compliance. Nadège's courage and appetite for new challenges is truly inspiring.

**Hobbies:** Hang-gliding, paragliding, gardening, and cooking.

### Notable Achievement this Past Year:

Nadège was recently selected for the Institute of Energy Law's Inaugural Leadership Class. She attributes her success to the people who supported her and helped her along the way, recognizing that all of us can benefit from both giving and receiving help.

### Advice for other young lawyers:

"Be authentic. It is good to have role models, but find what is true to yourself and embrace that person."

## A Simple Three-Step Approach to Professional Development

By: Liam O'Rourke, Baker Botts L.L.P.

Thinking about professional development reminds me of New Year's resolutions. It is easy to list a bunch of things that we should be doing (e.g., eating healthy and working out), but they are hard to do. Like New Year's resolutions, worthwhile professional development goals require a significant amount of time and effort to achieve them.

This article does not summarize all the best professional development ideas out there, although reading articles on the topic will tell you to get a mentor and ask for more challenging work. This article instead focuses on three specific steps we, as young energy professionals, can take to make professional development, and investing in ourselves, easier and yield

more results over time.

**Define the term.** Professional development is a broad term that encompasses too many activities for one person to realistically work into his or her schedule. We all have demanding jobs and personal lives, so we need to define what professional development means for us right now and regularly reevaluate that definition. Otherwise, we will commit our time and energy to "professional development" activities that have no noticeable impact on our careers.

For me right now, professional development is about getting as much trial experience as possible and meeting new people with common interests (e.g., young energy professionals). To supplement my own trial experiences, I tell my friends to let me know when they are going to court, so I can watch and learn from their experiences. I have learned more going to different courthouses and watching other attorneys than I ever did listening to panels of trial attorneys swap war stories.

Our definitions of professional development can and should change over time. For example, as I become a more experienced trial attorney, there will likely be a natural progression from trying to get more trial experience to becoming a responsive adviser and mentor. However, I expect meeting new people in our industry and earning their trust will always be a critical part of the definition for me because those things are essential in a relationship-based service industry like law.

The only way to take professional development seriously and figure out what is worth your time is to stop and think about it. If you do and conclude that you are spending too much time on an activity that is showing no signs of producing results, then cut it and try something else.

**Focus your energy.** The basic goal of professional development is to be better at your job. For some, being the best is enough because they are the best; for the rest of us, it ultimately becomes more about who we know than what we know.

The thought of having to develop relationships today that will determine whether we are successful in the future is intimidating. How many decision makers are beating down your door right now for your services? Zero probably, but that may change sooner than you think.

Instead of focusing on current leadership, who likely already have a stable of advisers and people who they trust working for them, look for people around your level or below your level. It is much easier to approach someone closer to your age and experience, and it is even easier to be a resource for someone who is younger or has less experience than you. This way, as you get older and more experienced, your network in the industry will grow organically over time

because most of your contacts will be around your age and experience or younger with varying levels of experience.

**Show up.** After you figure out where you should be spending your time, and after you make some contacts, look for and take advantage of opportunities to work with and support your new contacts. Invite them to attend events with you, even if you know they were also invited and they will likely go on their own. Show up at their events, especially if they are the organizers and they want a good turnout. Donate your time and money when they are reaching out on social media for their charities. Nominate them for awards and recognition. Connect your contacts with each other. Offer to help them achieve their goals in any way you can (and without asking for a billing number if you are an attorney). This non-exhaustive menu of options can help you build trust on a personal level that will likely become trust on a professional level over time, which is good because your contacts will be decision makers or know decision makers in the future.

Professional development is tough; there are no shortcuts. Odds are you are not going to walk up to a CEO at a happy hour tomorrow and get his or her business the next day. It takes consistent effort over a long period of time. The three steps outlined above are a good start for those of us who have been putting off working on our professional development. Keep it simple and good luck.

## Ready! Fire! Aim! Two Drafting Traps to Avoid in Papering a “Rush” Deal

By Brandon Durret, Dykema Cox Smith

*This article is Part 2 in a two-part series. If you would like to read Part 1, [click here](#).*

### II. PERILS OF THE “NOTWITHSTANDING” CLAUSE

Another idiom of oil and gas contract drafting is the addition of “notwithstanding anything else herein to the contrary,” or language to similar effect, the intent of which is to give priority and control to its associated language. “When parties use the clause ... in a paragraph of their contract, they contemplate the possibility that other parts of their contract may conflict with that paragraph, and they agree that this paragraph must be given effect regardless of any contrary provisions of the contract.” *Helmerich & Payne Intern. Drilling Co. v. Swift Energy Co.*, 180 S.W.3d 635, 646 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

Texas case law provides many examples of successful uses of the “notwithstanding” clause. See *id.* at 643. For example, in *Gulf Oil Corp. v. Southland Royalty Co.*, 496 S.W.2d 547 (Tex. 1973), the Supreme Court of Texas held that an oil and gas lease was extended beyond its hard-cap 50-year

term, despite the lessee’s failure to drill, because the lease provided that time lost due to a force majeure event would not count against the lessee, “anything in this lease to the contrary notwithstanding.” However, two recent Texas cases demonstrate unsuccessful uses of the clause.

*Westport Oil & Gas Co., L.P. v. Mecom*, decided by the San Antonio Court of Appeals in December of 2016, is a prime example of a “notwithstanding” clause failing to have the desired effect. 514 S.W.3d 247 (Tex. App.—San Antonio 2016, no pet.). In *Westport*, the lessors under an oil and gas lease sued the lessee alleging underpayment of royalty. The lease provided that gas royalty would be based on “market value at the well,” which Texas law defines as “the prevailing market price for gas in the vicinity at the time of sale, irrespective of the actual [gas purchase agreement] sale price.” *Id.* citing *Bowden v. Phillips Petrol. Co.*, 247 S.W.3d 690, 699 (Tex. 2008). Both parties admitted that the lessee had paid the lessors on this basis.

However, another lease clause provided that, “[n]otwithstanding any other provision of this lease to the contrary,” any gas sales contract that lessee entered must have a sales price “computed on the average of the highest price paid by three separate Intrastate Purchasers of gas of like quality and quantity ... .” Lessors argued that this clause amends the standard definition of “market value,” obligating the lessee to pay the lease royalty based on this higher price basis. See *id.* at 252-53. Specifically, the lessors argued that the “notwithstanding” language shows the parties’ intent for this clause to override the “market value” language.

The lessee countered that the clause only restricts the sales price that lessee may accept when entering a gas sales contract, but does not alter the “market value” price basis for lessors’ royalty. The court agreed:

[T]he notwithstanding clause operates only against “any other provision of this lease to the contrary.” Construing the plain language of the royalty and gas purchase agreement sales price provisions in light of the applicable case law, we conclude the royalty provision is not contrary to the gas purchase agreement provision and the notwithstanding clause does not elevate [the] gas purchase agreement minimum sales price over [the] express market value at the well royalty provision.

*Id.* The court further held:

“Although some leases may calculate the royalty owed based on the gas purchase agreement sales price, this one does not. ... The two paragraphs do not refer to each other, and there is no other lease language that makes the royalty provision subject to the gas purchase agreement minimum sales price provision.”

*Id.* In other words, the court did not give effect to the “notwithstanding” clause because the language it preceded was *not in conflict* with the royalty clause. The lease royalty was not based on sales price, so the lease provision requiring a minimum sales price did not affect the calculation of royalty. As such, the court held that it could give full meaning and effect to both clauses at the same time and rendered judgment for the lessee.

The *Westport* opinion provides an important practice tip for effective use of a “notwithstanding” clause: reference the conflicting contract language that it is intended to override. A court may be more likely to find a conflict between the relevant contract clauses if the contract reads, “notwithstanding the terms of Paragraph 13,” for example.

However, the main reason the *Westport* court did not find a conflict between the relevant lease clauses is because avoiding conflicting contract terms *is the court’s job*. “To construe an unambiguous lease, we ‘examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.’” *Id.* In other words, courts prefer a construction that gives effect to both clauses over a construction that renders one or the other meaningless, even in the face of a “notwithstanding” clause indicating the parties’ understanding that the clauses might conflict.

In August of 2017, the El Paso Court of Appeals similarly construed a “notwithstanding” clause in *Apache Deepwater, LLC v. Double Eagle Dev., LLC*, 2017 Tex. App. LEXIS 8062 (Tex. App.—El Paso 2017, pet. filed). This case involved a retained acreage clause in an oil and gas lease, which provided in part: “Notwithstanding anything to the contrary in the foregoing, Lessee covenants to release this lease after the primary term except as to each producing well on said lease ... .” The lessee argued that this language effected a typical one-time or “snapshot” partial termination event at the end of the primary term.

The lessor, who brought the lease termination suit, argued that this language effected a “rolling” partial termination, meaning that each unit of lease acreage retained at the end of the primary term can only be perpetuated during the secondary term by continuous production from or operations on such unit itself. Its central argument was that the phrase “after the primary term” should be construed to mean a cessation of production any time after the primary term, not just once at the end of the primary term. The lessor cited the “notwithstanding” language as evidence of the parties’ intent to negate the habendum clause, which would otherwise allow the lease to be perpetuated by production from anywhere on the leased premises. See *id.* at \*11.

The court disagreed, holding that the retained acreage clause’s language was not “clear, precise, and unequivocal” enough to negate the habendum clause and create rolling partial termination. *Id.* at \*15-16. While it does create a special limitation on the lease, the retained acreage clause does not contradict the habendum clause or demonstrate intent to carve up the leased premises into a separate lease for each retained unit. As such, production from any well will perpetuate the partially-terminated lease during the secondary term.

Despite the “notwithstanding” clause, the court held that the lessor “cannot escape that it must find language that clearly negates the habendum” for the lease to have rolling partial termination. *Id.* at \*16. In other words, the “notwithstanding” clause has no effect unless the lease language it precedes is in irreconcilable conflict with another lease term.

*Apache Deepwater* shows us that a “notwithstanding” clause has no substantive power by itself. It is not a substitute for thoughtful drafting. It does not make the language it modifies any more clear or precise, nor does it lend analytical strength to the argument of the party referencing it. It is merely a tie-breaker, which is activated only in the unlikely event of a tie. Thus, as in *Westport*, a “notwithstanding” clause becomes relevant when the court cannot reconcile two contradictory terms, which courts try to avoid.



## Pennsylvania Superior Court Weighs in on Subsurface Trespass

By Lucas Liben, Reed Smith LLP

*The author would like to thank Kazi S. Ahmed, Summer Associate at Reed Smith LLP, for his contributions to this work.*

On April 2, 2018, the Superior Court of Pennsylvania decided *Briggs v. Southwestern Energy Production Co.*, 184 A.3d 153

(Pa. Super. Ct. 2018) and held that hydraulic fracturing may constitute an actionable trespass where subsurface fractures, fracturing fluid, and proppant cross boundary lines and extend into the subsurface estate of an adjoining property for which the operator does not have a mineral lease, resulting in the extraction of natural gas from beneath the adjoining landowner's property. Briggs appears to be only the third decision in the nation to squarely address this issue, which had previously been dealt with only by the Texas Supreme Court and in a vacated federal District Court opinion.

#### ***Coastal Oil & Gas Corp. v. Garza Energy Trust***

In *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008), the Texas Supreme Court held that the rule of capture precludes liability for trespass as a result of hydraulic fracturing. The rule of capture is a fundamental principle of oil and gas law which precludes liability for drainage of oil and gas from under the lands of another. The Garza court offered four reasons in support of its holding: (1) the law already afforded full recourse to landowners claiming damages either by suing lessees for violation of the covenant to protect against drainage or by drilling their own wells; (2) the Texas Railroad Commission was the appropriate authority to regulate oil and gas production rather than the courts; (3) determining the value of oil and gas drained by hydraulic fracturing was problematic because trial judges and juries are ill-equipped to account for the social policies, industry operations, and the greater good in deciding the legality of hydraulic fracturing; and (4) the rule of capture should not apply differently to hydraulic fracturing because no one in the industry appeared to want or need the change.

#### ***Stone v. Chesapeake Appalachia, LLC***

In *Stone v. Chesapeake Appalachia, LLC*, 2013 WL 2097397 (N.D. W. Va. Apr. 10, 2013), vacated, 2013 WL 7863861 (N.D. W. Va. July 30, 2013), the United States District Court for the Northern District of West Virginia held that hydraulic fracturing under the land of a neighboring property without that party's consent is not protected by the rule of capture, but rather constitutes an actionable trespass. The Stone court was persuaded by the dissent in Garza and reasoned that (1) not all property owners are sophisticated enough or have the resources to drill their own well, (2) the Texas Railroad Commission had more regulatory power than West Virginia's regulatory authority, (3) difficulty in proving matters such as damages would not be a new problem for trial lawyers, and (4) the desires of the industry should not overcome the property rights of small landowners. The Stone opinion was later vacated.

#### ***Briggs v. Southwestern Energy Production, Co.***

The *Briggs* court recognized Pennsylvania's acceptance

of the rule of capture but drew a distinction between hydraulic fracturing and operating for natural gas absent fracturing. The Superior Court reasoned that operations absent fracturing target oil and gas from common subsurface reservoirs in which the oil and gas can migrate freely across property lines. On the other hand, said the court, hydraulic fracturing operations target natural gas trapped within shale formations. Only after the shale formation has been hydraulically fractured can the natural gas migrate freely. Therefore, according to the Briggs court, the rule of capture does not preclude liability for hydraulic fracturing because the process is allegedly distinguishable from oil and gas extraction which does not involve fracturing.

The Superior Court, however, will not necessarily have the final say on this issue in Pennsylvania. Southwestern has filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, giving the Commonwealth's highest court the opportunity to weigh in on the issue.

## **Understanding Similarities and Differences in Four Oilfield Anti-Indemnity Acts**

By Zoë Vermeulen, Kean Miller LLP

Indemnity provisions are widely used in the energy industry as a method of contractually apportioning liability between parties. These provisions are a staple in Master Service Agreements and can be unilateral or mutual. Often, agreements contain knock-for-knock provisions where each party assumes responsibility for claims made by its own employees or subcontractors. When disputes arise, indemnity provisions are often the first thing reviewed, because of their potential to dramatically affect the liability (or lack thereof) of one of the contracting parties. But many states limit contractual indemnity agreements, particularly those that attempt to indemnify a party for its own negligence. And four states – Louisiana, New Mexico, Texas, and Wyoming – have "anti-indemnity" acts specific to oilfield contracts.

While the primary purpose and language of these Oilfield Anti-Indemnity Acts are similar, there are some significant differences between them. Some of the biggest differences relate to what agreements are covered, the treatment of property damage claims, and whether additional insured/waiver of subrogation provisions are permitted to cover indemnity obligations. Given the importance of these indemnity provisions, oil and gas transactional and litigation attorneys should be well-versed in the laws governing them.

A brief treatment of the four Oilfield Anti-Indemnity Acts follows, but there are various nuances to each and years of



case law that are beyond the scope of this article. Contract drafters and litigators alike should familiarize themselves with the statute for the state in which their contract work is performed. This is particularly important with Anti-Indemnity Acts because courts typically reject attempts to avoid such acts through choice-of-law provisions selecting more favorable state laws or general maritime law.

#### **TEXAS OILFIELD ANTI-INDEMNITY ACT**

The Texas Oilfield Anti-Indemnity Act (“TOAIA”) applies to agreements pertaining to a well for oil, gas, or water or to a mine for a mineral (Tex. Civ. Prac. & Rem. Code § 127.001, *et seq.*). The TOAIA applies not only to agreements for production activities at the wellhead, but also to agreements for collateral services including furnishing or renting equipment, incidental transportation, and other goods and services furnished in connection with such services. But the TOAIA expressly excludes construction, repair, and maintenance of pipelines.

The TOAIA voids indemnification obligations that purport to indemnify a person against loss or liability for damage that (1) is caused by or results from the sole or concurrent negligence of the indemnitee; and (2) arises from (a) personal injury or death; (b) property injury; or (c) other loss, damage, or expense that arises from personal injury, death or property injury.

The TOAIA is the only Oilfield Anti-Indemnity Act that expressly allows limited insurance coverage of indemnity agreements that are otherwise void under the Act. With respect to a mutual indemnity obligation, the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party (as indemnitor) has agreed to obtain for the benefit of the other party (as indemnitee). If the indemnity obligation is unilateral, the amount of insurance required may not exceed \$500,000.

Additionally, for any indemnity provision to be valid in Texas, Texas case law requires that it comply with fair notice and conspicuousness requirements. Generally the contract must clearly establish the indemnitor’s express intent to indemnify for the indemnitee’s own negligence, and the indemnity language must be conspicuous enough to put a reasonable person on notice that the obligation provides indemnity for the other party’s own negligence. For this reason, many Texas-based indemnity provisions are written in some combination of all capital letters, bold, and underline – or all three.

#### **LOUISIANA OILFIELD ANTI-INDEMNITY ACT**

The Louisiana Oilfield Anti-Indemnity Act (“LOAIA”) applies to agreements pertaining to a well for oil, gas, or water, or

drilling for minerals (La. Rev. Stat. Ann. § 9:2780.). The LOAIA prohibits indemnification for an indemnitee’s own negligence or fault that causes death or bodily injury to another person. Unlike the other three Oilfield Indemnity Acts, the LOAIA does not prohibit indemnification for property damage.

The LOAIA also differs from the TOAIA because it expressly prohibits agreements requiring waivers of subrogation, additional named insured endorsements, or any other form of insurance protection that would frustrate or circumvent the prohibitions on defense and indemnity agreements. In other words, contracting parties cannot avoid the LOAIA by merely requiring insurance coverage to support indemnity obligations. But, there is an important jurisprudential exception to this insurance prohibition, known as the Marcel exception (*Marcel v. Placid Oil Co.*, 11 F.3d 563, 569–70 (5th Cir. 1994)). Under the Marcel exception, the LOAIA will not invalidate an indemnity provision and additional insured coverage if the party being indemnified pays the premiums for the insurance and no material part of the cost of the insurance is borne by the party procuring the coverage.

#### **NEW MEXICO OILFIELD ANTI-INDEMNITY ACT**

The New Mexico Oilfield Anti-Indemnity Act (“NMOAIA”) also applies to oilfield services, but its application is limited to production activities at the well head and does not cover all services rendered in connection with the well (N.M. Stat. Ann. § 56-7-2.). New Mexico case law has provided that the NMOAIA does not apply to the distribution, processing, or transportation of oil or gas. Unlike the LOAIA, the NMOAIA is not expressly limited to death or bodily injury, but, instead applies generally to “loss or liability for damages.”

The NMOAIA also prohibits additional insured provisions or waivers of subrogation that would have the effect of imposing a duty of indemnification on the primary insured party.

#### **WYOMING OILFIELD ANTI-INDEMNITY ACT**

The Wyoming Oilfield Anti-Indemnity Act (“WOAIA”) applies to agreements pertaining to any well for oil, gas or water, or mine for any mineral (Wyo. Stat. Ann. § 30-1-131.). The WOAIA prohibits agreements that purport to relieve the indemnitee from loss or liability for his own negligence. It also applies to death or bodily injury to persons, property damage, and any other loss, damage or expenses arising from death or bodily injury or property damage.

The WOAIA contains no language specifically addressing the effect of the Act on insurance coverage for an indemnity agreement prohibited under the Act. It simply states that the anti-indemnity act “shall not affect the validity of any insurance contract or any benefit conferred by the Worker’s Compensation Law . . . of this state.”

**CONSTRUCTION ANTI-INDEMNITY ACTS**

While this article specifically addresses Oilfield Anti-Indemnity Acts, practitioners are cautioned that many more states have enacted construction anti-indemnity statutes. While not specifically targeted to oilfield contracts, some of these construction anti-indemnity statutes can certainly apply to work in the energy industry. Imagine, for example, an indemnity provision in a Louisiana contract for sandblasting and painting an offshore platform. While this may or may not be a contract “pertaining to a well,” it arguably could be considered a “construction contract” under Louisiana’s definition, and the indemnity provision could be invalidated by the construction anti-indemnity act.

Like the Oilfield Anti-Indemnity Acts, these construction anti-indemnity acts vary widely from state to state and have many exceptions and nuances. And awareness of and familiarity with these statutes is also critical to adequately evaluating the viability of a contractual indemnity provision.



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A PUBLICATION OF THE  
IEL YOUNG ENERGY  
PROFESSIONALS' COMMITTEE