

APRIL 2020

VOL. 20-4

PRATT'S

ENERGY LAW

REPORT



LexisNexis

EDITOR'S NOTE: IN THE STATES

Victoria Prussen Spears

PROTECTING MUTUAL INDEMNITY PROVISIONS FROM THE NEW MEXICO OILFIELD ANTI-INDEMNITY ACT

Tom Donaho

CALIFORNIA TAKES ACTION TO AVOID ELECTRICITY SHORTAGES AND RELIABILITY CHALLENGES

Monica A. Schwabs, Neeraj Arora, F. Jackson Stoddard, and Levi McAllister

SITTING STILL (OR HOW STATE ANTI-IDLING LAWS ARE LANDING TRANSIT AND TRANSPORTATION COMPANIES IN FEDERAL COURT)

Aaron M. Flynn, Christopher J. Cunio, Michael J. Altieri, and Lauren Bachtel

TEXAS SUPREME COURT REJECTS "ACCIDENTAL PARTNERSHIPS" AND AFFIRMS REVERSAL OF \$535 MILLION PIPELINE JUDGMENT

Timothy S. Durst, Louis Layrisson, Liam O'Rourke, and Shayna M. Goldblatt

CUTTING CARBON, SAVING DOLLARS? PHILADELPHIA ADOPTS BUILDING ENERGY EFFICIENCY TUNEUP REQUIREMENT

Brad A. Molotsky and David Amerikaner

Pratt's Energy Law Report

VOLUME 20

NUMBER 4

April 2020

Editor's Note: In the States

Victoria Prussen Spears

109

Protecting Mutual Indemnity Provisions from the New Mexico Oilfield Anti-Indemnity Act

Tom Donaho

111

California Takes Action to Avoid Electricity Shortages and Reliability Challenges

Monica A. Schwebs, Neeraj Arora, F. Jackson Stoddard, and Levi McAllister

120

Sitting Still (or How State Anti-Idling Laws Are Landing Transit and Transportation Companies in Federal Court)

Aaron M. Flynn, Christopher J. Cunio, Michael J. Altieri, and Lauren Bachtel

127

Texas Supreme Court Rejects "Accidental Partnerships" and Affirms Reversal of \$535 Million Pipeline Judgment

Timothy S. Durst, Louis Layrisson, Liam O'Rourke, and Shayna M. Goldblatt

132

Cutting Carbon, Saving Dollars? Philadelphia Adopts Building Energy Efficiency Tuneup Requirement

Brad A. Molotsky and David Amerikaner

136

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please email:

Jacqueline M. Morris at (908) 673-1528
Email: jacqueline.m.morris@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT’S ENERGY LAW REPORT [page number]
(LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT’S ENERGY
LAW REPORT 4 (LexisNexis A.S. Pratt)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc. Copyright © 2020 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

SAMUEL B. BOXERMAN

Partner, Sidley Austin LLP

ANDREW CALDER

Partner, Kirkland & Ellis LLP

M. SETH GINTHER

Partner, Hirschler Fleischer, P.C.

STEPHEN J. HUMES

Partner, Holland & Knight LLP

R. TODD JOHNSON

Partner, Jones Day

BARCLAY NICHOLSON

Partner, Norton Rose Fulbright

BRADLEY A. WALKER

Counsel, Buchanan Ingersoll & Rooney PC

ELAINE M. WALSH

Partner, Baker Botts L.L.P.

SEAN T. WHEELER

Partner, Latham & Watkins LLP

Hydraulic Fracturing Developments

ERIC ROTHENBERG

Partner, O'Melveny & Myers LLP

Pratt's Energy Law Report is published 10 times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2020 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house energy counsel, government lawyers, senior business executives, and anyone interested in energy-related environmental preservation, the laws governing cutting-edge alternative energy technologies, and legal developments affecting traditional and new energy providers. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to Pratt's Energy Law Report, LexisNexis Matthew Bender, 121 Chanlon Road, North Building, New Providence, NJ 07974.

Protecting Mutual Indemnity Provisions from the New Mexico Oilfield Anti-Indemnity Act

*By Tom Donaho**

If parties wish to protect their contractual indemnity rights by circumventing the New Mexico Oilfield Anti-Indemnity Act, they should consider including in their contracts a mandatory venue provision that designates a Texas venue and a choice-of-law provision that identifies Texas law as controlling. The author of this article discusses contractual indemnity and the New Mexico Oilfield Anti-Indemnity Act.

One of the challenges frequently facing operators and oilfield service companies today is how to craft a risk management program that navigates the anti-indemnity acts of oil-rich states such as Texas, New Mexico, Louisiana, and Wyoming. In an effort to limit potential liability, these companies frequently include in their form contract agreements mutual (or “knock for knock”) indemnity provisions that purport to indemnify each party to the agreement against damages caused by its own negligence.

While such indemnity agreements may be valid and enforceable in some states, New Mexico has enacted a statute that renders them void. How, then, can an operator or oilfield service company that does business in both Texas and New Mexico ensure that its indemnity protections are not busted by New Mexico’s anti-indemnity law? The answer may come in the form of a mandatory venue provision.

SUMMARY

- The New Mexico Oilfield Anti-Indemnity Act (“NMOAIA”) voids indemnity agreements that purport to indemnify a party against liability for damages caused by the party’s own negligence.
- The Texas Oilfield Anti-Indemnity Act (“TOAIA”) voids the same category of indemnity agreements but contains a “safe harbor” exception for indemnity agreements that are expressly supported by insurance.
- New Mexico courts will not allow parties to avail themselves of TOAIA’s safe harbor exception where the parties have contractually agreed to the application of Texas law, because NMOAIA precludes

* Tom Donaho is an attorney at Baker & Hostetler LLP who focuses his practice on complex commercial and business litigation, and working with energy companies to develop contracts that serve risk allocation needs through indemnity and insurance protections. Mr. Donaho also navigates anti-indemnity statutes across the country, including the Texas Oilfield Anti-Indemnity Act. He may be contacted at tdonaho@bakerlaw.com.

application of foreign law to the extent that foreign law conflicts with New Mexico's public policy set forth in its anti-indemnity act.

- If parties to an indemnity agreement wish to circumvent application of NMOAIA and increase the chances that Texas law is applied, they should include (1) a mandatory venue provision that designates a Texas venue and (2) a choice-of-law provision that identifies Texas law as controlling.
- In the event of an incident in a New Mexico oilfield, a party seeking indemnity will need to make an expedient demand for defense and indemnity pursuant to the operative contract. If the demand is rejected or ignored by the potential indemnitor, a declaratory judgment action should be initiated in the mandatory Texas venue as soon as practicable.

OILFIELD ANTI-INDEMNITY ACTS

The New Mexico and Texas legislatures have both enacted statutes that generally void agreements that purport to create indemnity for an oilfield indemnitee's sole or concurrent negligence.¹

Texas Oilfield Anti-Indemnity Act

TOAIA provides that agreements pertaining to a well for oil, gas or water, or a mine for a mineral, are void as a matter of public policy if they purport to indemnify an entity against liability for damage that arises from personal injury or death and is "caused by or results from the sole or concurrent negligence of the indemnitee, his agent or employee, or an individual contractor directly responsible to the indemnitee."²

However, the Texas legislature specifically carved out a safe harbor provision that saves indemnity agreements supported by insurance. TOAIA does not apply to agreements that purport to indemnify parties against liability for their own negligence if:

- (a) [T]he parties agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the indemnitor, subject to the limitations specified in Subsection (b) or (c).
- (b) 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

¹ See N.M. Stat. Ann. § 56-7-2; TEX. CIV. PRAC. & REM. CODE ANN. § 127.003(a) (West 2011).

² TEX. CIV. PRAC. & REM. CODE ANN. § 127.003 (West 2016).

agreed to obtain for the benefit of the other party as indemnitee.

- (c) With respect to a unilateral indemnity obligation, the amount of insurance required may not exceed \$500,000.³

Where parties have entered into a mutual indemnity obligation, that obligation is capped at the “dollar limits” of the insurance the parties contractually agree to provide in support of their indemnity obligations.⁴ Where only one party has agreed to indemnify the other, that indemnity obligation may be capped at \$500,000.⁵

New Mexico Oilfield Anti-Indemnity Act

Similar to Texas’s oilfield anti-indemnity act, NMOAIA voids any indemnity provision that “purports to indemnify the indemnitee against loss or liability for damages arising from”—

- (1) The sole or concurrent negligence of the indemnitee or its agents or employees;
- (2) The sole or concurrent negligence of an independent contractor who is directly responsible to the indemnitee; or
- (3) An accident that occurs in operations carried on at the direction or under the supervision of the indemnitee or in accordance with methods and means specified by the indemnitee.⁶

The statute applies to “an agreement pertaining to a well for oil, gas or water, or mine for a mineral, within New Mexico.”⁷

Unlike Texas’ oilfield anti-indemnity act, NMOAIA does not contain a safe harbor provision that holds as valid indemnity provisions supported by insurance. New Mexico courts historically allowed parties to contract around NMOAIA through Texas choice-of-law provisions.

³ TEX. CIV. PRAC. & REM. CODE ANN. § 127.005.

⁴ TEX. CIV. PRAC. & REM. CODE ANN. § 127.005(b).

⁵ TEX. CIV. PRAC. & REM. CODE ANN. § 127.005(c).

⁶ N.M. STAT. ANN. § 56-7-2 (West 2016).

⁷ *Id.* An “agreement pertaining to a well for oil, gas or water, or mine for a mineral” means an agreement: (1) concerning any operations related to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging or otherwise rendering services in connection with a well drilled for the purpose of producing or disposing of oil, gas or other minerals or water; (2) for rendering services in connection with a mine shaft, drift or other structure intended for use in the exploration for or production of a mineral; or (3) to perform a portion of the work or services described in Paragraph (1) or (2) of this subsection or an act collateral thereto.

For example, in *Reagan v. McGee Drilling Corp.*, the New Mexico Supreme Court held that an indemnity provision covered by the indemnitor's insurance policy and governed by Texas law was valid.⁸ The court stated that "while a Texas indemnity contract covered by insurance is contrary to the letter of New Mexico law, it does not promote a policy at odds with New Mexico policy."⁹

Notably, this NMOAIA end-around was foreclosed in 1999 when the New Mexico Legislature amended the act to expressly state that indemnity provisions covered by the indemnitor's insurance are against New Mexico public policy and therefore void.¹⁰

In 2003, the New Mexico Legislature amended NMOAIA again so as to "make clearer what was already implicit in the 1999 amendments . . . indemnification agreements that undermine the indemnitee's incentive to promote safety at New Mexico well sites violate a fundamental public policy . . . are void and unenforceable . . . and further, agreements that purport to escape the effect of [NMOAIA] by invoking foreign law, likewise, are against public policy and are void and unenforceable."¹¹ Thus, New Mexico courts will not allow parties to escape the nullifying reach of NMOAIA by contractually agreeing to the application of Texas law.¹²

ESCAPING NEW MEXICO FOR TOAIA'S SAFE HARBOR

In order to escape the reach of New Mexico's strict anti-indemnity statute, the contracting parties may consider including in their agreement a mandatory forum selection clause that names a forum in Texas as the appropriate forum for resolution of any dispute arising from the agreement. Whereas a New Mexico court will refuse to apply Texas law to save an insured indemnity agreement on the grounds of public policy, a Texas court will not be so constrained.

⁸ *Reagan*, 933 P.2d 867, 871 (N.M. 1997).

⁹ *Id.*

¹⁰ N.M. STAT ANN. § 56-7-2(C); *Pina v. Gruy Petroleum Mgmt.*, 136 P.3d 1029, 1034 (N.M. Ct. App. 2006).

¹¹ N.M. STAT ANN. § 56-7-2(A) ("An agreement, covenant or promise, *foreign or domestic*, contained in . . . an agreement pertaining to a well for oil, gas or water, or mine for a mineral, within New Mexico, that purports to indemnify the indemnitee against loss or liability for damages arising from the circumstances specified . . . is against public policy and is void."); *Pina*, 136 P.3d at 1034.

¹² *Pina*, 136 P.3d at 1034 ("Accordingly, a choice-of-law provision contained in a contract executed subsequent to the effective date of Section 56-7-2 as amended by the 1999 Legislature and that purports to apply Texas' anti-indemnity statute to validate an otherwise prohibited indemnification agreement pertaining to work to be performed at a New Mexico oil well site is itself void as against public policy.").

Mandatory Forum Selection Clause and Transfer of Venue

The U.S. Supreme Court has recognized that a mandatory forum selection clause “should control absent a strong showing that it should be set aside.”¹³ The party resisting enforcement of a forum selection clause carries a “heavy burden of proof” to overcome the presumption that the clauses are valid and enforceable.¹⁴

Furthermore, “New Mexico . . . has a strong public policy of freedom of contract that requires enforcement of contracts unless they *clearly contravene* some law or rule of public morals.”¹⁵ New Mexico courts adhere to the general principle that forum selection clauses are *prima facie* valid.¹⁶ The rule in New Mexico is that “when venue is specified in a forum selection clause with mandatory or obligatory language, the clause will be enforced” unless found to be unreasonable.¹⁷

For example, in *Knight Oil Tools, Inc. v. Unit Petroleum Co.*, Knight Oil Tools Inc. (“Knight”) and Unit Petroleum Co. (“Unit”) entered into a Master Well and Lease Service Contract wherein Knight agreed to lease certain equipment, such as pipes and joints, to Unit for use at oilfields throughout New Mexico.¹⁸ When Unit returned hundreds of joints to Knight in damaged condition, Knight filed suit in New Mexico state court alleging breach of contract and tort damages.¹⁹ Unit timely removed the action to the U.S. District Court for the District of New Mexico and filed a motion to dismiss, or in the alternative, a

¹³ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

¹⁴ *Id.*

¹⁵ *K.R. Swerdfeger Constr. v. UNM Bd. of Regents*, 142 P.3d 962, 970 (N.M. Ct. App. 2006) (emphasis added) (internal citations omitted). Note that a party resisting transfer of venue and/or dismissal may argue that enforcement of a mandatory venue provision could undermine New Mexico’s public policy set forth in NMOAIA, but this argument is speculative and not supported by case law. First, a choice-of-law provision and forum selection clause are different provisions with different purposes and providing different results. See *Robbins & Meyers*, No. Civ. 01-0201E(F) (S.D.N.Y. Aug. 23, 2001) (not designated for publication) (noting that “a choice of law clause and a forum selection clause are not the same, and address different needs and concerns”); *Oestreicher v. Alienware Corp.*, 502 F.Supp.2d 1061, 1006 n. 2 (N.D.Cal. 2007) (recognizing that a separate analysis is required to determine the enforceability of a choice-of-law provision versus a forum selection clause). Second, a transfer of venue to Texas does not guarantee application of Texas’ substantive law, even if the subject contract contains a Texas choice-of-law provision. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 187–188.

¹⁶ *Mueller v. Sample*, 93 P.3d 769, 772 (N.M. Ct. App. 2004).

¹⁷ *Id.* at 773.

¹⁸ *Knight Oil Tools, Inc. v. Unit Petroleum Co.*, No. Civ. 05-0669 (D.N.M. Aug. 31, 2005) (Browning, J.).

¹⁹ *Id.*

motion to transfer the venue to Oklahoma, pursuant to a mandatory forum selection clause.²⁰ The forum selection clause contained in the Master Well and Lease Service Contract read:

This Contract, and all amendments, modifications, alterations, or supplements thereto, shall be governed by the laws of the State of Oklahoma as to the nature, validity, and interpretation thereof and that venue for any action involving this Contract shall be in the appropriate state or federal court located [in] Tulsa County, Oklahoma.²¹

As an initial matter, the court held that removing the case to federal court from state court did not waive the defendants' ability to enforce the forum selection clause.²² Then, relying upon mandatory language contained in the forum selection clause (that is, "shall"), the court held the clause to be mandatory and enforceable.²³ As such, the case was transferred to the Northern District of Oklahoma pursuant to 28 U.S.C. § 1406(a).²⁴

Thus, where parties to an agreement have included a mandatory venue provision identifying a Texas venue, New Mexico courts will likely enforce the provision and either dismiss the case or transfer the case to the proper venue in Texas pursuant to 28 U.S.C. § 1406(a).

Applying Texas' Choice-of-Law Rules

Once in Texas, the parties are not guaranteed application of Texas law. However, New Mexico's prophylactic rule against application of Texas law to indemnity agreements will no longer apply. In Texas, courts generally honor contracting parties' bargained-for and expressed choice of which state's laws govern their performance under the contract.²⁵

Historically, Texas courts have looked to the RESTATEMENT (SECOND) OF CONFLICT OF LAWS Section 187 to determine which state's law applies to the enforcement for contracts that contain choice-of-law clauses.²⁶ Under Section

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ See *Churchill Forge, Inc. v. Brown*, 61 S.W.3d 368, 371 (Tex. 2001) (explaining that Texas has a "strong commitment to the principle of contractual freedom"); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990) (op. on reh'g) (explaining that "judicial respect for [a choice-of-law provision] advances the policy of protecting [contracting parties'] expectations"), *cert. denied*, 498 U.S. 1048 (1991).

²⁶ *Sonat Expl. v. Cudd Pressure Control*, 271 S.W.3d 228, 231 (Tex. 2008) (citing *Maxus*

187, the law of the state chosen by the parties governs any breach of contract dispute *unless*:

- (1) There is a state with a more significant relationship to the transaction (applying Section 188);²⁷ and
- (2) Applying the chosen law would contravene a fundamental policy of that state; and
- (3) That state has a materially greater interest in the determination of the particular issue.²⁸

Texas courts must enforce the parties' choice of Texas law *unless all three* of these inquiries favor the application of New Mexico law.²⁹ If the court concludes that one of the three inquiries favors the parties' choice of Texas law to govern their dispute, it need not examine the other two factors.³⁰

In 2009, the Texas Legislature codified Texas' contractual choice-of-law rules in Sections 271.001–271.011 of the Texas Business and Commerce Code. Chapter 271, “Rights of Parties to Choose Law Applicable to Certain Transactions,”³¹ specifically applies to “qualified transactions,” defined under the statute as transactions where one of the parties pays or receives \$1 million

Expl. Co. v. Moran Bros., Inc., 817 S.W.2d 50, 53 (Tex. 1991) and RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 173 cmt. b (1971)).

²⁷ Section 188 provides five factors for determining whether a state has a more significant relationship to the dispute and the parties, namely:

- (1) the place of contracting,
- (2) the place of negotiation . . . ,
- (3) the place of performance,
- (4) the location of the subject matter . . . , and
- (5) the domicile, residence, nationality, place of incorporation and place of business of the parties.

RESTATEMENT (SECOND) CONFLICT OF LAWS § 188(2).

²⁸ See *Chesapeake Operating v. Nabors Drilling USA*, 94 S.W.3d 163, 169–70 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (citing *DeSantis*, 793 S.W.2d at 677–78).

²⁹ *N. Am. Tubular Servs., LLC v. BOPCO, L.P.*, No. 02-17-00352-CV (Tex. App.—Fort Worth, Aug. 30, 2018), *reh'g denied* (Oct. 25, 2018) (applying Restatement Section 187 and concluding that Texas law, rather than New Mexico law, applied); see also *Branch Banking and Tr. Co. v. Seideman*, No. 05-17-00381-CV (Tex. App.—Dallas, June 21, 2018, no pet. h.) (mem. op.).

³⁰ *N. Am. Tubular Servs., id.*

³¹ TEX. BUS. & COMM. CODE ANN. § 271 (West 2009).

or more.³² Section 271.005 provides that the law of a particular jurisdiction governs an issue relating to a qualified transaction if:

- (1) The parties to the transaction agree in writing that the law of that jurisdiction governs the issue, including the validity or enforceability of an agreement relating to the transaction or a provision of the agreement; and
- (2) The transaction bears a reasonable relation to that jurisdiction.³³

Importantly, the law of the particular jurisdiction agreed to by the parties will apply “regardless of whether the application of that law is contrary to a fundamental or public policy of [Texas] or of any other jurisdiction,” so long as the transaction at issue bears a reasonable relation to the agreed jurisdiction.³⁴

If a Texas court undertakes the above analysis and determines that Texas law applies to an agreement, then any indemnity provisions contained in that agreement will be evaluated under the Texas Oilfield Anti-Indemnity Act. As such, mutual indemnity provisions that would otherwise be rendered void under New Mexico law may be held enforceable.

IN THE EVENT OF AN INCIDENT

Should an incident occur in the oilfield and result in a lawsuit being filed in New Mexico state court, the defending party must act quickly to avail itself of any contractual rights to indemnity it may possess.

First, the defendant should tender defense and indemnity to its contractual counterpart, citing to the pertinent indemnity provision(s) contained in the parties' contract.

If the defendant's contractual counterpart refuses to accept the tender, or ignores the tender, the defendant should strongly consider filing a declaratory judgment action in the Texas venue identified as the mandatory venue for any dispute under the parties' contract.

If the defendant fails to do so, its contractual counterpart may win the race to the courthouse and file a declaratory judgment action first in New Mexico—where NMOAIA will apply and removal for purposes of venue transfer or dismissal will be available only if the parties are diverse.

³² TEX. BUS. & COMM. CODE ANN. § 271.001.

³³ TEX. BUS. & COMM. CODE ANN. § 271.005(A).

³⁴ TEX. BUS. & COMM. CODE ANN. § 271.005(B).

CONCLUSION

In an effort to limit potential liability, parties doing business in both New Mexico and Texas frequently include in their form contract agreements mutual indemnity provisions that purport to indemnify each party against damages caused by their own negligence.

In order to maximize the likelihood of such indemnity obligations being upheld, parties should take steps to avoid application of the New Mexico Oilfield Anti-Indemnity Act by including in their contracts (1) a mandatory venue provision that designates a Texas venue, and (2) a choice-of-law provision that identifies Texas law as controlling.