Louisiana Law Review

Volume 81
Number 3 *Spring 2021*

Article 13

4-29-2021

Removing the Risk from Risk Allocation: Reforming Louisiana's Oilfield Anti-Indemnity Act

Katherine Fruge Corry

Removing the Risk from Risk Allocation: Reforming Louisiana's Oilfield Anti-Indemnity Act

Katherine Fruge Corry[*]

TABLE OF CONTENTS

* J.D., 2021. Paul M. Hebert Law Center, Louisiana State University. I would like to thank my husband and my family for their continued support, love, and encouragement.

INTRODUCTION

The oil and gas industry has been the fuel driving Louisiana's economy for decades.[1] Given their proximity to the Gulf of Mexico, Louisiana and its economy are uniquely intertwined with the oil and gas industry.[2] As of 2002, the total direct and indirect economic impact of drilling and production activities in Louisiana totaled approximately one billion dollars per year, with the estimated total employment from these activities amounting to nearly 6,600 jobs in the state.[3] In 2018, however, 33% of all drilling activity in the United States occurred in the Permian Basin in Texas and New Mexico, and an insignificant percentage of nationwide drilling activity occurred in Louisiana.[4] In that same year, Louisiana's economy ranked 44th.[5] With the number of active rigs on the outer continental shelf projected to slowly rise in the near future, the time is now for the Louisiana Legislature to lift the restrictions on indemnity and risk allocation[6] in oilfield contracts.[7] If the state legislature does not act swiftly, the oil and gas sector in Louisiana may never recover, and

---

1. Allan G. Pulsipher, *Cumulative and Transitory Effects of Offshore Oil and Gas Development on Personal Income in Louisiana's Coastal Parishes: 1969 to 2000*, *in* 1 HISTORY OF THE OFFSHORE OIL AND GAS INDUSTRY IN SOUTHERN LOUISIANA 219 (2008).

2. *Id.*

3. ROBERT H. BAUMANN ET. AL, LSU CTR. FOR ENERGY STUD., ANALYSIS OF THE ECONOMIC IMPACT ASSOCIATED WITH OIL AND GAS ACTIVITIES ON STATE LEASES (2002), http://www.dnr.louisiana.gov/assets/docs/mineral/formspubs/ecoreport.pdf [https://perma.cc/XEN3-HJDC]. Estimated total employment from direct and indirect drilling and production activities in Louisiana is nearly 6,600 jobs. *Id.*

4. DAVID E. DISMUKES ET AL., LSU CTR. FOR ENERGY STUD. & LSU E.J. OURSO COLL. OF BUS. ECON. & POL'Y RES. GRP., 2019 GULF COAST ENERGY OUTLOOK 3 (2018), https://www.lsu.edu/ces/presentations/2018/gceo-kickoff-presentation-final.pdf [https://perma.cc/5UHR-Q3GY].

5. U.S. NEWS & WORLD REPORT, BEST STATES 2018: RANKING PERFORMANCE THROUGHOUT ALL 50 STATES (2018), https://media.beam.usnews.com/ba/b2/c75f31c94080b1d8a17931bcddd0/171206-best-states-overall-rankings-2018.pdf [https://perma.cc/7NHQ-2DLF].

6. "Risk allocation" refers to the assignment of responsibility and liability to a specific party in the event certain losses arise; this assignment is accomplished through contractual provisions. *See generally* Harold J. Flanagan & Stephen M. Pesce, *What You Really Need to Know About How Master Service Agreements and Risk Allocation Provisions Work, Even If You Hope to Never Have to Write One*, 3 ROCKY MTN. MIN. L. FOUND. Paper No. 9, §§ 6.01, 6.03 (2013), Westlaw 2013 No. 3 RMMLF-INST Paper No. 9.

7. DISMUKES ET AL., *supra* note 4.

Louisiana's economy could fall even lower in the state rankings during the upcoming years.[8]

The Louisiana Legislature ended regardless-of-fault risk allocation in oil and gas contracts in 1981 with the enactment of the Louisiana Oilfield Anti-Indemnity Act (LOIA).[9] The prosperity of the oil and gas industry during the 20th century brought vast amounts of wealth and power to big oil companies. The wealth of these oil companies gave them significant leverage in drafting agreements with service companies and other contractors.[10] Oil companies used this leverage to force service companies and other contractors into agreeing to indemnity provisions that required the contractors to indemnify the oil company for its own negligence or fault, and to procure insurance in favor of the oil company.[11] Through the LOIA, the Louisiana Legislature curbed this practice.[12] The LOIA completely removed parties' freedom to allocate risks in virtually any oilfield contract in Louisiana.[13] The only remaining method of risk allocation is provided through the *Marcel* exception to the LOIA.[14] The Fifth Circuit's decision in *Marcel v. Placid Oil Co.* permits an oil company

---

8. *See generally* U.S. NEWS & WORLD REPORT, *supra* note 5.

9. *See generally* LA. REV. STAT. § 9:2780 (2018).

10. Diogenis C. Panagiotis, *Offshore Update – Five Years after Passage: Contractual Indemnity, Defense and Insurance under the Louisiana Oilfield Indemnity Act*, 10 MAR. LAW. 203, 203 (1985). "Service companies" are contractors and subcontractors who provide goods and services to exploration and production (E&P) companies. *See generally* Flanagan & Pesce, *supra* note 6, at § 6.01. E&P companies find the hydrocarbons, hire various contractors to aid in the extractions of the hydrocarbons, sell the raw materials to companies that refine them, and often act as the operator on a job. Rebecca McClay, *How the Oil and Gas Industry Works*, INVESTOPEDIA (last updated Mar. 6, 2020), https://www.investopedia.com/investing/oil-gas-industry-overview/ [https://perma.cc/GM3W-DC3J]. Given that the E&P companies are the ones hiring the service companies, they naturally have more bargaining power. Hereinafter, the term "oil company" will be used to refer to the exploration and production company or operator company that hires the contractors to perform work, and that has the superior bargaining power and control.

11. Panagiotis, *supra* note 10, at 203.

12. *See generally* LA. REV. STAT. § 9:2780.

13. *See generally id.* Courts in Louisiana have interpreted the scope of the LOIA broadly such that it can apply to virtually "any contract [in Louisiana] in which an oil company is a party." 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, 1097 (1996).

14. *See* LA. REV. STAT. § 9:2780; Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994).

to obtain insurance coverage as an additional insured on the contractor's insurance policy as long as the oil company pays the "material part" of the premium.[15] Both Louisiana state courts and federal courts applying Louisiana law have created uncertainty and ambiguity in interpreting and applying the *Marcel* exception.[16] This ambiguity hinders the ability of parties to evaluate potential risk exposure and to contractually manage such risk exposure through risk-allocation provisions.[17]

The ambiguities surrounding the *Marcel* exception show that this exception has fallen short of meeting parties' need for predictability in risk allocation.[18] The high probability of bodily injury to workers, along with the large amount of money invested in oil and gas operations, increases parties' need to rely upon predictable risk-allocation outcomes.[19] Given the disjointed state of case law addressing the *Marcel* exception, parties to oilfield contracts who intend to obtain *Marcel* coverage cannot readily predict whether courts will honor the terms of their risk management schemes.[20] Neither the Louisiana Supreme Court nor the U.S. Fifth Circuit Court of Appeals has definitively ruled on whether *Marcel* coverage extends to third parties to the contract who do not independently pay a *Marcel* premium.[21] Further, the Louisiana Supreme Court has not addressed the *Marcel* exception more generally, and federal and state courts in Louisiana have interpreted and applied the *Marcel* exception inconsistently.[22]

---

15. *See generally Marcel*, 11 F.3d 563.

16. *See, e.g.*, Rogers v. Samedan Oil Corp., 308 F.3d 477 (5th Cir. 2002); Amoco Prod. Co. COG-EPCO 1992 Ltd. P'ship v. Lexington Ins., 745 So. 2d 676 (La. Ct. App. 1st Cir. 1999).

17. *See* discussion *infra* Part II.

18. *See* discussion *infra* Part II.

19. William W. Pugh III, *Overview of Risk Allocation in Operational Contracts*, 2018 ADVANCED OIL, GAS & ENERGY RES. 4-11 (2018), Westlaw 2018 TXCLE-AOGERL 4-II.

20. *Rogers*, 308 F.3d at 478 (citing the confused state of the law surrounding the enforceability of additional-insured endorsements under the LOIA as justification for refusing to hold that insurer's actions in withdrawal of oil company's defense against claim of injured employee of contractor amounted to bad faith). To be explicitly clear, under the LOIA, additional insured endorsements are only valid to cover the principal's negligence when the agreement falls within the *Marcel* exception. *Id.* Therefore, the U.S. Fifth Circuit Court of Appeals was noting the confused state of the law surrounding the *Marcel* exception. *See generally id.*

21. *See* discussion *infra* Part II.

22. *Compare Rogers*, 308 F.3d 477, *with* Amoco Prod. Co. COG-EPCO 1992 Ltd. P'ship v. Lexington Ins., 745 So. 2d 676 (La. Ct. App. 1st Cir. 1999).

Given the state's history as an oil and gas powerhouse, Louisiana has an interest in incentivizing exploration and production companies to invest in drilling and production activity in the state.[23] The Louisiana Legislature should resolve this issue by amending the LOIA to provide a means for parties to indemnify each other on a regardless-of-fault basis.[24] The Texas Oilfield Anti-Indemnity Act (TOIA) is similar to the LOIA, but it contains an exception under which parties can agree to indemnify one another on a regardless-of-fault basis.[25] Louisiana should follow industry leaders—specifically, Texas—in codifying a new exception that will remove the inequity foisted upon oil companies and their contractors by the LOIA and by the courts applying it, while still serving the major policy objective of the LOIA—protecting Louisiana contractors and service companies.[26]

Part I of this Comment will examine risk allocation in operational contracts generally and discuss the major provisions of the LOIA as well as the policy considerations behind it. Next, Part II will survey Louisiana jurisprudence addressing the *Marcel* exception to demonstrate the lack of clarity surrounding it. Finally, Part III will propose a legislative solution—specifically, the adoption of the exception provided for under the TOIA.

I. Risk Allocation in Operational Contracts

Oil and gas companies use operational agreements such as master service agreements (MSAs) to contract for the performance of work on a project that will last for weeks, months, or even years.[27] A single MSA will often govern the relationship between an oil company and its contractor for an extended period of time.[28] Parties typically use MSAs

---

23. *See generally* Pulsipher, *supra* note 1.

24. Regardless-of-fault indemnity is a form of regardless-of-fault risk allocation that assigns responsibility for a loss or losses to a pre-designated party without regard to cause, negligence, or fault of any party. Flanagan & Pesce, *supra* note 6, at § 6.02. Commonly, parties agree to allocate risk according to the party with "ownership" of the injured employee. *Id.*

25. *See* TEX. CIV. PRAC. & REM. CODE § 127.005 (West 2019).

26. *See generally* Panagiotis*, supra* note 10, at 205.

27. William W. Pugh, *A Strategic Look at the Bigger Picture – Risk Allocation in Oil and Gas Operational Agreements*, 4 ROCKY MOUNTAIN MIN. L. FOUND. Paper No. 7 (2008), Westlaw 2008 No. 4 RMMLF-INST Paper No. 7.

28. Flanagan & Pesce, *supra* note 6, at § 6.01. "An MSA is a traditional means of retaining a contractor or a subcontractor to perform work on a given project, on either a one time or long-term basis. In the pure sense, however, the MSA merely provides the *framework* for tasks to be performed by a contractor . . . . A contract between the E&P company, and a contractor . . . for a

when there is a common workplace for multiple contractors and subcontractors, and a relatively high risk of bodily injury and property damage.[29] Risk management is essential in operations of this sort, and parties manage these risks by inserting risk-allocation provisions in their MSAs.[30] Due to both the complex nature of the jobsites and the large number of contractors and subcontractors involved in oil and gas operations, when an employee sustains injuries, courts often face difficulty in determining which party is at fault.[31] Typically, there are two disputes to resolve: (1) a tort suit brought by the injured employee against the defendants who are potentially liable for the injuries, except for the employer of the injured employee,[32] and (2) a contract suit among those defendants and the employer of the injured employee to determine fault allocations and responsibility for the costs of any settlement or judgment.[33] By allocating risks before a loss arises, provisions in the MSA can resolve the dispute between the defendants and the employer of the injured employee.[34] Although the injured employee's third-party tort claim still has to be resolved, the risk-allocation provisions in the MSA eliminate the contractual dispute between the employer of the injured employee and the third-party tortfeasors by allocating responsibility for the losses of the injured employee back to his or her employer.[35] In this way, risk allocation provides parties with predictability, and it can save parties the time and expenses associated with further litigation.[36] Predictable outcomes are

---

particular job is formed upon the issuance of the oral or written purchase or work order." *Id.* at § 6.02.

29. Pugh, *supra* note 27.

30. Flanagan & Pesce, *supra* note 6.

31. Richard C. Beu & Donald P. Butler, *Oilfield Master Service Agreements: Indemnities and Associated Insurance Provisions*, 2 ROCKY MTN. MIN. L. FOUND. Paper No. 10A (2004), Westlaw 2004 No. 2 RMMLF-INST Paper No. 10A.

32. Workers' compensation bars negligence suits by injured employees against their employers. In both onshore and offshore oil and gas operations, there is a governing workers' compensation scheme that bars an employee from suing his employer for negligence. *See* LA. REV. STAT. § 23:1032(A) (2018) (workers' compensation statute that applies when the operations occur onshore, or offshore on a fixed platform located in Louisiana state territorial waters); *see also* 33 U.S.C. § 905(b) (2018) (workers' compensation statute that applies when the operations occur offshore on a fixed platform on the outer continental shelf).

33. Beu & Butler, *supra* note 31.

34. *Id.*

35. *Id.*

36. *See generally id.*

useful to parties during negotiations and as they plan to appropriately protect against the potential risks that may arise during a future project.[37]

The exploration, drilling, and production of oil and gas are extremely hazardous activities.[38] Further, exploring for and producing oil and gas are expensive endeavors, whether onshore or offshore.[39] Given the high stakes and high probability of risk, oil companies and contractors prepare for uncertainties in advance by inserting carefully drafted risk-allocation provisions in the MSA.[40] Oil companies, due to their wealth and industry control, typically command stronger bargaining power than the individual contractors who bid for their jobs.[41] Prior to the enactment of anti-indemnity statutes in various states, oil companies used their bargaining strength to strong-arm contractors into agreeing to provide insurance and indemnity to the oil company, regardless of the negligence or fault of the oil company.[42]

A. The Louisiana Legislature Jumps into the Arm-Wrestling Match and Puts an End to "Strong-Arming"

Courts typically uphold regardless-of-fault indemnity agreements unless the agreement is contrary to public policy.[43] In general, risk-shifting indemnity agreements that extend to losses arising out of a party's negligence or fault are not against public policy in Louisiana.[44] The LOIA provides an exception to this general rule, declaring provisions in oilfield contracts that allow a party to obtain indemnity for losses arising out of its own negligence or fault to be against the public policy of the State of Louisiana.[45]

---

37. *See generally id.*

38. Knapp v. Chevron USA, Inc., 781 F.2d 1123, 1130 (5th Cir. 1996).

39. *See generally* U.S. ENERGY INFO. ADMIN., U.S. DEPT. OF ENERGY, TRENDS IN U.S. OIL AND NATURAL GAS UPSTREAM COSTS (2016), https://www.eia.gov/analysis/studies/drilling/pdf/upstream.pdf [https://perma.cc/RF6A-GPVH].

40. *See generally* Flanagan & Pesce, *supra* note 6.

41. Panagiotis, *supra* note 10, at 203.

42. *Id.*

43. 8 WILLISTON ON CONTRACTS § 19:19 (4th ed. 2019), Westlaw WILLSTN-CN § 19:19.

44. Kehoe, *supra* note 13, at 1098.

45. *See* LA. REV. STAT. § 9:2780(A) (2018). The single, stated intent of the legislature in enacting the LOIA was to "declare null and void and against [the] 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,

The LOIA was the result of intense lobbying efforts on the part of Louisiana service companies.[46] In response to fear of being forced out of the market by competitors who could afford to agree to the inclusion of regardless-of-fault indemnity clauses, service companies had to either bear the burden of the indemnity or lose out on jobs.[47] The LOIA voids provisions in oilfield contracts that require a party to indemnify another for the negligence or fault of the other.[48] To prevent oil companies from strong-arming service companies into contracts whereby the service company had to agree to indemnify the oil company for the consequences arising from the negligence or fault of the oil company, the Louisiana Legislature enacted the LOIA.[49] Subsection A of the LOIA declares that "an inequity is foisted on certain contractors" by certain indemnity provisions in oilfield contracts.[50] It is unclear exactly what the perceived inequity as stated in subsection A refers to.[51] Scholars have concluded that this inequity encompasses the situation in which an oil company uses its superior bargaining power and wealth as leverage to force the service company to agree to indemnify the oil company for its negligence or fault.[52] Even in situations where the contractor is not one that needs protection from the oil company, courts have held steadfast to the public policy principles behind the LOIA.[53] In such cases, courts will strike indemnity provisions from the MSA "to preserve fairness of competition among oilfield service contractors."[54]

The ambiguities surrounding the legislative intent and the lack of legislative history accompanying the LOIA have led courts in Louisiana to interpret the LOIA broadly and to accord their own "spirit" to the LOIA.[55] Courts have stated that the LOIA is an attempt to improve

---

where there is negligence or fault (strict liability) on the part of the indemnitee." *Id.*

46. *See* Rodrigue v. LeGros, 563 So. 2d 248, 254 (La. 1990); Panagiotis, *supra* note 10 at 208.

47. Panagiotis, *supra* note 10, at 203.

48. *See generally* LA. REV. STAT. § 9:2780.

49. *See generally* Panagiotis, *supra* note 10.

50. LA REV. STAT. § 9:2780(A).

51. *See generally* Panagiotis, *supra* note 10.

52. LA. REV. STAT. § 9:2780(A). *See generally* Panagiotis, *supra* note 10, at 204.

53. *See* Amoco Prod. Co. COG-EPCO 1992 Ltd. P'ship v. Lexington Ins., 745 So. 2d 676, 680 (La. Ct. App. 1st Cir. 1999).

54. *Id.*

55. *See, e.g.*, Knapp v. Chevron USA, Inc., 781 F.2d 1123, 1130 (5th Cir. 1996); Moser v. Aminoil, U.S.A., Inc., 618 F. Supp. 774, 780 (W.D. La. 1985);

safety.[56] Safety, however, is not mentioned in the LOIA.[57] Nonetheless, courts have found that the promotion of safety is an underlying policy of the LOIA, reasoning that if the oil company, as opposed to the contractor, will be financially responsible for its own negligence, the oil company is more likely to take steps towards the promotion of safety.[58] Courts have stated that the policy goals of the Louisiana Legislature in enacting the LOIA include the following: (1) protecting offshore service companies from oil companies that have greater bargaining power; (2) prohibiting an indemnitee from being indemnified for its own negligence; and (3) promoting safety in offshore oil and gas operations.[59] Subsection B of the LOIA implements the policy directives established by subsection A of the LOIA.[60]

B. Regardless of the Terms of the Agreement, the LOIA Voids Regardless-of-Fault Indemnity

Subsection B of the LOIA declares null and void certain indemnity agreements that require the indemnitor to indemnify or defend the indemnitee for damages arising out of the indemnitee's negligence or fault.[61] Although the prohibition on regardless-of-fault indemnity contained in the LOIA is absolute, the LOIA only applies in specific situations.[62] This prohibition only applies to injuries arising out of death or bodily injury to persons.[63] The LOIA does not nullify indemnity agreements that pertain to property damages.[64] Moreover, the LOIA

Bryant v. Platform Well Serv., Inc., 563 F. Supp. 760, 763 (E.D. La. 1983); *see also* Panagiotis, *supra* note 10, at 206.

56. *Knapp*, 781 F.2d at 1130; *Moser*, 618 F. Supp. at 780; *Bryant*, 563 F. Supp. at 763.

57. *See generally* LA. REV. STAT. § 9:2780.

58. *See, e.g.*, *Knapp*, 781 F.2d at 1130; *Moser*, 618 F. Supp. at 780; *Bryant*, 563 F. Supp. at 763.

59. *See* Panagiotis, *supra* note 10, at 208.

60. *See* LA. REV. STAT. § 9:2780(A)–(B).

61. *Id.* The indemnitor is the party who pays the indemnity. The indemnitee is the party who receives the indemnity. Michael Golemi & William Pugh, *Hoping for the Best, Preparing for the Worst: "Don't Worry, We Have Indemnity,"* 78 ADVOC. (TEX.) 47, 47 (2017).

62. *See generally* LA REV. STAT. § 9:2780.

63. *See id.* § 9:2780(B).

64. *See id.* It is good practice to bifurcate indemnity provisions in the master service agreement—one provision that applies to property damage, and another provision that applies to injury to persons, because different results will obtain under the LOIA depending on whether the damages arise out of personal injury

prohibits indemnity and defense provisions where the indemnitee is negligent or at fault; it does not apply where the indemnitee is not negligent or at fault.[65] The LOIA does extend its nullifying reach, however, to certain insurance agreements.[66]

Subsection G of the LOIA bolsters the protection provided by subsection B by prohibiting insurance agreements that would undermine the prohibition and purpose of the LOIA.[67] Parties can circumvent statutory prohibitions on contractual indemnity through contractual liability insurance coverage.[68] This circumvention can be accomplished by requiring that the indemnitor name the indemnitee as an additional insured on the indemnitor's insurance policy.[69] These types of insurance agreements allow the indemnitee to shift its risk to the indemnitor's insurance company.[70] The Louisiana Legislature—clearly aware of these insurance-related workarounds—wrote subsection G of the LOIA to nullify such insurance arrangements.[71] Accordingly, subsection G of the LOIA nullifies any waiver of subrogation, additional named insured endorsement, and any other form of insurance coverage that would circumvent the indemnity-voiding provisions of the LOIA.[72]

Courts typically find that any provision in an agreement requiring the contractor to extend its insurance coverage to cover the principal's acts of negligence or fault are void under the LOIA because these insurance agreements undermine the purpose of the LOIA and allow indemnitees to obtain indemnity for their negligence or fault.[73] Although they are not indemnity agreements per se, these insurance arrangements frustrate the

---

or property injury. Julia M. Adams & Karen K. Milhollin, *Indemnity on the Outer Continental Shelf—A Practical Primer*, 27 TUL. MAR. L. J. 43, 89 (2002).

65. Meloy v. Conoco, Inc., 504 So. 2d 833, 839 (La. Ct. App. 5th Cir. 1987).

66. *See* LA. REV. STAT. § 9:2780(G). The LOIA prohibits "waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the prohibitions of [the LOIA]." *Id.*

67. *Id.*

68. SCOTT TURNER, INSURANCE COVERAGE OF CONSTRUCTION DISPUTES § 10:16 (2d ed. Nov. 2020), Westlaw ICCDS § 10:16.

69. *Id.*

70. Daniel B. Shilliday et al., *Contractual Risk-Shifting in Offshore Energy Operations*, 81 TUL. L. REV. 1579 (2007).

71. *See generally* LA. REV. STAT. § 9:2780(G).

72. *Id.*

73. *See, e.g.*, Rogers v. Samedan Oil Corp., 308 F.3d 477 (5th Cir. 2002); Roberts v. Energy Dev. Corp., 235 F.3d 935 (5th. Cir. 2000); Hodgen v. Forest Oil Corp., 87 F.3d 1512 (5th Cir. 1996); Davis v. Mobil Oil Expl. & Prod. Se., Inc., 864 F.2d 1171 (5th Cir. 1989).

purpose of the LOIA by shifting the economic burden of the indemnitee's negligence or fault onto the indemnitor by requiring the indemnitor to purchase insurance covering losses that arise out of the indemnitee's fault or negligence.[74] In certain oilfield contracts in Louisiana, parties cannot circumvent the regardless-of-fault indemnification ban of the LOIA by agreeing that a party will purchase insurance in favor of the other party.[75] Pursuant to subsections B and G of the LOIA, parties are prohibited from inserting indemnity provisions and certain insurance arrangements in their contract; thus, it is important for parties to determine whether the LOIA applies to their agreement.[76] Subsection C of the LOIA governs whether an agreement falls within the scope of the LOIA.[77]

C. The Scope of Application of the LOIA

The LOIA applies to those oilfield contracts that "pertain to a well."[78] Part C of the LOIA states that "the term 'agreement,' as it pertains to a well for oil, [or] gas . . . means any agreement . . . concerning any operations related to the exploration, development, production, or transportation of oil, [or] gas."[79] In *Transcontinental Gas Pipe Line Corp. v. Transportation Insurance Co.*, the U.S. Fifth Circuit Court of Appeals, interpreting subsection C, set forth a two-part test to determine whether the LOIA applies to a given contract.[80] Transcontinental Gas Pipe Line Corporation (Transco) entered into an MSA with Associated Painting Services (APS) in which APS agreed to perform certain work on Transco's pipelines and platforms located in the Gulf of Mexico and the adjacent marshlands of Louisiana.[81] Pursuant to the agreement, APS named Transco as an additional insured on its insurance policy.[82] During the course of the job, an APS employee sustained injuries on a Transco platform on the outer continental shelf off Louisiana's coast.[83]

---

74. Jefferson v. Int'l Marine, LLC, 224 So. 3d 50, 54 (La. Ct. App. 1st Cir. 2017).
75. *See* LA. REV. STAT. § 9:2780(G).
76. *See id.* § 9:2780(B), (G).
77. *See id.* § 9:2780(C).
78. *See id.*
79. *Id.*
80. Transcon. Gas Pipe Line Corp. v. Transp. Ins., 953 F.2d 985, 991 (5th Cir. 1992).
81. *Id.* at 986.
82. *Id.* at 986–87.
83. *Id.* at 987.

The APS employee filed suit against Transco, who eventually settled the case with the employee for $225,000.[84] Transco then filed suit against APS's insurer, Transportation Insurance Co. (TIC), alleging that the contract between Transco and APS obliged APS to name Transco as an additional insured and that TIC's failure to defend and indemnify Transco with respect to the tort lawsuit brought by APS's employee was arbitrary and capricious.[85] Resolution of the suit turned on whether the LOIA applied to the agreement. If the LOIA did not apply, then Transco was entitled to defense and indemnity for the tort lawsuit.[86] If, however, the LOIA did apply, then the provision requiring APS to name Transco as an additional insured would be void pursuant to subsection G.[87] Relying on the language of subsection C, the Fifth Circuit stated that in order for the LOIA to apply the agreement must (1) pertain to a well and (2) be related to the exploration, development, production, or transportation of oil, gas, or water.[88] The *Transcontinental* court also articulated a 10-factor test for determining when an agreement "pertains to a well":

> (1) whether the structures or facilities to which the contract applies or with which it is associated . . . are part of an in-field gas-gathering system; (2) what is the geographical location of the facility or system relative to the well or wells; . . . (7) what is the purpose or function of the facility or structure in question; . . . (9) who owns and operates the facility or structure in question, and who owns and operates the well or wells that produce the [oil or] gas in question; (10) and any number of other details affecting the functional and geographic nexus between "a well" and the structure or facility that is the object of the agreement under scrutiny.[89]

---

84. *Id.*

85. *Id.* "Outer Continental Shelf," as defined in the Outer Continental Shelf Lands Act, means "all submerged lands lying seaward and outside of the area of lands beneath navigable waters . . . and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a) (2018).

86. *See generally Transcon. Gas Pipe Line Corp.*, 953 F.2d 985.

87. *See generally id.*

88. *Id.* at 991.

89. *Id.* at 995. Factors three, four, five, six, and eight are only relevant when the services provided for in the contract under scrutiny are related to natural gas transmission systems, like the one at issue in *Transcontinental*. *Id.* Courts have applied the modified five-factor *Transcontinental* test in cases involving oil and

The court ultimately concluded that it did not have enough information to determine the applicability of the LOIA and remanded the case to the district court.[90]

Courts applying the two-prong *Transcontinental* test have placed the most emphasis on, and have broadly construed, the first prong.[91] The second prong of the *Transcontinental* test has not faced much scrutiny in the courts because if the agreement pertains to a well, it most likely is related to the exploration, development, production, or transportation of oil, gas, or water.[92] Because of both the broad definition of the term "agreement" contained in the statute, and the broad interpretation accorded by the judiciary, the LOIA can apply to virtually any contract in Louisiana related to oil and gas services.[93]

In *Broussard v. Conoco, Inc.*, the U.S. Fifth Circuit Court of Appeals addressed the application of the LOIA to a contract for catering services between Conoco, Inc. (Conoco) and SHRM Catering Services, Inc. (SHRM).[94] Oliver Broussard fell from a stool while changing the sheets on a bunk bed and subsequently brought suit against Conoco for negligence.[95] Broussard sustained his injuries while working on a living quarters platform on the outer continental shelf off the coast of Louisiana in the course of his employment with SHRM.[96] The platform involved did not house any oilfield-related equipment; the platform merely contained sleeping quarters and a cafeteria for the offshore workers.[97] The court found that the purpose of the living quarters platform was to sustain manpower for production and that the LOIA therefore applied, because the contract pertained to a well and was related to the production of oil.[98]

Transcontinental and *Broussard* demonstrate that courts in Louisiana have interpreted the scope of the LOIA broadly.[99] When offshore operations are involved, before a court can determine whether the LOIA

---

gas platforms and related structures. *See* Broussard v. Conoco, Inc., 959 F.2d 42 (5th Cir 1992).

90. *Transcon. Gas Pipe Line Corp.*, 953 F.2d at 994–96.

91. Adams & Milhollin, *supra* note 64, at 91.

92. *Id.* at 92.

93. Kehoe, *supra* note 13, at 1099–1100.

94. *Broussard*, 959 F.2d at 43.

95. *Id.*

96. *Id.* at 44.

97. *Id.* at 43–44.

98. *Id.* at 45.

99. *See, e.g.*, Livings v. Serv. Truck Lines of Tex., Inc., 467 So. 2d 595 (La. Ct. App. 3d Cir. 1985); *see also* Fuselier v. Amoco Prod. Co., 546 So. 2d 306 (La. Ct. App. 3d Cir.), *writ denied*, 551 So. 2d 1317 (La. 1989).

will apply to an agreement, it must first determine that state law, as opposed to federal maritime law, governs the agreement.[100]

D. When Indemnity Suits Arise Offshore—the "Amphibious Multiparty Donnybrook"[101]

Courts have to labor through additional steps in resolving indemnity claims and applying anti-indemnity statutes when offshore operations are involved.[102] Extensive maritime activity occurs off the coast of Louisiana, and maritime activity has close ties to the oil and gas industry.[103] This relationship creates a complexity for courts and parties in determining whether the law requires that the court either uphold or strike an indemnity provision in a contract.[104] First, the court must determine whether the offshore contract is maritime or non-maritime.[105] This determination dictates whether federal maritime law or state law—and state anti-indemnity statutes—will apply to the contract.[106] If the contract is maritime, courts will generally allow an indemnitee to be indemnified for his own fault or negligence, subject to some limitations which are outside the scope of this Comment.[107] If the contract is non-maritime, and thus governed by Louisiana law and subject to the LOIA, the indemnitee cannot obtain indemnity for his own negligence or fault if the "'agreement' pertains to a well for oil, gas, or water, or drilling for minerals."[108]

Second, and further complicating the analysis of indemnity in offshore oil and gas contracts, is the intersection of state law and the Outer Continental Shelf Lands Act (OCSLA).[109] For the LOIA to apply to a non-maritime contract that governs offshore oil and gas operations on the outer continental shelf, Louisiana law must apply as "surrogate federal law" through the OCSLA.[110] The OCSLA declares that federal law,

---

100. Shilliday et al., *supra* note 70.

101. Roberts v. Williams-McWilliams Co., 648 F.2d 255, 257 (5th Cir. 1981) (using this phrase to describe the typical offshore case.)

102. *Id.*; Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1209 (5th Cir. 1986).

103. Kehoe, *supra* note 13, at 1123.

104. *Id.*

105. *Id.*

106. Fontenot v. Sw. Offshore Corp., 771 So. 2d 679, 682 (La. Ct. App. 3d Cir.), *writ denied*, 773 So. 2d 144 (La. 2000).

107. *Id.*

108. LA. REV. STAT. § 9:2780(B) (2018); *id.* § 9:2780(C).

109. *See generally* Adams & Milhollin, *supra* note 64, at 52.

110. *See generally* 43 U.S.C. § 1333(a)(1) (2018).

incorporating the law of the adjacent state, applies to fixed structures on the outer continental shelf.[111] Section 1333(a)(1) of the OCSLA declares:

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom . . . .[112]

Furthermore, the OCSLA provides that the law of the adjacent state shall apply as surrogate federal law to structures permanently affixed to the subsoil or seabed of the outer continental shelf, but only when the law of the adjacent state is not inconsistent with federal law.[113]

The U.S. Fifth Circuit Court of Appeals, in *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, set forth the following three-factor test—the *UTP* test—for determining whether state law will apply as surrogate federal law on the outer continental shelf through the OCSLA: (1) the controversy must arise on an OCSLA situs;[114] (2) federal maritime law must not apply; and (3) state law must not be inconsistent with federal law.[115]

As to the first factor of the *UTP* test, a contractual indemnity claim arises on an OCSLA situs, such as the subsoil, seabed, or other artificial structures permanently or temporarily attached thereto, if the contract requires that the majority of the work be performed on stationary platforms or other situses listed in 43 U.S.C. § 1333(a).[116]

With respect to the second factor of the *UTP* test, to determine whether maritime law applies, the court must inquire into whether the contract at

---

111. Adams & Milhollin, *supra* note 64, at 52.

112. 43 U.S.C. § 1333(a)(1).

113. *Id.* § 1333(a)(2)(A) ("To the extent that they are applicable and not inconsistent with this subchapter or with other Federal . . . the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon.").

114. A situs is "[t]he location or position (of something) for legal purposes." *Situs*, BLACK'S LAW DICTIONARY (11th ed. 2019).

115. Union Tex. Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043, 1047 (5th Cir. 1990) (citing Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 355–56 (1969)).

116. ACE Am. Ins. v. M-I, L.L.C., 699 F.3d 826, 830 (5th Cir. 2012).

issue is maritime in nature.[117] In *In re Larry Doiron, Inc.*, the U.S. Fifth Circuit Court of Appeals established the following dual-inquiry test to determine whether a contract in the oil and gas context is maritime: first, whether the contract is one to provide services to facilitate the drilling or production of oil or gas on navigable waters; and second, whether the parties expect that a vessel will play a substantial role in the completion of the contract.[118] If the answer to both inquiries is "yes," then the contract is maritime.[119] This test places central focus on the contract and the parties' expectations, which the *Doiron* court noted is the proper approach in a contract dispute.[120] The court in *Doiron* favored this approach because it assists the parties in evaluating their risks and liabilities under indemnity clauses in their MSAs.[121]

As to the third factor of the *UTP* test, courts have repeatedly held that the LOIA is not inconsistent with federal law.[122]

The Fifth Circuit's decision in *Grand Isle Shipyard v. Seacor Marine* demonstrates the application of the LOIA through the OCSLA to a controversy arising on the outer continental shelf.[123] The suit arose out of an indemnity dispute between two contractors of British Petroleum (BP).[124] BP, the owner of the platform, entered into a contract with Grand Isle Shipyard Inc. (Grand Isle) whereby Grand Isle agreed to perform certain construction work on the platform.[125] The contract between BP and Seacor Marine, LLC (Seacor) provided that Seacor would transport workers for BP and BP's contractors.[126] The BP-Grand Isle contract contained a provision requiring Grand Isle to defend and indemnify BP and its contractors for injuries sustained by Grand Isle employees.[127] The BP-Seacor contract also contained an indemnity provision in favor of BP and BP's other contractors in the event of an injury to one of Seacor's employees.[128] The undisputed objective of these indemnity provisions was

117. *Id.* at 831.
118. *In re* Larry Doiron, Inc., 879 F.3d 568, 576 (5th Cir. 2018).
119. *Id.*
120. *Id.*
121. *Id.*
122. Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 589 F.3d 778, 789 (5th Cir. 2009) (quoting Hodgen v. Forest Oil Corp., 87 F.3d 1512, 1529 (5th Cir. 1996)).
123. *See generally id.* at 778.
124. *Id.*
125. *Id.*
126. *Id.* at 781.
127. *Id.* at 782.
128. *Id.*

for each contractor whose employee was injured to hold harmless and indemnify BP and BP's other contractors for liability resulting from injuries to or the death of that employee.[129]

The controversy arose when Danny Neil, an employee of Grand Isle, was injured while being transported on a vessel owned by Seacor from the stationary platform where he worked to the platform containing his living quarters.[130] Neil sued Seacor for negligence, and Seacor sought indemnity from Grand Isle.[131] Thereafter, Grand Isle filed suit in the U.S. District Court for the Eastern District of Louisiana.[132] Grand Isle sought a declaratory judgment[133] recognizing that it did not owe defense, indemnity, or insurance coverage to Seacor on the basis that the LOIA, which applied by virtue of the OCSLA, rendered such provisions invalid.[134] Seacor filed a cross-motion for summary judgment, seeking a determination that the indemnity provisions were enforceable because general maritime law applied.[135]

The court stated that the issue was whether the law of the adjacent State of Louisiana, including the LOIA, applied to the case.[136] The parties agreed that if the LOIA applied, it would invalidate Grand Isle's indemnity obligation to Seacor.[137] If the LOIA did not apply, the indemnity agreement would be enforceable.[138] In order to resolve the issue, the court had to determine the applicability of the OCLSA and, more specifically, the situs of the controversy that gave rise to the lawsuit.[139] The court stated that the situs of the underlying tort which prompts the contractual indemnity dispute does not determine the situs of the contract dispute.[140] In contract disputes that are triggered by an underlying tort claim, the location of the majority of the performance called for under the contract

---

129. *Id.*

130. *Id.* at 781.

131. *Id.* at 782.

132. *Id.* at 783.

133. A declaratory judgment is a "binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement. Declaratory judgments are often sought, for example, by insurance companies in determining whether a policy covers a given insured or peril." *Declaratory judgment*, BLACK'S LAW DICTIONARY (11th ed. 2019).

134. *Grand Isle Shipyard, Inc.*, 589 F.3d at 782.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 783–84.

140. *Id.* at 784; *see also In re* Larry Doiron, Inc., 879 F.3d 568, 576 n.51 (5th Cir. 2018).

determines the situs requirement.[141] If that location consists of stationary platforms or other situses enumerated in 43 U.S.C. § 1333(a)(2)(A), then the matter arises on an OCSLA situs.[142] Thus, the court held that the LOIA applied to the suit by virtue of the OCSLA, and the LOIA nullified the indemnity provision.[143]

In justifying its focus-of-the-contract test for determining the situs in contractual indemnity disputes, the court cited "predictability and stability in allocating risk."[144] The court noted that the "[t]ort-situs approach prevents commercial parties from reliably allocating risk in their contractual arrangements because they have no way of predicting where 'controversies' might arise and thus no way of knowing which law will govern."[145]

The Fifth Circuit noted—in *Grand Isle* and in *In re Larry Doiron*—that predictability in risk evaluation and in risk allocation is vitally important; however, under the LOIA and the case law interpreting the *Marcel* exception, parties cannot predictably allocate risk in oilfield contracts.[146] The Louisiana Legislature rejected a regardless-of-fault risk-allocation scheme under the LOIA; indemnity provisions are void under the LOIA "only to the extent that they purport to require indemnification . . . where there is negligence or fault on the part of the indemnitee; otherwise, they are enforceable as any other legal covenant."[147] A court can only make the determination that the LOIA voids the indemnity provision after it decides whether the indemnitee was or was not negligent or at fault in causing injury.[148] The need to make a preliminary determination regarding the negligence or fault of the indemnitee leads to uncertain risk-allocation outcomes, thereby undermining certain benefits of risk allocation—namely, predictability and preclusion of certain disputes concerning fault.[149] Parties can better realize the benefits of risk allocation if they are permitted to undertake

---

141. *Grand Isle Shipyard, Inc.*, 589 F.3d at 787.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *See generally* Panagiotis, *supra* note 10; Pugh, *supra* note 27.
147. Meloy v. Conoco, Inc., 504 So. 2d 833, 838 (La. 1987).
148. *Id.* at 835.
149. *See generally* Cary A. Moomjian, *Contractual Insurance and Risk Allocation in the Offshore Drilling Industry*, DRILLING CONTRACTOR, Jan./Feb. 1999, at 19, *available at* http://www.iadc.org/dcpi/dc-janfeb99/j-cary.pdf [https://perma.cc/48RB-GMH7].

regardless-of-fault indemnity.[150] Additionally, relying solely on the *Marcel* exception to the LOIA, parties are further hindered in achieving the stability and predictability that risk allocation is intended to provide.[151]

II. RELYING ON THE *MARCEL* EXCEPTION TO SATISFY RISK-ALLOCATION NEEDS: A RISK IN ITSELF

The Fifth Circuit has recognized that parties need to be able to rely upon the risk-allocation provisions in their contracts, emphasizing the importance of predictability in risk allocation.[152] In *Grand Isle*, the Fifth Circuit justified its holding by stating that the focus-of-the-contract test provides parties with certainty regarding their risk-allocation arrangements.[153] Louisiana law voids all regardless-of-fault risk-allocation schemes in agreements that "pertain to a well"; *Marcel* coverage provides the only exception to this rule.[154] The above-referenced statement from the Fifth Circuit in *Grand Isle* regarding the importance of certainty in risk-allocation agreements conflicts with the obscure state of the case law addressing the *Marcel* exception—the only method by which parties may allocate risk on a regardless-of-fault basis in Louisiana oilfield contracts.[155] Courts have created ambiguities with respect to compliance with the requirements of falling within the *Marcel* exception, causing challenges for parties obtaining and relying upon *Marcel* coverage.[156] Moreover, recent case law demonstrates that, even when parties have obtained *Marcel* coverage, it is unclear exactly the extent of the coverage

150. *See generally id.*

151. *See generally* Flanagan & Pesce, *supra* note 6.

152. *See generally* Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 589 F.3d 778 (5th Cir. 2009).

153. *Id.* at 787.

154. Kehoe, *supra* note 13, at 1120 (stating that the "oil companies, short of purchasing insurance policies for each individual well site, are, under the LOIA, specifically prevented from protecting themselves from the liability exposure arising in oil exploration").

155. *See* discussion *infra* Part II.B–C.

156. *See* Rogers v. Samedan Oil Co., 308 F.3d 477 (5th Cir. 2002); Hodgen v. Forest Oil Corp., 87 F.3d 1512, 1529 (5th Cir. 1997); Amoco Prod. Co. COG-EPCO, Ltd. P'ship v. Lexington Ins., 745 So. 2d 676, 680 (La. Ct. App. 1st Cir. 1999).

secured.[157] It is clear, however, that the *Marcel* exception does allow parties some freedom to allocate risks.[158]

A. The Birth of Marcel

The U.S. District Court for the Western District of Louisiana established the *Marcel* exception to the LOIA in *Patterson v. Conoco, Inc*.[159] Armando Patterson sustained injuries while working on a fixed platform off the coast of Louisiana on the outer continental shelf.[160] At the time he was injured, Patterson was working for J. Lee Boyle & Associates, Inc.[161] Patterson filed suit against Conoco, the owner of the platform, as well as E.I. Dupont De Nemours & Company and National Union Fire Insurance Company.[162] Dupont filed a third-party claim against Boyle seeking tort and contractual indemnification.[163] The court dismissed Dupont's tort indemnity claim on the basis of workers' compensation.[164]

Boyle and Dupont's agreement contained an indemnity provision requiring Boyle to fully indemnify Dupont against any losses and expenses arising out of injury to any person on a regardless-of-fault basis.[165] Applying the LOIA to the indemnity agreement, the court struck the indemnity provisions in the contract and dismissed Dupont's third-party

---

157. *See* Borman v. Shamrock Energy Sols., LLC, No. 17-11720, 2019 WL 4930231, at *1 (E.D. La. Oct. 7, 2019); Durr v. GOL, LLC, 393 F. Supp. 3d 476 (E.D. La. 2019); Jefferson v. Int'l Marine, LLC, 224 So. 3d 50, 55 (La. Ct. App. 1st Cir. 2017).

158. *See* generally Kehoe, *supra* note 13, at 1129.

159. Patterson v. Conoco, Inc., 670 F. Supp. 182 (W.D. La. 1987).

160. *Id.* at 183.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901–50, with few exceptions, provides that the employer's liability to an injured employee shall be limited to payment of compensation as provided under the Longshore Act, thereby extinguishing any tort liability on the part of an LHWCA-covered employer to its injured employee. *See id.* § 905(a). Hence, no tort liability exists to support a third-party tortfeasor's tort indemnity or tort contribution claims against the covered-LHWCA employer. *See* Ketchum v. Gulf Oil Corp., 789 F.2d 159, 161 (5th Cir. 1986).

165. *Patterson*, 670 F. Supp. at 183. The specific language contained in the indemnity provision provided that "Boyle agrees to indemnify fully Dupont against all losses and expenses resulting from injury to any person resulting in any way from any act or omission, negligent or otherwise, on the part of Dupont or Boyle." *Id.*

claim for indemnity.[166] The court applied LOIA subsection B, which prohibits indemnity for losses arising out of the negligence or fault of the indemnitee, and voided the indemnity provision.[167] The agreement between the parties also provided that Boyle would obtain liability insurance coverage for the contract work and name Dupont as a co-insured.[168] Normally, such an agreement would violate Subsection G of the LOIA because it requires one party to obtain insurance to protect the other from the consequences of his own negligence or fault.[169] In this case, however, Dupont submitted evidence showing that Dupont had reimbursed Boyle for the costs of the insurance premium associated with extending coverage to Dupont.[170] The court found that the LOIA did not require dismissal of Dupont's claim for insurance coverage since Dupont proved that it paid for its additional insured coverage.[171] As the LOIA prevents the shifting of the economic burden of the oil company's negligence onto the independent contractor, the agreement did not violate the LOIA because the indemnitee did not shift the economic burden of its fault onto the indemnitor.[172]

In *Marcel v. Placid Oil Co.*, the Fifth Circuit adopted the *Patterson* court's approach, giving rise to the well-known *Marcel* exception.[173] In *Marcel*, Jeffrey Marcel sustained injuries while working on a fixed platform on the outer continental shelf off the coast of Louisiana.[174] SEE, Inc. employed Marcel, and Placid Oil Company operated the platform on which Marcel allegedly slipped on a puddle of oil and sustained injuries.[175] The agreement between SEE and Placid provided that SEE would obtain insurance indemnifying Placid, name Placid as an insured, and bill Placid directly for its share of the insurance premiums.[176] Marcel sued Placid for negligence in connection with the injuries he sustained.[177] Placid subsequently filed a third-party claim against SEE for breach of contract, arguing that SEE failed to obtain insurance coverage on behalf of Placid

166. *Id.* at 184.
167. *See* LA. REV. STAT. § 9:2780(B) (2018).
168. *Patterson*, 670 F. Supp. at 184.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994).
174. *Id.* at 565.
175. *Id.*
176. *Id.* at 566.
177. *Id.* at 565.

as provided in the agreement.[178] The district court granted summary judgment in favor of SEE and, in dismissing Placid's claims, held that a provision which obligates a party to obtain insurance in favor of another violates subsection G of the LOIA.[179] Placid, however, appealed this ruling on the basis of the holding in *Patterson v. Conoco, Inc*.[180]

The Fifth Circuit adopted the exception carved out in *Patterson*, which provides that a party may obtain the status of additional insured through its contractor's insurance policy when it pays for the coverage.[181] The court reasoned that the purpose of the LOIA is to prevent an oil company from shifting the economic costs associated with the its own negligence onto its contractor.[182] When the oil company pays the cost of being named as an additional insured on the contractor's policy, the economic burden associated with the oil company's negligence is not shifted onto the contractor.[183] Such an arrangement does not violate the policy behind the LOIA.[184] The court stressed that this exception only applies if the principal pays the "material part" of the premium associated with the additional insured endorsement.[185] *Marcel* stands for the proposition that the LOIA does not prohibit an oil company from obtaining additional insured coverage through its contractor's insurance policy, provided that the oil company pays its fair share for that coverage.[186] Therefore, when an agreement is not contrary to the policy considerations that prompted the enactment of the LOIA, the court will not void the agreement.[187] The *Marcel* exception, however, provides parties with a less-than-ideal risk-allocation arrangement.[188] Parties struggle to comply with the requirements for obtaining *Marcel* coverage, and when parties comply with the *Marcel* exception, they struggle to determine what exactly they are receiving.[189]

It is clear that the *Marcel* exception allows the oil company to obtain additional insured status on its contractor's policy, which permits the oil company to obtain indemnity from the contractor's insurer if the oil

178. *Id.* at 565–66.
179. *Id.* at 566; *see also* LA. REV. STAT. § 9:278(G) (2018).
180. *Marcel*, 11 F.3d at 569.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 570.
186. *See generally id.*
187. *See generally id.*
188. *See* discussion *infra* Part II.B–C.
189. *See* discussion *infra* Part II.B–C.

company is sued in tort by an injured employee of the contractor.[190] Courts and practitioners alike have historically considered additional insured endorsements to be a legitimate method of risk allocation.[191] Under the LOIA, obtaining additional insured coverage through the *Marcel* exception is the only option parties have to allocate risks without first determining that the indemnitee is free from fault.[192] Risk allocation is especially important in exploration and production activities because of the high probability of loss inherent in the hazardous nature of the work.[193] The production of oil and gas poses significant risks to safety and human health, as oil field workers face serious risks of bodily injury during day-to-day operations.[194] This increased likelihood of personal injury leads to an increased likelihood of personal injury lawsuits.[195] When a contractor's employee sustains injuries on the job, the employee may not sue his employer, pursuant to the governing workers' compensation scheme.[196] The injured employee can, however, sue the oil company and any third-party contractors.[197] Thus, oil companies expose themselves to the risk of liability for the injuries of their contractor's employees when hiring various contractors.[198] Oil companies secure themselves from this exposure through the *Marcel* exception, which permits additional insured endorsements and allows the oil company to be indemnified for losses

190. *See, e.g.*, Patterson v. Conoco, Inc., 670 F. Supp. 182 (W.D. La. 1987). Patterson, an employee of Boyle, was injured and sued Dupont in tort. Thereafter, Dupont sued Boyle for indemnification pursuant to its additional insured status on Boyle's insurance policy. *Id.* This is a typical example of how a lawsuit alleging a right to *Marcel* coverage arises.

191. Trisha Strode, Comment, *From the Bottom of the Food Chain Looking Up: Subcontractors Are Finding That Additional Insured Endorsements Are Giving Them Much More Than They Bargained For*, 23 ST. LOUIS U. PUB. L. REV. 697, 703 (2004).

192. *See generally* LA. REV. STAT. § 9:2780 (2018); *Marcel*, 11 F.3d 563; *see also* Kehoe, *supra* note 13.

193. *See generally* Flanagan & Pesce, *supra* note 6.

194. Knapp v. Chevron USA, Inc., 781 F.2d 1123, 1130 (5th Cir. 1986) (noting that "[i]t is universally known that the exploration for oil, gas and other minerals is extremely hazardous").

195. *See generally* Strode, *supra* note 191.

196. *See* LA. REV. STAT. § 23:1032(A); *see also* 33 U.S.C. § 905(b) (2018).

197. *See, e.g.*, Patterson v. Conoco, Inc., 670 F. Supp. 182 (W.D. La. 1987).

198. Strode, *supra* note 191, at 704. The original rationale for this practice was that each party should be responsible for its own employees as the entity with the most control over its own employees and the daily operations relating to their work.

arising out of its negligence or fault.[199] For the oil company to benefit from the *Marcel* exception, they must accurately ensure that they have complied with *Marcel*'s requirements, namely, paying the "material part" of the premium.[200]

B. Rejection of Claims for Marcel *Coverage on the Basis of a Failure to Pay the "Material Part" of the Premium*

As the Fifth Circuit set forth in *Marcel v. Placid Oil Co.*, the oil company must pay the "material part" of the premium in order for the exception to apply.[201] The following cases demonstrate that the requirement of paying the "material part" is rife with ambiguity.[202] This ambiguity has left parties unable to obtain the *Marcel* coverage that they have contracted for and relied upon in drafting their agreements.[203]

1. The Contractor May Not Factor the Cost of the Additional Insured Coverage into the Price Charged to the Oil Company

The Fifth Circuit rejected an operator's claim to *Marcel* coverage in *Hodgen v. Forest Oil Corp.*[204] Based on the non-maritime nature of the contract, the LOIA governed the contract between Forest Oil Corp. and Operators and Consulting Services, Inc. (OCS).[205] Forest asserted a right to *Marcel* coverage under the insurance policy obtained by OCS.[206] Forest argued that it paid the *Marcel* premium pursuant to its company practice which permitted its contractors, like OCS, to factor the cost of naming Forest as an additional insured into its contract price.[207] The court refused to find that this agreement fell within the *Marcel* exception, reasoning that allowing an oil company to satisfy the requirement of paying the "material part" of the premium by permitting the contractor to factor the cost into the price charged to the operator would undermine the LOIA.[208] If courts

199. *See generally* Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994).
200. *See generally id.*
201. *See generally id.*
202. *See* discussion *infra* Part II.B.1–2.
203. *See* discussion *infra* Part II.B.1–2.
204. Hodgen v. Forest Oil Corp., 87 F.3d 1512 (5th Cir. 1996), *overruled on other grounds by* Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 589 F.3d 778 (5th Cir. 2009).
205. *Id.* at 1526–27.
206. *Id.* at 1529.
207. *Id.*
208. *Id.*

were to permit this arrangement, every oil company would claim a right to *Marcel* coverage by virtue of the contractor having factored in the cost of paying the "material part" of the premium into the price charged to the oil company for its services.[209] The oil company must actually be able to present proof that it paid the "material part" of the coverage so that the *Marcel* exception does not effectively write out subsection G of the LOIA from the statute.[210] Subsequent case law has not clarified what constitutes sufficient proof of payment of the "material part" of the *Marcel* premium.[211]

2. The $2,000 Question—a Comparison of Amoco *and* Rogers

Louisiana state courts and federal courts applying Louisiana law have accorded different interpretations to what constitutes the "material part" of the premium.[212] In *Amoco Production Co. COG-EPCO, Ltd. Partnership v. Lexington Insurance Co.*, the Louisiana First Circuit Court of Appeal addressed the question of whether Amoco Production Co. paid the "material part" of the premium associated with the additional insured endorsement made in Amoco's favor.[213] Amoco entered into an MSA with Pride Petroleum Services, a workover contractor, in which Pride agreed to perform workover services on one of Amoco's wells in Point Coupee Parish, Louisiana.[214] Pride added Amoco as an additional insured under Pride's primary and excess insurance policies.[215] The court noted that it was undisputed that the total increase in the premium associated with the additional insured endorsement was $2,000 and that Amoco paid the $2,000.[216] Lexington Insurance Co. provided Pride's insurance coverage.[217] One Pride employee was killed and several others were

---

209. *See generally id.*

210. *See generally id.*

211. *See* Amoco Prod. Co. COG-EPCO 1992 Ltd. P'ship v. Lexington Ins., 745 So. 2d 676, 680 (La. Ct. App. 1st Cir. 1999); *cf.* Rogers v. Samedan Oil Corp., 308 F.3d 477, 479 (5th Cir. 2002).

212. *See Amoco Prod. Co. COG-EPCO 1992 Ltd. P'ship*, 745 So. 2d 676.

213. *Id.*

214. *Id.* at 677.

215. *Id.* at 678.

216. *Id.* Amoco tried to argue that the LOIA should not apply because Pride was not the type of "mom and pop" oil service company that the LOIA was aimed at protecting. Amoco cited the fact that Pride had purchased 85 times the amount of coverage required under their agreement. The court rejected this argument and struck the coverage in the name of preserving fairness of competition among Louisiana contractors. *Id.* at 680.

217. *Id.* at 678.

seriously injured when an explosion occurred at the wellsite.[218] As a result, numerous survivors brought suit against Amoco.[219]

Lexington rejected Amoco's claims for coverage under the Pride policy, citing the LOIA as justification for the rejection.[220] Amoco argued that Pride, an international company performing work all over the world, was not the type of "mom and pop" contractor that the LOIA was enacted to protect and that the LOIA, therefore, should not apply.[221] The court rejected Amoco's argument that the LOIA should not apply.[222] The court reasoned that applying the LOIA to void coverage in this case would serve to promote the purpose of the LOIA by preventing oil companies from forcing contractors to purchase insurance to cover the oil company's negligence, thereby preserving fairness of competition among contractors.[223] The court found that the $2,000 paid by Amoco for nearly $11,000,000 in coverage provided under the Lexington policy was "insufficient consideration."[224] Amoco failed to prove that it paid the "material part" of the cost of coverage; therefore, the *Marcel* exception did not apply.[225] Thus, the additional insured endorsement was held unenforceable pursuant to subsection G of the LOIA.[226]

The court rejected Amoco's argument that Pride purchased more than 85 times the amount of insurance required under the MSA, and Amoco asserted that Pride would have needed that coverage for its operations in other states even in the absence of its contract with Amoco.[227] It remains unclear what would have been a sufficient amount of money for the majority to find that the "material part" of the premium was paid, as Amoco did in fact pay the entire cost of the additional insured endorsement.[228]

In *Rogers v. Samedan Oil Corp.*, a successful claim to *Marcel* coverage was made and subsequently affirmed by the U.S. Fifth Circuit Court of Appeals.[229] Charles Rogers was working for Pride Petroleum Services—Samedan Oil Corporation's contractor—at the time he

218. *Id.* at 677.
219. *Id.*
220. *Id.*
221. *Id.* at 680.
222. *Id.*
223. *Id.*
224. *Id.* at 680–81.
225. *Id.*
226. *Id.*; *see also* LA. REV. STAT. § 9:2780(G) (2018).
227. *Amoco Prod. Co. COG-EPCO 1992 Ltd. P'ship*, 745 So. 2d at 680.
228. *See generally id.*
229. Rogers v. Samedan Oil Corp., 308 F.3d 477 (5th Cir. 2002).

sustained injuries.[230] Pride named Samedan as an additional insured on the insurance policy that Pride obtained from Lexington Insurance Co.[231] Lexington charged Samedan $2,000 per year for the additional insured endorsement, and Samedan paid these premiums directly to Lexington.[232] Moreover, the amount of liability coverage available to Samedan under the policy was $11,000,000.[233] Charles Rogers filed a personal injury lawsuit against Samedan, which it eventually settled with Rogers.[234] Samedan filed a third-party claim against Lexington for reimbursement of settlement costs paid to Rogers pursuant to the additional insured endorsement on Pride's insurance policy.[235] Despite the factual similarities between *Rogers* and *Amoco,* the Fifth Circuit in *Rogers* entered a holding directly contrary to that entered by the Louisiana First Circuit Court of Appeal in *Amoco*.[236] The Fifth Circuit found that Pride had not borne the "material part" of the premium associated with Samedan's additional insured endorsement on Pride's insurance policy.[237] Moreover, the court found that Samedan paid the entire part of the premium for its additional insured coverage.[238] Therefore, the Fifth Circuit held that the *Marcel* exception applied and that the arrangement did not violate the LOIA.[239]

The Fifth Circuit distinguished *Amoco* from *Rogers* based on the fact that Lexington set the premiums and that Samedan paid these premiums directly to Lexington.[240] Amoco did, however, pay the premium for its additional insured endorsement, and it is not clear from the *Amoco* opinion whether Amoco made the payment to Pride or Lexington.[241] The minor factual distinction between *Rogers* and *Amoco* resulted in diametrically opposed outcomes, creating further ambiguity surrounding what

230. *Id.* at 479.
231. *Id.*
232. *Id.* at 480.
233. *Id.* at 479.
234. *Id.*
235. *Id.*
236. *See id.*; *cf.* Amoco Prod. Co. COG-EPCO 1992 Ltd. P'ship v. Lexington Ins. Co., 745 So. 2d 676 (La. Ct. App. 1st Cir. 1999).
237. *Rogers*, 308 F.3d at 479.
238. *Id.* at 482.
239. *Id.*
240. *Id.* Skeptics might make the distinction based upon the fact that *Amoco* involved a Louisiana state court, and *Rogers* involved a federal district court.
241. *Amoco Prod. Co. COG-EPCO 1992 Ltd. P'ship*, 745 So. 2d at 678.

constitutes the "material part" of the premium.[242] This ambiguity leaves parties with a lack of predictability in their risk-allocation agreements.[243]

In the context of multimillion-dollar exploration and production projects, predictability of risk allocation is extremely important, especially given the dangerous work environment and the likelihood of personal injury lawsuits.[244] In fact, the main purposes of allocating risk are to achieve predictability and avoid the uncertainties and costs that follow from making determinations of fault and causation.[245] From the preceding three cases, at least one thing is clear: the operator must make a showing that it actually paid the "material part" of the premium associated with its additional insured endorsement.[246] The boundaries of the *Marcel* exception are even less clear when the contractor's insurance policy names third parties to the MSA as additional insureds.[247]

C. The Extension of Marcel *Coverage to Third Parties*

A recent issue that has surfaced in several cases is whether *Marcel* coverage extends to third-party contractors who do not pay a *Marcel* premium. The controversy in *Jefferson v. International Marine, LLC* arose when Robert Jefferson, an employee of General Fabricators, Inc., fell into a hole caused by a missing deck board on International Marine LLC's vessel while being transported to McMoRan Oil & Gas LLC's platform off the coast of Louisiana.[248] International entered into an agreement with McMoRan, the principal, to provide certain vessel services in connection with McMoRan's offshore project.[249] General also contracted with McMoRan to provide services as a subcontractor on McMoRan's offshore drilling platform.[250] Pursuant to the contract, General agreed to name McMoRan as an additional insured under General's insurance policy.[251]

---

242. *See generally id.*; *Rogers*, 308 F.3d 477.
243. *See Rogers*, 308 F.3d 477; *cf. Amoco Prod. Co. COG-EPCO 1992 Ltd. P'ship*,745 So. 2d 676.
244. *See generally* Pugh, *supra* note 27; Flanagan & Pesce, *supra* note 6, at § 6.03.
245. *See generally* Pugh, *supra* note 27; Flanagan & Pesce, *supra* note 6, at § 6.03.
246. *See generally* Pugh, *supra* note 27; Flanagan & Pesce, *supra* note 6, at § 6.03.
247. *See* discussion *infra* Part II.C.
248. Jefferson v. Int'l Marine, LLC, 224 So. 3d 50, 51–52 (La. Ct. App. 1st Cir. 2017).
249. *Id.*
250. *Id.* at 52.
251. *Id.*

McMoRan stipulated that it would pay the premium in order to fit within the *Marcel* exception to the LOIA; however, McMoRan failed to pay the *Marcel* premium.[252] Jefferson sued International, and International filed a third-party claim against McMoRan, alleging, *inter alia*, that McMoRan's failure to pay the *Marcel* premium caused International to lose its right of indemnity from General.[253]

International argued that, as an invitee of McMoRan under the contract between McMoRan and General, it had a right to indemnity from General.[254] McMoRan's failure to pay the premium, however, caused International to lose that right.[255] The court held that McMoRan had no obligation to purchase *Marcel* coverage under General's policy to protect International from claims by General's employees.[256] Thus, International did not lose a right to indemnity from General because International could not lose a right it never had.[257] The court, without explanation, stated in dicta that the *Marcel* coverage does not extend to third-party beneficiaries, like International, who have not paid a *Marcel* premium.[258]

Two recent cases from the U.S. District Court for the Eastern District of Louisiana have provided a more substantial analysis of whether third parties are entitled to *Marcel* coverage.[259] The first case is *Borman v. Shamrock Energy Solutions, LLC*, in which the court addressed a third-party contractor's claim to *Marcel* coverage.[260] Plaintiff Garland Borman sustained injuries during the course of his employment with Linear Controls, Inc. while working aboard an offshore platform on the outer continental shelf off the coast of Louisiana.[261] Fieldwood Energy owned the platform.[262] At the time of the accident, Shamrock Energy Solutions,

---

252. *Id.* Although the court did not address this specific issue, due to McMoRan's failure to pay the increased cost associated with its addition to General's policy, the provision in the McMoRan-General contract requiring General to name McMoRan as an additional insured was void under Louisiana Revised Statutes § 9:2780(G). *See* Marcel v. Placid Oil Co., 11 F.3d 563, 570 (5th Cir. 1994).

253. *Jefferson*, 224 So. 3d at 54.

254. *Id.* at 52–53.

255. *Id.* at 52.

256. *Id.* at 55.

257. *Id.*

258. *Id.*

259. *See* Borman v. Shamrock Energy Sols., LLC, 421 F. Supp. 3d 382 (E.D. La. 2019); Durr v. GOL, LLC, 393 F. Supp. 3d 476 (E.D. La. 2019).

260. *Borman*, 421 F. Supp. 3d at 384.

261. *Id.*

262. *Id.*

LLC also had employees working on the Fieldwood platform.[263] Both Shamrock and Linear had each individually entered into MSAs with Fieldwood that obligated each to obtain *Marcel* coverage in favor of Fieldwood; however, Shamrock and Linear were not in privity of contract with one another.[264]

Borman filed a negligence lawsuit against Shamrock and Fieldwood.[265] Shamrock thereafter filed a third-party claim against Linear and Linear's insurer, First Mercury Insurance Company (FMIC), alleging, *inter alia,* that Shamrock was entitled to *Marcel* coverage under Linear's insurance policy pursuant to the Linear-Fieldwood MSA.[266] Shamrock moved for summary judgment on this specific issue.[267] Linear and FMIC, in opposition to Shamrock's motion, argued that the principal's payment of the *Marcel* premium was insufficient to extend the *Marcel* coverage to a third party, like Shamrock, who had neither paid nor contributed to payment of the *Marcel* premium.[268] Shamrock argued that the *Marcel* exception does not require that the party seeking coverage pay the *Marcel* premium when the principal has paid the entire *Marcel* premium, and no portion of the *Marcel* premium was borne by the independent contractor that procures the coverage.[269] The court held first that Shamrock was an invitee and was therefore part of Fieldwood's company group[270] for insurance indemnification purposes.[271] The court noted that neither the Louisiana Supreme Court nor the U.S. Fifth Circuit Court of Appeals has directly addressed whether a third-party contractor within a company group is entitled to *Marcel* coverage when the principal pays the *Marcel* premium on behalf of itself and the company group.[272] It was undisputed that Fieldwood, the principal, paid the entirety of the "material part" of the *Marcel* premium on behalf of itself and the company group.[273] Since

263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.* at 385.
269. *Id.* at 386. "Fieldwood is the principal or company. Shamrock is the third-party contractor or indemnitee. Linear is the indemnitor," or the party who procured the insurance coverage. *Id.* at 386 n.3.
270. "The Company Group is defined as '[Fieldwood] and its parent, affiliates and subsidiary companies, co-lessees, co-owners, partners, joint venturers, together with its and all of their respective officers, directors, employees, in-house legal counsel, agents, representatives, insurers and *invitees.*'" *Id.* at 387.
271. *Id.* at 388.
272. *Id.* at 389.
273. *Id.* at 390.

Fieldwood, and not Linear, bore the increased costs of procuring the *Marcel* coverage for Fieldwood and its company group, Fieldwood did not shift the economic burden of its negligence or fault upon Linear.[274] Relying on the two underlying policy goals of the *Marcel* exception and the LOIA—promoting the acquisition of insurance for accidents occurring on offshore platforms while preventing the shifting of the economic burden of insurance coverage to the indemnitor—the court found that application of the *Marcel* exception to this case was appropriate.[275] Thus, the court held that the agreement did not violate the purpose of the LOIA and the *Marcel* exception.[276] Shamrock prevailed on its motion for summary judgment.[277]

In the second case, *Dur v. Gol, LLC,* the U.S. District Court for the Eastern District of Louisiana addressed a motion to dismiss which raised the issue of whether the principal's payment of the *Marcel* premium extends additional insured coverage under the contractor's insurance policy to the principal's other contractors.[278] Terry Durr, an employee of Linear Control, Inc., was injured while being transported via a vessel to a fixed platform owned by Fieldwood Energy, located on the outer continental shelf off the coast of Louisiana where he worked.[279] Fieldwood paid the *Marcel* premium to obtain additional insured coverage on Linear's policy.[280] At the time of Durr's injuries, Linear was working as a contractor for Fieldwood.[281] Pursuant to an MSA between Fieldwood and the Wood Group PSN, Inc., Wood Group was also working as a contractor for Fieldwood at the time of Durr's injuries.[282] Durr sued Wood Group, Fieldwood, and others for his injuries, alleging that their negligence contributed to his injuries.[283] Wood Group filed a third-party claim against Linear and its insurer, First Mercury Insurance Company (FMIC), alleging, *inter alia*, that it was entitled to *Marcel* coverage under Linear's insurance policy as an additional insured.[284] Wood Group argued that the Linear-Fieldwood contract required Linear to obtain insurance coverage for the benefit of the company group, which by definition included Wood

274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.* at 391.
278. Durr v. GOL, LLC, 393 F. Supp. 3d 476 (E.D. La. 2019).
279. *Id.* at 479.
280. *Id.* at 480–81.
281. *Id*. at 479.
282. *Id.* at 480.
283. *Id.* at 479.
284. *Id.*

Group.[285] It was undisputed that Fieldwood paid the cost of the premium associated with the additional insured endorsement and that Linear did not bear any portion of the cost.[286] Moreover, it was undisputed that the Linear-Fieldwood MSA required Linear to obtain *Marcel* coverage for Fieldwood and Fieldwood's company group, of which Wood Group was a member.[287] The court denied Linear's motion to dismiss and held that Wood Group stated a plausible claim that it is a member of Fieldwood's company group that is entitled to benefit from Fieldwood's payment of the *Marcel* premium.[288]

At first blush, it does not seem that extending *Marcel* coverage to third parties would violate the policy behind the LOIA and the *Marcel* exception.[289] The justification of the *Marcel* exception to the LOIA is that the oil company is not impermissibly shifting the economic burden of its fault or negligence onto the contractor.[290] *Marcel* stands for the proposition that when the oil company pays the cost of the increased premium associated with being named as an additional insured on the contractor's policy, the oil company does not violate the LOIA because there is no impermissible economic burden-shifting.[291] This exception does not apply where the contractor pays any part of this increased premium because that would amount to impermissible burden-shifting.[292] The preceding three cases addressed the attempts of parties to extend *Marcel* coverage to third-party contractors; however, the courts have provided no definite answer as to whether this arrangement comports with the policy behind the LOIA.[293]

Parties have attempted to accomplish this extension of coverage by naming the whole company group as an additional insured on the contractor's policy, and having the oil company pay the entire cost

---

285. *Id*. at 480–81.

286. *Id*. at 486.

287. *Id.*

288. *Id.* at 488–89. The court noted that Linear had paid no cost of the *Marcel* premium because the *Marcel* premium was paid in full by Fieldwood on behalf of Fieldwood and the company group. The court stated that this arrangement was consistent with the public policy behind the LOIA and the *Marcel* exception. *Id.*

289. *See generally id.*

290. Marcel v. Placid Oil Co., 11 F.3d 563, 570 (5th Cir. 1994).

291. *See id.* at 569–70; Patterson v. Conoco, Inc., 670 F. Supp. 182, 184 (W.D. La. 1987).

292. *Marcel*, 11 F.3d at 570.

293. Jefferson v. Int'l Marine, LLC, 224 So. 3d 50 (La. Ct. App. 1st Cir. 2017); Borman v. Shamrock Energy Sols., LLC, No. 17-11720, 2019 WL 4930231, at *1 (E.D. La. Oct. 7, 2019); *Durr*, 393 F. Supp. 3d 476.

associated with the increased premium in favor of itself and the company group.[294] Courts could find that extending *Marcel* coverage to third-party members of the company group is consistent with the LOIA and the *Marcel* exception when the contractor procuring the coverage does not pay any part of the increased premium associated with the additional insured endorsements.[295] Furthermore, recognizing the right of the company group to the *Marcel* coverage fits within the Louisiana Civil Code articles on third-party beneficiaries, so long as the intended benefit is express.[296] An examination of the economic factors that motivate oil companies to seek additional insured status, however, undermines the assertion that extending *Marcel* coverage to the company group comports with the policy behind the LOIA.[297] In order to bring clarity to this area of the law, the Louisiana Legislature should revise the LOIA to allow for regardless-of-fault indemnity agreements so that parties may freely structure their risk-allocation arrangements, subject to statutorily prescribed limitations and conditions that ensure adequate protection of contractors.

III. REVISING THE LOIA WITH GUIDANCE FROM THE TOIA

Oil companies typically aim to avoid depleting their own insurance to defend lawsuits brought by the employees of their contractors.[298] By tendering defense to the contractor's insurer, the additional insured oil company assures that its own insurance company is not brought into the action.[299] The oil company thus faces no risk of negative impacts on its own insurance, like increased premiums and policy cancellations.[300] Instead, these negative impacts will fall upon the contractor procuring the coverage.[301] The oil company's own insurance is further insulated because the oil company's additional insured status precludes the contractor's insurer from suing the oil company or his insurance provider to recover defense costs.[302] This is because an insurer has no right of subrogation against his insureds, including his additional insureds, if the money paid

294. *See, e.g.*, *Durr*, 393 F. Supp. 3d 476.

295. *See id.* In addition, no case expressly "holds that a third-party is prohibited from benefitting from someone else's payment of the *Marcel* premium on behalf of itself and the 'Company Group.'" *Id.* at 489.

296. *See* LA. CIV. CODE. arts. 1978–82 (2018).

297. *See generally* Strode, *supra* note 191.

298. *Id.* at 704.

299. *Id.*

300. *Id.* at 705.

301. *Id.*

302. *Id.*

out was within the defined scope of the coverage.[303] Extending *Marcel* coverage to the whole company group, by increasing the number of additional insureds, increases the likelihood that claims for losses will be made against the insurance policy of the contractor that procures the coverage.[304]

The increased likelihood of claims against the contractor's policy can lead to a depletion of the amount of insurance coverage available to the contractor, increased insurance premiums, and potentially even policy cancellations.[305] The insurer maintains a "loss experience" based on the claims and losses made on the contractor's policy, and when the insurer is determining coverage and premiums for the future, the insurer takes the losses and claims made on the contractor's policy into account.[306] A poor loss experience will lead to higher insurance premiums and less coverage in the future.[307] In fact, the insurer may even refuse to renew the policy altogether.[308] The "material part" of the premium paid by the oil company to secure *Marcel* coverage thus represents only a portion of the costs associated with the additional insured endorsement.[309] The hidden, future costs of the additional insured endorsement are borne solely by the contractor.[310] Additional insured coverage can thus result in economic burden-shifting, and this burden-shifting is out of line with the LOIA's single stated policy of protecting contractors.[311] Thus, even the *Marcel* exception is not entirely protective of contractors, and if courts are going to continue to permit economic burden-shifting through risk allocation, there is a much more effective way to do it than through *Marcel*.[312] The Louisiana Legislature should amend the LOIA to permit parties to allocate risk effectively. Specifically, the Louisiana Legislature should revise the LOIA to loosen its restrictions on regardless-of-fault risk allocation so that other important policy goals—such as enhancing predictability in the event of a loss and reducing litigation expenses—can also be promoted, while simultaneously preserving certain protections provided to

303. *Id.*
304. *Id.* at 717.
305. *Id.*
306. *Id.* at 718.
307. *Id.*
308. *Id.*
309. *See generally id*. at 716–18.
310. *Id.* at 718.
311. *See* LA. REV. STAT. § 9:2780(A) (2019); *see also* Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994).
312. *See* discussion *supra* Part II.B.–C.

contractors by placing limitations on the extent to which parties may allocate risk on a regardless-of-fault basis.

Risk allocation in the form of regardless-of-fault indemnity serves utility and efficiency purposes that benefit both contracting parties.[313] Risk allocation developed for a variety of reasons, including the difficulties and expenses involved in determining proportionate fault in accidents that arise in common workplaces, and the availability of and reliance upon insurance.[314] Given that oil and gas activity presents danger and risk to both person and property, losses are likely, and parties need to plan for losses before they arise in order to minimize the negative impacts of them.[315] A proper risk-allocation scheme, one that includes indemnity, insurance, and other contractual provisions, serves to mitigate the effects of casualty risks, foster certainty in the case of an accident, and reduce litigation costs.[316] Further, by removing any unpredictability about what risks a party will be responsible for absorbing, regardless-of-fault indemnity provisions allow parties to accurately evaluate risk exposure and obtain appropriate insurance.[317] This clear understanding of potential risk exposure enables a contractor to determine if taking the job is worth the risk.[318] Under the *Marcel* exception, the contractor lacks this ability to accurately evaluate his risk exposure during the negotiations phase, before the job commences.[319] This problem is further exacerbated when the oil company and the contractor agree to extend the *Marcel* coverage to third-party members of the company group.[320] In revising the LOIA, the Louisiana Legislature should look to the TOIA for guidance.[321] The TOIA strikes the right balance between protecting contractors and permitting parties to allocate risk in order to better plan for losses before they arise, and the Louisiana Legislature should adopt the insurance-related exception provided for under the TOIA.[322]

---

313. *See generally* Pugh, *supra* note 19; Flanagan & Pesce, *supra* note 6.

314. Pugh, *supra* note 19.

315. Flanagan & Pesce, *supra* note 6.

316. *Id.*

317. Moomjian, *supra* note 149, at 19–20.

318. *See generally id.* at 19.

319. *See generally id.*; *see also* Marcel v. Placid Oil Co., 11 F.3d 563, 569–70 (5th Cir. 1994).

320. *See generally* Moomjian, *supra* note 149; *see also Marcel*, 11 F.3d at 569–70.

321. *See* TEX. CIV. PRAC. & REM. CODE §§ 127.001–.007 (West 2019).

322. *See id.* § 127.005.

Both Texas and Louisiana have economies that are strongly tied to oil and gas.[323] Additionally, the legislatures of both Texas and Louisiana have each enacted anti-indemnity statutes, the TOIA and LOIA, respectively, aimed at protecting contractors in the oil and gas industry.[324] The TOIA's stated purpose mirrors that of the LOIA: "remedying an inequity fostered on certain contractors by indemnity provisions" in certain oilfield contracts.[325] Specifically, the Texas Legislature enacted the TOIA to relieve contractors of the large and uncertain liabilities caused by provisions in oilfield contracts that required the contractor to assume the financial responsibility of the oil company's negligence or fault.[326] The legislative history to the TOIA explains that, at the time of its original enactment, contractors found it difficult or impossible to obtain liability insurance to cover their indemnity obligations.[327] Thus, the TOIA, similar to the LOIA, declares null and void indemnity provisions in certain oilfield contracts to the extent those provisions purport to indemnify the indemnitee for its negligence or fault.[328]

Once insurance for oil and gas operations became readily available, however, oil companies and contractors in Texas lobbied the Texas Legislature to amend the TOIA.[329] The Texas Legislature responded to these lobbying efforts by amending the TOIA to expand the exceptions provided for under the statute.[330] This exception, found at Texas Civil Practice and Remedies Code § 127.005, permits parties to include regardless-of-fault indemnity provisions in their contracts when liability insurance supports the indemnity agreement.[331] Specifically, § 127.005 of the TOIA permits: (1) unilateral indemnity obligations, but the amount of insurance required may not exceed $500,000,[332] and (2) mutual indemnity

323. *See generally* Kehoe, *supra* note 13.

324. *See* TEX. CIV. PRAC. & REM. CODE § 127.002; *see also* LA. REV. STAT. § 9:2780(A) (2018).

325. TEX. CIV. PRAC. & REM. CODE § 127.002.

326. Getty Oil Co. v. Ins. of N. Am., NL Indus. Inc., 845 S.W.2d 794, 803 (Tex. 1992).

327. Ken Petroleum Corp. v. Questor Drilling Corp., 24 S.W.3d 344, 348 (Tex. 2000).

328. TEX. CIV. PRAC. & REM. CODE § 127.003; *accord* LA. REV. STAT. § 9:2780(A), (B).

329. *Ken Petroleum Corp*, 24 S.W.3d at 349 (citing *Hearings on S.B. 1084 Before the Senate Comm. on Jurisprudence*, 71st Leg. (Mar. 28, 1989) (statement of Senator Bob McFarland)).

330. *See* TEX. CIV. PRAC. & REM. CODE § 127.005; *see also Ken Petroleum Corp.*, 24 S.W.3d at 349.

331. TEX. CIV. PRAC. & REM. CODE § 127.005.

332. *Id.* § 127.005(c).

obligations, but the indemnity obligation is limited to the amount of insurance coverage or qualified self-insurance that the parties have equally obtained.[333] Under § 127.005, the indemnitor's indemnity obligation will be limited to the dollar amount of insurance coverage that the indemnitor procures to support his obligations under the indemnity agreement. The contractor receives protection from unreasonable burden-shifting through limitations in § 127.005 in the following manner: if the indemnity agreement is unilateral, the indemnitor's indemnity obligation is capped at $500,000, a relatively small amount by industry standards; whereas, if the agreement is mutual, the indemnity obligations of each party as indemnitor will be limited to the amount of insurance coverage equally provided by both parties. Because the amount of insurance procured by the contractor is likely to be lower than that obtained by the oil company, the "equally-provided" limit protects a smaller contractor from being forced, by a large oil company, to indemnify the oil company up to the amount of insurance or self-insurance procured by the oil company. The exception provided

> "Unilateral indemnity obligation" means an indemnity obligation in an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral in which one of the parties as indemnitor agrees to indemnify the other party as indemnitee with respect to claims for personal injury or death to the indemnitor's employees or agents or to the employees or agents of the indemnitor's contractors but in which the indemnitee does not make a reciprocal indemnity to the indemnitor.

Id. § 127.001(6).

333. *Id.* § 127.005(b).

> "Mutual indemnity obligation" means an indemnity obligation in an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral in which the parties agree to indemnify each other and each other's contractors and their employees against loss, liability, or damages arising in connection with bodily injury, death, and damage to property of the respective employees, contractors or their employees, and invitees of each party arising out of or resulting from the performance of the agreement.

Id. § 127.001(3). The Texas Supreme Court has interpreted § 127.005(b) to mean:

> "[T]he indemnity obligation is limited" to the amount of insurance that is equally provided. If one party provides more insurance than the other, the party providing the higher amount of coverage may not enforce its right to indemnity beyond the amount of coverage that the other party agreed to provide. And the party providing the lower amount of insurance may not enforce its right to indemnity beyond its own amount of coverage.

Ken Petroleum Corp., 24 S.W.3d at 350.

under § 127.005 of the TOIA creates a major distinction between the LOIA and the TOIA.[334]

The Louisiana Legislature should adopt the exception created under § 127.005 because doing so would relieve parties in Louisiana of the need to rely on *Marcel* to allocate risk on a regardless-of-fault basis.[335] The *Marcel* exception has fallen short of meeting parties' risk-allocation needs because of the ambiguities and uncertainties that surround it.[336] These ambiguities and uncertainties do not exist with the TOIA's exception because, unlike the *Marcel* exception, the exception provided under the TOIA does not require the indemnitee to pay any part of the premium in order for the exception to apply.[337] Although the TOIA does sacrifice the complete contractor protection provided under the LOIA, the TOIA provides a contractor with certainty as to the extent of his potential indemnity obligations, which allows the contractor to accurately assess his potential risk exposure and undertake appropriate risk management and risk planning.[338] The contractor benefits from an accurate evaluation of potential risk exposure because it permits the contractor to better negotiate with his insurer for protection from future negative impacts on the contractor's insurance policy.[339] Moreover, the contractor still receives a fair amount of protection from strong-arming through limitations on indemnity agreements that are specified in § 127.005.[340]

As the LOIA currently stands, it does not allow indemnity on a regardless-of-fault basis.[341] The LOIA only permits indemnity where the indemnitee is free from fault.[342] This type of conditional risk allocation

---

334. *Compare* TEX. CIV. PRAC. & REM. CODE § 127.005, *with* LA. REV. STAT. § 9:2780 (2018).

335. *See generally* TEX. CIV. PRAC. & REM. CODE § 127.005; Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994).

336. *See* discussion *supra* Part II.

337. *See generally* TEX. CIV. PRAC. & REM. CODE § 127.005.

338. *See generally* Moomjian, *supra* note 149, at 19, 20.

339. *See generally* Strode, *supra* note 191, at 718.

340. *See generally* TEX. CIV. PRAC. & REM. CODE § 127.005. These limitations are as follows: (i) the $500,000 cap on unilateral indemnity agreements, which by industry standards is a relatively minor amount of money, and (ii) for bilateral agreements, both parties have a duty to indemnify, and the right to be indemnified, for certain losses, and the indemnity obligation is limited to the amount of insurance equally provided by both parties as indemnitor. Additionally, with bilateral indemnity agreements, the contractor will also itself be indemnified by the oil company for certain losses, so protection is less important in the context of bilateral indemnity agreements.

341. *See generally* LA. REV. STAT. § 9:2780 (2018).

342. *See id.* § 9:2780(B).

requires that a determination of culpability be made in order to identify which party is responsible for absorbing a particular risk.[343] In effect, this requires both parties to obtain insurance to cover the same risks, as a determination of culpability—and the resulting contractual liability—can only be made after the loss arises.[344] The *Marcel* exception eliminates this economic inefficiency by allowing the parties to obtain one insurance policy to cover certain risks.[345] The exception provided under the TOIA also eliminates the economic inefficiency of purchasing two insurance policies to cover the same risks but without the ambiguities and uncertainties attendant to *Marcel*.[346]

Section 127.005 of the TOIA permits parties to freely allocate risk on a regardless-of-fault basis, before a given loss arises, which increases predictability.[347] This predictability allows parties to rely upon their risk-allocation provisions and undertake appropriate financial plans.[348] A straightforward risk-allocation scheme allows both contracting parties to clearly and accurately predict the risks they will be responsible for absorbing, which allows each party to adequately insure these risks.[349] Section 127.005 serves the interests of both contracting parties.[350] Moreover, the limitations placed on the permitted indemnity agreements provide contractors with the protection that they need to avoid being strong-armed into burdensome indemnity agreements.[351] The Louisiana Legislature will further the policy behind the LOIA while allowing parties the freedom to allocate risks and insure the risks they assume by adopting the exception provided for under the TOIA.

CONCLUSION

A law that prevents oil companies from strong-arming weaker parties into contracts of adhesion and promotes safety in one of the state's most dangerous industries amounts to good legislation.[352] The Louisiana

---

343. Moomjian, *supra* note 149, at 19, 20.
344. *Id.*
345. *See generally* Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994).
346. *See generally* TEX. CIV. PRAC. & REM. CODE § 127.005 (West 2019).
347. *See generally* Moomjian, *supra* note 149, at 19; Pugh, *supra* note 19.
348. *See generally* Pugh, *supra* note 19.
349. *See generally* Moomjian, *supra* note 149, at 19.
350. *See* TEX. CIV. PRAC. & REM. CODE § 127.005; *see also* Moomjian, *supra* note 149, at 19.
351. *See* TEX. CIV. PRAC. & REM. CODE § 127.005.
352. *See* LA. REV. STAT. § 9:2780(A) (2018); *see also* Knapp v. Chevron USA, Inc., 781 F.2d 1123, 1130 (5th Cir. 1996).

Legislature aimed to accomplish as much by enacting the LOIA.[353] Remedying this inequity, however, has come at the expense of the freedom of parties to contract for oil and gas services in Louisiana.[354] The LOIA has also deprived parties of predictability with respect to the risk-allocation provisions included in oilfield contracts.[355] The broad language of the LOIA and its broad judicial interpretation have resulted in a lack of clarity and uniformity in the courts.[356] Additionally, the broad construction has had the effect of fostering an inequity upon oil companies and contractors.[357] The only way to restore clarity, uniformity, and predictability in this area of the law is through legislation at the state level. It is time for the Louisiana Legislature to respond to the unanswered questions surrounding the *Marcel* exception by removing parties' need to rely on *Marcel* through the adoption of the exception provided for under the TOIA. Once federal and state governments, along with private-sector actors, bring the American economy back to life, Louisiana's economy in particular can benefit from the revisions to the LOIA proposed in this Comment. These revisions will be especially attractive to oil companies, but also to service companies. Assuming prices in the oil and gas markets are able to improve and stabilize, oil companies will undoubtedly be eager to get the hydrocarbons and, consequently, the cash flowing as soon as possible. By attracting oil companies to drill off the coast of Louisiana, these revisions can lead to a much-needed increase in jobs and income in Louisiana.

353. *See* LA. REV. STAT. § 9:2780(A); *see also Knapp*, 781 F.2d at 1130.
354. Panagiotis, *supra* note 10, at 205.
355. *See* discussion *supra* Part III.
356. *See* discussion *supra* Part II.
357. *See generally* Kehoe, *supra* note 13, at 1097.