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DON'T BLAME ME --
I HAVE BEEN EXCULPATED:

"EXCULPATORY CLAUSES" IN OPERATING AGREEMENTS

Patrick S. Ottinger
OTTINGER HEBERT, L.L.C.
P. O. Drawer 52606
1313 West Pinhook Road (70503)
Lafayette, Louisiana 70505-2606
(337) 232-2606
e-mail: psottinger@ohllc.com

Member, Louisiana and Texas Bars

Adjunct Professor of Law, Paul M. Hebert Law Center
Louisiana State University
Baton Rouge, Louisiana

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Patrick S. Ottinger*

I. INTRODUCTION

A. Preface:[1]

Co-tenants (or, as termed in Louisiana, a civil law jurisdiction, co-owners or owners in indivision) of mineral leases often enter into a "joint operating agreement" that regulates the exploration, development, operation or production of jointly owned mineral leases. Agreements of this kind are often called "joint operating agreements," or simply "JOAs."

The American Association of Professional Landmen ("AAPL") has played an integral role in the development, refinement and promotion of operating agreements through the publication and promotion of its Model Form Operating Agreement (herein, "Model Form").[2]

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* Ottinger Hebert, L.L.C., Lafayette, Louisiana. Member, Louisiana and Texas Bars; Adjunct Professor of Law, Paul M. Hebert Law Center, Louisiana State University, Baton Rouge, Louisiana; Reporter, Mineral Law Committee of the Louisiana State Law Institute; Chairman, Advisory Council, Louisiana Mineral Law Institute.

[1] Portions of this section are an adaptation of material taken from Patrick S. Ottinger, *Be Careful What You Ask For: Subsequent Operations Under the Model Form Operating Agreement*, 63 INST. ON OIL & GAS LAW, Ch. 7 (2012). The author also draws on his Treatise on Louisiana Mineral Leases, *viz*., Patrick S. Ottinger, LOUISIANA MINERAL LEASES: A TREATISE (Claitor's Law Books & Publishing Division, Inc., 2016) (hereinafter cited as "OTTINGER, MINERAL LEASE TREATISE").

[2] The most widely used form of operating agreement is the AAPL Form 610--Model Form Operating Agreement published by the AAPL. First introduced in 1956 at its Annual Meeting in Denver, Colorado, revised forms were issued by the AAPL in 1977, 1982, 1989 and 2015. This Article does not focus exclusively on any particular iteration of the Model Form.

The AAPL itself has identified the following papers "addressing the history and development of the AAPL Form 610," *viz.*, J. O. Young, *Oil and Gas Operating Agreements: Producers 88 Operating Agreements, Selected Problems and Suggested Solutions*, 20 ROCKY MT. MIN. L. INST. 197, 198-202 (Matthew Bender 1975); Marvin Wigley, *AAPL Form 610-1977 Model Form Operating Agreement*, 24 ROCKY MT. MIN. L. INST. 693, *et seq.* (Matthew Bender 1978); and John R. Reeves, J. Matthew Thompson, *Significant Cases Governing the Onshore Operating Agreement*, 49 INST. ON OIL & GAS L. & TAX'N., Sec. 2.02 (Sw. L. Fdn. 1998).

"Typically, the agreement provides for the development of the premises by one of the parties for the joint account. The parties to the agreement share in the expenses of the operations and in the proceeds of development, but the agreement normally is not intended to affect the ownership of the minerals or the rights to produce, in which respects, among others, the joint operating agreement is to be distinguished from a unitization agreement and from a mining partnership."[3]

As stated by other respected Commentators, an operating agreement is a contract prevalent in the oil and gas industry whose function is to designate an "operator, describe the scope of the operator's authority, provide for the allocation of costs and production among the parties to the agreement, and provide for recourse among the parties if one or more default in their obligations."[4]

As characterized by a Texas court,[5] the joint operating agreement is not "an ordinary contract," describing it further, as follows:

> Joint Operating Agreements, standardized forms developed over years by the industry to govern ventures in the development of oil and gas properties, are simply not everyday fixtures of life. They govern operations involving immense financial risk and reward; the parties to J.O.A. are experienced and sophisticated and generally have balanced bargaining positions. These are agreements which involve liabilities and obligations unique to the legal and technical peculiarities of the oil and gas industry.[6]

This Article considers the ability of contracting parties to limit or allocate liability and particularly examines the import of an "exculpatory clause." Not surprisingly, this is perennially a "hot topic" in the industry, and there certainly has been no dearth of prior commentary in a variety of fora.[7]

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[3] Patrick H. Martin & Bruce M. Kramer, WILLIAMS & MEYERS: MANUAL OF OIL AND GAS TERMS (17th ed. 2018).

[4] 3 Ernest E. Smith & Jacqueline L. Weaver, *Texas Law of Oil and Gas*, § 17.3 at 17-7 (2d ed. 2006).

[5] *Hill v. Heritage Resources, Inc.*, 964 S.W. 2d 89 (Tex. App.-El Paso 1997, *pet. den'd*).

[6] *Id*. at 112.

[7] Gary Conine, *The Prudent Operator Standard: Applications Beyond the Oil and Gas Lease*, 41 NAT. RES. J. 23 (2001); Fabené W. Talbot, *The Exculpatory Clause of the Joint Operating Agreement and Its Impact on the Operator's Standard of Performance*, State Bar of Texas, 21st Annual Advanced Oil, Gas & Energy Resources Law Course, Chapter 8 (2003); Wilson Woods, *The Effect of Exculpatory Clauses in Joint Operating Agreements: What Protections do Operators Really Have in the Oil Patch?*, 38 TEX. TECH. L. REV. 211 (2005-06); Ernest E. Smith, *The Operator: Liability to Non--Operators, Resignation, Removal and Selection of a Successor*, INSTITUTE ON OIL AND GAS AGREEMENTS: JOINT OPERATIONS

B. "Freedom of Contract":

1. Preface.

The doctrine of contractual freedom is fully operative in reference to operating agreements.[8] Illustratively, the Texas Supreme Court has noted that, "perhaps no principle of law is as deeply engrained in Texas jurisprudence as freedom of contract."[9] "And, absent a compelling reason, courts must respect and enforce the terms of a contract that the parties have freely and voluntarily made."[10]

Another Texas court[11] stated this proposition in these words:

> Simply put, we cannot change the contract merely because we or one of the parties comes to dislike its provisions or thinks that something else is needed in it. . . .. This is so because parties to the contract are considered masters of their own choices. They are entitled to select what terms and provisions to include in a contract before executing it. And, in so choosing, each is entitled to rely upon the words selected to demarcate their respective obligations and rights. In short, the parties strike the deal *they* choose to strike and, thus,

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(May 2007); Scott Lansdown, *Reeder v. Wood County Energy LLC and the Application by Texas Courts of the "Exculpatory Clause" in Operating Agreements Used in Oil and Gas Operations*, 8 TEX. J. OIL GAS & ENERGY L. 202 (2012-13); John S. Lowe, *Some Recurring Issues in Operating Agreements and What AAPL's Drafting Committee Might Do About Them*, 60 ROCKY MT. MIN. L. INST. 27-1 (2014); Milam Randolph Pharo, *Liabilities of the Parties to a Model Form Joint Operating Agreement: Who is Responsible for What?*, JOINT OPERATIONS AND THE NEW AAPL FORM 610-2015 MODEL FORM OPERATING AGREEMENT 9-1, 9-12 (Rocky Mt. Min. L. Fdn. 2016); Keith B. Hall, *The Operator Under Oil & Gas Joint Operating Agreements--The 3 Rs of Responsibilities, Removal, and Replacement*, JOINT OPERATIONS AND THE NEW AAPL FORM 610 - 2015 MODEL FORM OPERATING AGREEMENT 3-1, 3-29 (Rocky Mt. Min. L. Fdn. 2016); Frederick M. MacDonald, *The A.A.P.L. Form 610 - 2015 Model Form Joint Operating Agreement--Commentary of the Form 610 Revision Task Force*, JOINT OPERATIONS AND THE NEW AAPL FORM 610 - 2015 MODEL FORM OPERATING AGREEMENT 1-1 (Rocky Mt. Min. L. Fdn. 2016), and Lamont C. Larsen, *What's Different About the New AAPL Form 610-2015 Model Form Operating Agreement, and Why Should I Use It?*, 63 ROCKY MTN. MIN. L. INST. 29-1 (2017).

[8] *See* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, Part I of Chapter Two, concerning "freedom of contract."

[9] *Energy Transfer Partners, L.P. v. Enter. Prod. Partners, L.P.*, 593 S.W. 3d 732, 740 (Tex. 2020).

[10] *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W. 3d 213, 230 (Tex. 2019).

[11] *Cross Timbers Oil Co. v. Exxon Corp.*, 22 S.W. 3d 24 (Tex. App.–Amarillo 2000).

> voluntarily bind themselves in the manner *they* choose. And, that is why parties are bound by their agreement as written.[12]

In Louisiana, it is said that parties are "free to contract for any object that is lawful, possible, and determined or determinable."[13] As a consequence, agreements legally entered into have the effect of law on those who have formed them.[14]

Under the law of Oklahoma, contracting parties are assured that a "contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties."[15] Thus, in *Oxley v. General Atlantic Resources, Inc.*,[16] the Oklahoma Supreme Court affirmed the proposition that, "[a]bsent illegality, the parties are free to bargain as they see fit, and the court may neither make a new contract, or (sic) rewrite the existing contract."[17]

To the same import is the law of New Mexico where it has been held, as follows:

> A court should thus not interfere with the bargain reached by the parties unless the court concludes that the policy favoring freedom of contract ought to give way to one of the well-defined equitable exceptions, such as unconscionability, mistake, fraud, or illegality.[18]

As such, there are very few, if any, principles of public policy that delimit the matters as to which parties are free to contract. For this reason, it is always necessary to resort to the particular agreement in order to determine the relative rights and obligations of the parties. Although it is informative to consider the case law involving the interpretation of operating agreements, it is somewhat illusory to attempt to draw generalized conclusions therefrom, as the particular agreement in question must always be reviewed.[19]

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[12] *Id*. at 26.

[13] LA. CIV. CODE ANN. art. 1971. *See Tassin v. Slidell Mini-Storage, Inc.*, 396 So. 2d 1261, 1264 (La. 1981).

[14] "Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law." LA. CIV. CODE ANN. art. 1983.

[15] OKLA. STAT. ANN. tit. 15, § 159 (West).

[16] 936 P. 2d 943 (Okla. 1997).

[17] *Id*. at 945.

[18] *Nearburg v. Yates Petroleum Corp.*, 943 P. 2d 560, 571 (N.M. Ct. of App.), *cert. den'd*, 942 P. 2d 189 (N.M. 1997) (holding that, "[s]ince we see nothing in this case to trigger the court's power of equity, the district court abused its discretion in refusing to enforce the non-consent penalty provisions [of the operating agreement] to which the parties had agreed.").

[19] In fact, each iteration of the Model Forms invite--or certainly contemplate--contractual modifications or additions in its last article. Or, as noted by a respected Commentator, "[a]ll of the AAPL

In the event of conflict between the body proper of the Model Form and the "Other Provisions" added by the parties, the latter would control under the interpretive principle that typewritten language governs over printed language.[20] However, as one respected Commentator has observed, "[b]y saying that the Extra Provisions govern to the extent of a conflict allows somebody other than the parties to decide whether there is a conflict and the extent of the conflict."[21]

2. Rules of Interpretation.

At its core, an analysis of the "exculpatory clause" contained in an operating agreement (particularly as it pertains to the ambit of the provision) is a matter of contractual construction. General principles of contractual interpretation apply to these industry-specific contracts.[22] However, because the reported decisions considered herein do not always identify the particular version of the Model Form involved, it is not easy to draw a consensus on the rules evolved from the cases interpreting these provisions.

Although there is scant support in the jurisprudence for the proposition that the interpretive doctrine of strict construction applies to "exculpatory clauses," that approach was taken in at least two reported decisions.

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versions of the Form 610 Model Form Joint Operating Agreement, from the first in 1956 to the new 2015 edition, end with a prompt for Other Provisions." *See* Terry I. Cross, *Extra Provisions—The Final Word in the AAPL Model Form Operating Agreement*, JOINT OPERATIONS AND THE NEW AAPL FORM 610 - 2015 MODEL FORM OPERATING AGREEMENT 1 (Rocky Mt. Min. L. Fdn. 2016).

[20] *Kuhn v. Stan A. Plauché Real Est. Co.*, 185 So. 2d 210, 212 (La. 1966) ("Under elementary principles of interpretation of contracts, the written portions prevail over the printed portions when the two are in conflict, ..."). *See also* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, § 2-04(c). Even without this established principle of contractual interpretation, Article XV.E of the 2015 Model Form affirms the precedence of the "Other Provisions" in Article XVI by announcing that, "[n]otwithstanding anything in this agreement to the contrary, in the event of any conflict between the provisions of Articles I through XV of this agreement and the provisions of Article XVI, if any, the provisions of Article XVI, if any, shall govern."

[21] Terry I. Cross, *Extra Provisions—The Final Word in the AAPL Model Form Operating Agreement*, *supra* note 19, at 3.

[22] "However, the JOA is a contract and shall be construed like any other contract." *Oxley v. General Atlantic Resources, Inc.*, *supra* note 16, at 945. *See also Pitco Prod. Co. v. Chaparral Energy, Inc.*, 63 P. 3d 541, 545 (Okla. 2003). *See* Patrick S. Ottinger, *Principles of Contractual Interpretation*, 60 LA. L. REV. 765 (Spring 2000).

Thus, in *Amoco Rocmount Co. v. The Anschutz Corp.*,[23] the court stated that it would "apply[] strict construction" to the "exculpatory clause,"[24] without any citing any authority in support of the invocation of such rule of interpretation as pertaining to a JOA.

In *Stine v. Marathon Oil Co.*,[25] the court stated that, "[i]n Texas, exculpatory clauses are not favored and are strictly construed."[26]

3. Ability of Parties to Contractually Limit Liability.

"Freedom of contract" generally includes the right to limit the liability of a party to a contract. Thus, in *Rhodes v. Congregation of St. Francis de Sales Roman Catholic Church*,[27] the court stated, as follows:

> A party may, under some circumstances, legally contract against liability for his own negligence or for a limitation on recoverable damages, but such an agreement must clearly indicate the intention of the parties.[28]

Under Louisiana law, contracts limiting liability are generally valid and enforceable.[29] Any waiver of liability for intentional misconduct or gross negligence, however, is void.[30]

The only exception in Louisiana to the enforceability of a liability limitation provision like the "exculpatory clause," is found in article 2004, Louisiana Civil Code, which states, in pertinent part, as follows:

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[23] 7 F. 3d 909 (10th Cir. 1993) (applying Colorado law).

[24] *Id*. at 923.

[25] 976 F. 2d 254 (5th Cir. 1992) (applying Texas law).

[26] *Id*. at 260.

[27] 476 So. 2d 461 (La. Ct. App. 1st 1985).

[28] *Id*. at 463. The court did not elucidate on the "some circumstances" that must be present to allow this contractual stipulation, but presumably refers to the inability of parties to contract with respect to "intentional or gross fault that causes damage to the other party." *See also Daigle v. Clemco Indus.*, 613 So. 2d 619, 623 (La. 1993) ("The clear implication of these provisions, when considered *in pari materia,* is that a compromise or contractual clause is not null because it excludes or limits liability in advance except when a party to the contract relinquishes future rights of action arising from his or her physical injury or from the intentional or gross fault of another party.").

[29] *See, e.g., Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F. 2d 577, 580-83 (5th Cir. 1986) , and *Nicor Supply Ships Assocs. v. General Motors Corp.*, 876 F. 2d 501, 504 (5th Cir. 1989).

[30] *See Sevarg Co., Inc. v. Energy Drilling Co.*, 591 So. 2d 1278 (La. Ct. App. 3d), *writ den'd* 595 So. 2d 662 (La. 1992).

Art. 2004. Clause that excludes or limits liability

> Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party.[31]

Comment (a) to article 2004 notes that the prohibition against contractually excluding or limiting liability for "intentional or gross fault" is a necessary corollary to the overriding principle that all contracts must be performed in good faith because this principle "would be destroyed if it were possible to contract away liability for fraud."[32]

An interesting argument was made in *Franklin v. Regions Bank*,[33] a case which involved an "exculpatory clause" in an agency agreement with a bank engaged by the plaintiffs to manage the customers' mineral interests. The contention was made that "the exculpatory clause is overbroad in that it does not eliminate liability for Regions due to intentional or grossly negligent conduct."[34] On this basis, it was urged that such contended "overbreadth of Regions (sic) exculpatory clause should result in nullity of the exculpatory clause in the Agency Agreements."[35]

The court did not indulge this argument, noting:

> La. Civ. Code Ann. art. 2004 states that any "clause" that excludes or limits liability for intentional or gross fault is null. The exculpatory clause at issue here does not attempt to exclude or limit liability for intentional or gross fault. If it did, their "clause" would be null. By restricting the nullity just to that "clause," the implication is that the rest of the exculpatory clause is valid.[36]

This proposition is embraced in other jurisdictions. As stated by a Colorado court, "[a]greements to limit liability will be upheld so long as they are not contrary to public policy."[37]

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31 LA. CIV. CODE ANN. art. 2004.

32 *Id*., cmt. (a).

33 2021 WL 1907836, at *11 (W.D. La. May 12, 2021) (applying Louisiana law).

34 *Id*.

35 *Id*.

36 *Id*.

37 *Oryx Energy Co. v. Tatex Energy*, 779 F. Supp. 144, 146 (D. Colo. 1991) (applying Colorado law).

Indicatively, under Colorado law, it has been held, as follows:

> An exculpatory agreement, which attempts to insulate a party from liability from his own negligence, must be closely scrutinized, and in no event will such an agreement provide a shield against a claim for willful and wanton negligence. . . .. In determining whether an exculpatory agreement is valid, there are four factors which a court must consider: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language.[38]

The New Mexico Supreme Court has held that "exculpatory clauses" are valid, provided that they are written in very clear terms such that "a person without legal training can understand the agreement he or she has made."[39]

The Texas courts support the notion that "[l]imitation-of-liability clauses, . . ., are generally valid and enforceable."[40]

"[U]nder Pennsylvania law, contractual provisions limiting warranties, establishing repair or replacement as the exclusive remedy for breach of warranty and excluding liability for special, indirect and consequential damages in a commercial setting are generally valid and enforceable."[41] "Exculpatory clauses are valid as long as three conditions are met: (i) the clause is not against public policy, (ii) the contract is between persons relating to their private affairs, (iii) the contract is not one of adhesion."[42]

"Similarly," as it has been stated in West Virginia, "a general clause in an exculpatory agreement or anticipatory release exempting the defendant from all liability for any future negligence will not be construed to include intentional or reckless misconduct or gross negligence, unless such intention clearly appears from the circumstances."[43]

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[38] *Jones v. Dressel*, 623 P. 2d 370, 376 (Colo. 1981).

[39] *See Berlangieri v. Running Elk Corp.*, 76 P. 3d 1098, 1108 (N.M. 2003) ("Thus, we adopt a standard today for the strict construction of liability releases that requires such clarity that a person without legal training can understand the agreement he or she has made. Context is important; the words surrounding the portion being construed and the circumstances surrounding the agreement are relevant.").

[40] *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, *supra* note 10, at 231.

[41] *New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp.*, 564 A. 2d 919, 924 (Pa. Super. Ct. 1989) (citing 13 Pa.Cons.Stat.Ann. §§ 2316, 2718 & 2719 (1982)).

[42] *Topp Copy Prods., Inc. v. Singletary*, 626 A. 2d 98, 99 (Pa. 1993).

[43] *Murphy v. N. Am. River Runners, Inc.*, 412 S.E. 2d 504, 510 (W. Va. 1991).

4. Province of the Court

Also relevant in the construction of the "exculpatory clause" is the tenet that it "is not the province of the courts to relieve a party of a bad bargain, no matter how harsh."[44] "Its only province is to render judgment in conformity with the law and evidence."[45]

The Oklahoma Supreme Court concurs: "In the absence of fraud, duress, undue influence, or mistake, the fairness, unfairness, folly or wisdom or inequality of contracts are immaterial. Such questions are exclusively within the rights of the contracting parties to adjust at the time of entering into the contract."[46]

In Texas, it is the principle that an "agreement will be enforced as the parties have made it, without regard to whether they contracted wisely."[47]

5. An "Exculpatory Clause" is Not an Indemnity.

An "exculpatory clause" is not an indemnity provision; it does not involve claims by third persons, but merely regulates responsibilities between contracting parties.[48] Thus, the notion that an indemnity clause must be strictly construed has no relevance to a dispute between the parties to the operating agreement.[49]

Concordant with a prior observation with respect to Louisiana law, "Article [2004] does not govern 'indemnity' clauses, 'hold harmless' agreements, or other agreements where parties allocate between themselves, the risk of potential liability towards third persons."[50]

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[44] *Sunrise Construction and Development Corp. v. Coast Waterworks, Inc.*, 806 So. 2d 1, 5 (La. Ct. App. 1st 2001), *writ den'd* 807 So. 2d 235 (La. 2002).

[45] *Hinterlang v. Usner*, 41 So. 2d 455, 456 (La. 1949).

[46] *State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P. 2d 813, 820 (Okla. 1973).

[47] *CMS Partners, Ltd. v. Plumrose USA, Inc.*, 101 S.W. 3d 730, 733 (Tex. App. 2003).

[48] "An indemnity, or *hold harmless*, agreement is a contract whereby a party, called the indemnitor, agrees to protect another, called the indemnitee, against damages incurred by the latter as a result of his breach of a duty owed to a third party." 6 LA. CIV. L. TREATISE, LAW OF OBLIGATIONS § 11.27 (2d ed.) (underscored emphasis added; italics in original).

[49] "A contract of indemnity whereby the indemnitee is indemnified against the consequences of his own negligence is strictly construed, and such a contract will not be construed to indemnify an indemnitee against losses resulting to him through his own negligent act, unless such an intention was expressed in unequivocal terms." *Polozola v. Garlock, Inc.*, 343 So. 2d 1000, 1003 (La. 1977).

[50] LA. CIV. CODE ANN. art. 2004, cmt. (e).

In *Elephant, Inc. v. Hartford Accident & Indemnity Co.*,[51] the elephant "Sparkle" was loaned by its owner to a candidate for Congress. A veterinarian, Dr. Cane, agreed to house, transport and care for Sparkle in a stall. Unfortunately for Sparkle, the adjoining stall contained some poison which Sparkle consumed, resulting in Sparkle's demise.

The agreement pursuant to which the veterinarian had agreed to care for the elephant provided that the owner "shall hold Dr. Robert Cane harmless from any liability in the event of the death of the elephant, Sparkle."[52]

In reliance on this "exculpatory clause," the veterinarian's insuror secured a summary judgment dismissing the owner's claim for damages. The owner contended that, under well-established indemnity principles,[53] an indemnity agreement may not be construed to release one from its own negligence unless the agreement specifically mentions "negligence."[54]

The court stated that these principles of construction "should have no bearing on the situation presented here, which involves an agreement between two parties, by virtue of which one of them is purportedly made free from liability if a certain event occurs."[55] Thus, the court enforced the agreement as written and released the veterinarian from liability arising out of Sparkle's death.

Not being an indemnity provision, any state law that otherwise requires conspicuousness should not apply to the "exculpatory clause."[56] Additionally, the Oilfield Anti-Indemnity Acts of the several states should not implicate the enforceability of the "exculpatory clause" because the clause is not a clause of indemnity, and these statutes typically arise in the context of the operator-contractor relationship, not in the unique relationship between an operator and a non-operator.[57]

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[51] 239 So. 2d 692 (La. Ct. App. 1st 1970).

[52] *Id*. at 693.

[53] *Arnold v. Stupp Corp.*, 205 So.2d 797 (La. Ct. App. 1st 1967).

[54] 239 So. 2d at 694-95.

[55] *Id*. at 694.

[56] *See Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W. 2d 505, 511 (Tex. 1993) ("We thus adopt the standard for conspicuousness contained in the Code for indemnity agreements and releases like those in this case that relieve a party in advance of responsibility for its own negligence. When a reasonable person against whom a clause is to operate ought to have noticed it, the clause is conspicuous. For example, language in capital headings, language in contrasting type or color, and language in an extremely short document, such as a telegram, is conspicuous."). *Dresser* involved a well service contract purporting to release a party for its own simple negligence, not an operating agreement between working interest owners.

[57] *See, e.g.,* LA. REV. STAT. ANN. § 9:2780; N.M. STAT. ANN. § 56-7-2 and TEX. CIV. PRAC. & REM. CODE §127.001, *et seq.* Indeed, the Texas Supreme Court has stated that the Texas Oilfield Anti-Indemnity Act "was enacted to protect *contractors* from inequitable indemnification provisions." *Getty Oil*

In particular reference to both the Louisiana and Texas versions of the Oilfield Anti-Indemnity Act,[58] there is an explicit exemption of an operating agreement from the coverage of the Act.[59] However, one commentor examined the issue of "whether the language of the JOA would fall within some exception to the 'fair notice' requirements" of the Texas Oilfield Anti-Indemnity Statute.[60]

Wyoming also has an Oilfield Anti-Indemnity Statute[61] which, unlike the Louisiana and Texas counterparts, contains no explicit statement of inapplicability to an operating agreement. In a Utah case applying Wyoming law,[62] the court held that "the exculpatory provisions are not unenforceable under Wyoming's anti-indemnity statute."[63] Notably, the contract at issue was a drilling contract, not an operating agreement. However, in *Bolack v. Chevron, U.S.A., Inc.*,[64] the Wyoming Supreme Court (responding to a substantive question certified to it by a Federal district court) held that the Wyoming Oilfield Anti-Indemnity Statute applied and operated to disallow an operator's effort under an operating agreement "to charge the non-negligent interest owners its 'costs' to compensate workers who were seriously injured by Chevron's negligence."[65]

C. Applicable Law and Pertinence of Decisions of Other States:

The Model Forms contain a default provision by which parties agree that the operating agreement "shall be governed and determined by the law of the state in which the Contract Area is located." For example, the 2015 Model Form provides, as follows:

Co. v. Ins. Co. of N. Am., 845 S.W. 2d 794, 805 n. 16 (Tex. 1992). *See also* Patrick S. Ottinger, *Drilling Contracts*, 38 ANN. INST. ON MIN. LAW 99, 147 (1991).

[58] TEX. CIV. PRAC. & REM. CODE § 127.001, et *seq.,* and LA. REV. STAT. ANN. § 9:2780.

[59] TEX. CIV. PRAC. & REM. CODE §§ 127.001(1)(B) and 127.002(c). LA. REV. STAT. ANN. § 9:2780D.

[60] *See* Hunter H. White, *Winding Your Way Through the Texas Oilfield Anti-Indemnity Statute, the Fair Notice Requirements and Other Indemnity Related Issues*, 37 S. TEX. L. REV. 161, 177 (1996).

[61] W.S. 1977 § 30-1-131.

[62] *Patmos Energy, LLC v. SST Energy Corp.*, 2009 WL 10690065 (D. Utah Dec. 29, 2009) (applying Wyoming law).

[63] *Id*. at * 6.

[64] 963 P. 2d 237 (Wyo. 1998).

[65] *Id*. at 242. The case did not involve the JOA's "exculpatory clause." Indeed, the court held out the possibility to rule differently if another clause were involved. ("While the contractual provisions at issue may be enforceable under other circumstances, in this instance they are being used to enforce the Unit Operating Agreement in a manner which patently violates Wyo. Stat. § 30–1–131."). *Id*.

> This agreement and all matters pertaining hereto, including but not limited to matters of performance, non-performance, breach, remedies, procedures, rights, duties, and interpretation or construction, shall be governed and determined by the law of the state in which the Contract Area is located. If the Contract Area is in two or more states, the law of the state of ____ shall govern.[66]

However, parties are free to elect to be governed by a law other than the law of the state where the Contract Area is located.[67]

Regardless of the law determined to be applicable to a dispute between the operator and a non-operator, because the Model Form is widely used throughout the country, and in particular, since the physical or operational aspects of drilling or operating a well are essentially uniform across state boundaries, and the administrative tasks are virtually identical, the decisions of the courts in one state are particularly informative in another state, albeit not binding, subject only to peculiarities of the law of one state or another. For these reasons, courts often look to decisions from another state if the issue involved has not been addressed by the courts of the forum state. Certainly, the workings of the "exculpatory clause" do not implicate title to the lands or leases covered by the operating agreement, thus the "local action doctrine" is not implicated.[68]

As the Louisiana Supreme Court stated, "[a]lthough the decisions of other jurisdictions are not controlling on the Courts of Louisiana, if they determine an issue practically identical with the one under consideration, they possess at least a persuasive effect and merit attention."[69]

Another Louisiana court has stated this understandable proposition, as follows:

> Of course, such authorities [from courts of another state] are not binding on the courts of Louisiana; but as they determine an issue practically identical with the one in the instant case and constitute expressions of the highest courts of the named states, they possess

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[66] Article XIV.B, 2015 Model Form.

[67] An exception to this statement prevails with respect to an operating agreement pertaining to activities on the Outer Continental Shelf where "forum selection clauses" dictating a state other than the "adjacent state" are not valid. *See Union Texas Petroleum Corp. v. PLT Eng'g, Inc.*, 895 F. 2d 1043, 1050 (5th Cir. 1990) ("Although Louisiana's choice of law rules might enforce this choice of law provision, OCSLA will not. We find it beyond any doubt that OCSLA is itself a Congressionally mandated choice of law provision requiring that the substantive law of the adjacent state is to apply even in the presence of a choice of law provision in the contract to the contrary.").

[68] While it is essentially a matter of subject matter jurisdiction, not an issue of applicable law, it has been held that a "local action involving real property can only be brought within the territorial boundaries of the state where the land is located." *Hayes v. Gulf Oil Corp.*, 821 F. 2d 285, 287 (5th Cir. 1987).

[69] *C H F Fin. Co. v. Jochum*, 127 So. 2d 534, 539 (La. 1961).

> at least a persuasive effect and merit our consideration and a discussion in this opinion.[70]

This notion prevails also in other oil and gas producing states that customarily use the Model Form.[71]

With particular reference to a Federal court sitting in diversity jurisdiction, it is required to apply the substantive law of the applicable state, and is often required to make an "*Erie* guess."[72] Thus was the situation in one recent case[73] in which the district court explained this decisional methodology as applied to an operating agreement, as follows:

> In so doing, this Court may consider, "among other sources, treatises, decisions from other jurisdictions, and the 'majority rule.'" Accordingly, although cases interpreting the law of other states, . . ., may inform this Court's analysis of the UOA's exculpatory clause, they do not govern it.[74]

Certainly, the several decisions of the courts of multiple states on the topic of "exculpatory clauses" readily cite to decisions of other states without even the need for discussion or justification of crossing state boundaries.

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[70] *Michiels v. Succession of Gladden*, 180 So. 862, 864 (La. Ct. App. 2d), *aff'd* 183 So. 217 (La. 1938).

[71] Colorado: "We are unaware of any Colorado case addressing these issues. Under such circumstances, we may look to the decisions of other jurisdictions as persuasive authority." *LaFond v. Sweeney*, 343 P. 3d 939, 945 (Colo. 2015). Nebraska: ". . . absent controlling decisions from state courts, precedents in other jurisdictions become persuasive." *Kresha v. Kresha*, 344 N.W. 2d 906, 910 (Neb. 1984). Texas: "It has been held by this Court that, when we are called upon to decide a question of first impression in this state, we may look to other jurisdictions for guidance in reaching our decision on the question." *Hollins v. Rapid Transit Lines, Inc.*, 440 S.W. 2d 57, 59 (Tex. 1969).

[72] An "*Erie* guess" refers to the circumstance when a Federal court sitting in diversity jurisdiction has to "guess" as to how the highest court of the relevant state would decide an issue of first impression. *See Howe ex rel. Howe v. Scottsdale Ins. Co.*, 204 F. 3d 624, 627 (5th Cir. 2000) ("The substantive law of this case is the law of Louisiana. *See Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). . . .. To determine Louisiana law on the [subject at issue], this Court should first look to final decisions of the Louisiana Supreme Court. *Id.* If the Louisiana Supreme Court has not ruled on this issue, then this Court must make an '*Erie* guess' and 'determine as best it can' what the Louisiana Supreme Court would decide.").

[73] *Shell Offshore Inc. v. ENI Petroleum USA LLC*, 2017 WL 4226154 (E.D. La. Sept. 21, 2017) (applying Louisiana law).

[74] *Id*. at * 2.

II. OPERATING AGREEMENTS

A. Geographical Scope of the Operating Agreement:

The Model Form defines the geographical area to which the agreement relates as the "Contract Area."[75] The agreement may also have a depth limitation.[76]

Consequently, the first consideration is to establish that an operation proposed by one party is to be conducted "on the Contract Area" covered by the operating agreement under which it is to be proposed; self-evidently, the requirements and strictures of the operating agreement only relate to operations conducted "on" the Contract Area.

In one case,[77] the Contract Area of the operating agreement only extended to subsurface depths down to 20,000 feet, but not below. Notwithstanding this horizontal limitation at a vertical subsurface depth, Authorizations for Expenditure ("AFEs") proposing the drilling of the 22-3 well to a subsurface depth of 22,000 feet were circulated by the operator. The AFEs were signed by some, but not all, of the working interest parties. After the well was drilled, it was held that the supposed non-consent election by certain parties was not effective and, consequently, the supposed consenting parties--who thought that they had agreed to "carry" the non-consenting interests--never owned those interests and, thus, had no authority to sell them.

The court observed that, "[b]ecause the 22 J.O.A. did not govern the 22-3 well, there was no obligation by any of the working interest owners to make a consent or non-consent election when the 22-3 well was proposed by Heritage."[78]

Rejecting an alternative argument, the court held that the execution of the AFEs by less than all of the working interest owners was not effective to amend the operating agreement so as to extend the depth limitation of 20,000 feet to the deeper depth of 22,000 feet.[79]

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[75] The "Contract Area" is defined in the Model Form as "all of the lands, oil and gas leasehold interests and oil and gas interests intended to be developed and operated for oil and gas purposes under this agreement." *See*, *e.g.*, Article I.D of the 1982 Model Form. Article I.E of the 2015 Model Form is functionally similar.

[76] *See, e.g.*, Article II.A(2) of the 2015 Model Form, contemplating the identification of "Restrictions, if any, as to depths, formations or substances" on Exhibit "A" to the JOA.

[77] *Hill v. Heritage Resources, Inc., supra* note 5.

[78] 964 S.W. 2d at 115.

[79] *Id*. at 114-15.

This holding is consonant with an earlier observation, of broader application, that:

> It is a common practice to conduct mineral development under a joint operating agreement, and while there are duties between the parties for the operations of the lands embraced by the written agreement, those duties do not extend to operations by one of the parties on other and different lands.[80]

This geographical facet is relevant as to whether the "exculpatory clause" applies to a particular well.[81]

B. The Operator and its Duties:

1. General.

Integral to confection of an operating agreement among several working interest owners is the designation of the operator. As noted by Professor Lowe, the "operator is not directly compensated for being the operator. The concept is that the operator will make its profits from its ownership of mineral rights and the sale of its percentage of production, just like the non-operators, rather than from fees paid by its co-owners."[82] This tenet is called the "No Gain, No Loss" principle.[83]

Although there is no prohibition against an individual serving as an operator, more typically, a company serves in that role, often with a staff of landmen, engineers, geophysicists, geologists, accountants, lawyers, insurance specialists, etc.

There are a lot of moving parts in the operation of an oil and gas property, and a broad array of duties and responsibilities are assigned to the operator. Indisputably, the responsibilities of the operator under a JOA are myriad, ranging from the administrative to the technical, from "in the office, to "in the field," from dealing with land owners or well partners, as well as

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[80] *Rankin v. Naftalis*, 557 S.W. 2d 940, 946 (Tex. 1977). *See also McAlpin v. Sanchez*, 858 S.W. 2d 501 (Tex. App.–Corpus Christi 1993, *writ den'd*).

[81] *See In re Great W. Drilling, Ltd.*, 211 S.W. 3d 828, 843 (Tex. App.-Eastland 2006) ("The JOAs' good faith requirement is, by its terms, limited to the contract area. The provision does not purport to impose a duty of good faith in all dealings between the parties, but only those activities arising under the JOAs.").

[82] John S. Lowe, *Some Recurring Issues in Operating Agreements and What AAPL's Drafting Committee Might Do About Them*, *supra* note 7, at 27-7.

[83] "It has also been stressed many times that an operator should neither gain nor lose just because he is the operator." John E. Jolly, *The COPAS Accounting Procedures Demystified*, 34 ROCKY MT. MIN. L. INST. 21-40 (1988).

contractors and regulatory agencies. Indeed, the Model Form enumerates the following discrete, but non-exclusive, duties which are the responsibility of the operator, to-wit:

- Seeking Competitive Rates in the Selection of Contractors or Services.
- Discharging Joint Account Obligations.
- Protecting Joint Properties from Liens.
- Maintaining Custody of Funds.
- Allowing Access to Contract Area and Records.
- Filing and Furnishing Governmental Reports.
- Drilling and Testing Operations.
- Providing Cost Estimates.
- Procuring and Maintaining Insurance.

2. Characterization of Relationship Between the Operator and the Non-operator.

The characterization of the legal relationship between an operator and the non-operators is relevant to the attributes by which the operator's performance of its assigned duties will be evaluated. Courts have characterized the relationship in a variety of ways.

In *Taylor v. GWR Operating Co.*,[84] the court (citing prior precedent)[85] held that it agreed with the holding that "parties in a joint operating agreement do not generally owe each other the duty of utmost good faith and fair dealing."[86]

The Oklahoma Supreme Court has held that an "operating agreement in itself does not create a mining partnership. However, a mining partnership can arise from the behavior of the parties."[87]

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[84] 820 S.W. 2d 908 (Tex. App.—Houston [1st. Dist.] 1991, *writ den'd*).

[85] *Texstar North America, Inc. v. Ladd Petroleum Corp.*, 809 S.W. 2d 672 (Tex. App.—Corpus Christi 1991, *writ den'd*).

[86] 820 S.W. 2d at 912.

[87] *Sparks Bros. Drilling Co. v. Texas Moran Expl. Co.*, 829 P. 2d 951, 953 (Okla. 1991).

It should be remembered that the more contemporary forms of the Model Form contain a provision that explicitly negates any intention to create any sort of associational relationship, such as Article VII.A of the 2015 Model Form, to-wit:

> It is not the intention of the parties to create, nor shall this agreement be construed as creating, a mining or other partnership, joint venture, agency relationship or association, or to render the parties liable as partners, co-venturers, or principals. In their relations with each other under this agreement, the parties shall not be considered fiduciaries or to have established a confidential relationship but rather shall be free to act on an arm's-length basis in accordance with their own respective self-interest, subject, however, to the obligation of the parties to act in good faith in their dealings with each other with respect to activities hereunder.

Even without this explicit negation of partnership clause, in Louisiana, it is statutorily provided that a "written contract for the joint exploration, development, or operation of mineral rights does not create a partnership unless the contract expressly so provides."[88]

Notwithstanding the explicit statement in each of the Model Forms that "[i]t is not the intention of the parties to create . . . a mining or other partnership or association, or to render them liable as partners," courts have not been reluctant, in a proper case, to find a "joint venture," with the consequence that the non-operators might have (unanticipated) liability to third parties, either in tort or contract.[89] In other words, a judge will not permit litigants to "tie his (or her) hands" by the mere expediency of a contractual stipulation which, based on relevant facts, is contrary to the reality of the relationship.

Also relevant to the foregoing is the observation by one court that, "[i]n determining the nature of transaction, courts will look to the substance rather than to mere terms used to describe it."[90]

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[88] LA. REV. STAT. ANN. § 31:215.

[89] *Cajun Elec. Power Co-Op., Inc. v. McNamara*, 452 So. 2d 212, 216 (La. Ct. App. 1st), *writ den'd* 458 So. 2d 123 (La. 1984) ("Cajun's argument [that its contract expressly negated a joint venture or partnership relationship] overlooks the obvious that the legal relationship of parties will not be conclusively controlled by the terms which the parties use to designate their relationship, especially with regard to third parties. Courts look to the totality of evidence and not just the written agreement between the parties to determine whether a joint venture was entered into.").

[90] *American Bank and Trust Co. of Baton Rouge v. Louisiana Sav. Ass'n*, 386 So. 2d 96, 105 (La. Ct. App. 3d 1980). *See also* OTTINGER, MINERAL LEASE TREATISE, *supra* note 1, § 10-06.

There is, however, case authority in Louisiana for the proposition that the "relation of parties" provision is controlling, particularly if no third person is involved.[91]

The Tenth Circuit held that "this contract created a trustee type relationship imposing a duty of fair dealing between the operator and the non-operator owners in the matter of distribution of shares among the owners."[92]

In Texas, under the Business Organizations Code which prescribes the circumstances under which a partnership might be deemed to exist, it is provided that certain enumerated "circumstances, by itself, does not indicate that a person is a partner in the business," relevantly including "ownership of mineral property under a joint operating agreement."[93]

In one case,[94] the relationship between Dime Box, the non-operator, and LL&E, as operator, was determined to be a joint venture such that, "under Colorado law," "LL&E would owe nonoperator Dime Box a fiduciary duty unless the contract modified this obligation."[95]

Citing the "exculpatory clause" of the JOA, the court noted that the "operator has no liability to nonoperator for negligence or unintentional misconduct."[96] "This measure of conduct bears no relationship to the yardstick used to measure the conduct of a fiduciary."[97]

3. Applicable Standard of Care By Which Operator is to be Judged.

The operating agreement sets forth a general statement of the standard of performance expected of the operator, which is that the "operator shall conduct all such operations in a good and workmanlike manner."[98]

While this standard is provided contractually, it does not displace the general duty that the operator must perform its duties in "good faith." This "good faith" principle is recognized

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91 *Prentice v. Amax Petroleum Corp.*, 220 So. 2d 783, 787 (La. Ct. App. 1st), *writ den'd* 223 So. 2d 867 (La. 1969) ("The intent of the parties [in negating a joint venture or partnership relationship] is explicit and we are bound to give it legal effect.").

92 *Reserve Oil, Inc. v. Dixon*, 711 F. 2d 951, 953 (10th Cir. 1983) (applying Oklahoma law).

93 TEX. BUS. ORGS. CODE § 152.052(b)(4).

94 *Dime Box Petroleum Corp. v. The Louisiana Land and Exploration Co.*, 938 F. 2d 1144 (10th Cir. 1991) (applying Colorado law).

95 *Id*. at 1147.

96 *Id*. at 1147-48.

97 *Id*. at 1148.

98 Article V.A, 1982 Model Form.

at general law. Thus, in Louisiana, it is provided that "[c]ontracts must be performed in good faith."[99]

While this tenet obtains in many other states, a notable exception is Texas. In the Lone Star State, absent a "special relationship," there is not, in every contract, an implied covenant of "good faith and fair dealing" that neither party will do anything which injures the right of the other party to receive the benefits of the agreement.[100]

The courts of Texas have commented on this standard of performance under a JOA, as follows:

> Under the JOA, Cometra has a duty to perform "in a good and workmanlike manner." 1977 A.A.P.L. Model Form Operating Agreement art. V. In the context of a drilling contract, this phrase has been interpreted to mean "as a reasonably prudent person engaged in drilling oil wells." *Westbrook v. Watts,* 268 S.W.2d 694, 697–98 (Tex.Civ.App.1954, writ ref'd n.r.e.). Accordingly, Cometra's duty to appellants under the JOA would be to perform as a reasonably prudent operator.[101]

The standard of "good and workmanlike" is an integral touchstone in construction law. In Louisiana, it has been noted that it is "implicit in every contract of this nature for the work of the builder to be performed in a good workmanlike manner, free from defects attributable either to faulty material or poor workmanship."[102] This principle finds its genesis in article 2769 of the Louisiana Civil Code that prescribes that, "[i]f an undertaker fails to do the work he has contracted to do, or if he does not execute it in the manner and at the time he has agreed to do it, he shall be liable in damages for the losses that may ensue from his non-compliance with his contract."[103]

As noted by Professor Lowe:

> Proof of the failure or refusal of an operator to perform its duties under the operating agreement, particularly in light of the operator's obligation to perform in a "good and workmanlike manner," gen-

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[99] LA. CIV. CODE ANN. art. 1983.

[100] *English v. Fischer*, 660 S.W. 2d 521 (Tex. 1983). In *Crowder v. Tri-C Res., Inc.*, 821 S.W. 2d 393 (Tex. App.—Houston [1st Dist.] 1991), the non-operator's attempt to find a "special relationship" as having arisen out of a JOA was rejected by the court.

[101] *Johnston v. Am. Cometra, Inc.*, 837 S.W. 2d 711, 716 (Tex. App.--Austin 1992, *writ den'd* 1993).

[102] *Rathe v. Maher*, 184 So. 2d 256, 258 (La. Ct. App. 1st), *writ ref'd* 186 So. 2d 159 (La. 1966).

[103] LA. CIV. CODE ANN. art. 2769.

> erally requires testimony of industry norm and custom. Whether or not the operator has adhered to the standard of performance reasonably expected of operators under similar circumstances is not a matter within the common understanding of a jury.[104]

"To establish that an operator failed to operate a well in a good and workmanlike manner, the plaintiff must establish that the operator failed to act as a reasonably prudent person engaged in drilling oil wells."[105] Courts have held that "the duty of care owed by an operator is not a matter within the knowledge of the average juror but is instead an area of specialized knowledge requiring expert testimony."[106]

A Louisiana case involving the workmanlike duty of conduct is *Professional Divers of New Orleans v. The William G. Helis Co., L.L.C.*[107] In that case, Helis contracted with the plaintiff to bury flow lines under the ocean floor. After the plaintiff buried the lines, Helis learned that the lines were buried at a shallower depth than what the contract required. Plaintiff refused to remediate and sued Helis for failure to pay for plaintiff's services.

The court found that, since the plaintiff did not fulfill the requirements of the contract by laying the lines to a specified depth, it failed to perform its services in a "workmanlike manner consistent with good oilfield standards."[108] In support of this holding, the court noted that "no reasonable explanation is offered for their failure to complete their job as required."[109]

In a case between a drilling contractor and an operator,[110] the court found that the drilling contractor failed to exercise due diligence, reasonable care and workmanlike procedure in connection with his operations as required by the drilling contract. In that case, an owner hired a drilling contractor to drill a well. The drilling contract obligated the contractor to drill the well with "due diligence and care and in a good workmanlike manner" and to use reasonable means to prevent blowouts. The well blew out and caught fire while the contractor was away from the drillsite.

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104 John S. Lowe, *Some Recurring Issues in Operating Agreements and What AAPL's Drafting Committee Might Do About Them*, *supra* note 7, at 27-32.

105 *Norman v. Apache Corp.,* 19 F. 3d 1017, 1029 (5th Cir. 1994).

106 *Bonn Operating Co. v. Devon Energy Prod. Co., LP*, 2009 WL 484218, at *15 (N.D. Tex. Feb. 26, 2009).

107 861 So. 2d 245 (La. Ct. App. 4th 2003).

108 *Id*. at 247.

109 *Id*.

110 *E.B. Duncan Drilling & Well Servicing Co., Inc. v. Robinson Research, Inc*., 147 So. 2d 95 (La. Ct. App. 2d 1962).

The contractor filed suit for payment of daywork charges and shut-in charges for the time the well was shut-in while the rig was repaired. The court denied recovery, holding that the contractor failed to exercise due diligence, reasonable care, and workmanlike procedure in connection with its operations as required by the drilling contract.

More recently, a Texas court held that the "gross negligence or willful misconduct" standard of care was the applicable standard to be applied to the alleged breach of the operator, not the "reasonably prudent operator" standard.[111]

Pattern jury charges in the Texas courts provide the following guidance on the meaning of a "reasonably prudent operator," to-wit:

> The term 'reasonably prudent operator' as used in this charge, means an operator of ordinary prudence, that is having neither the highest nor the lowest prudence, but on the contrary an operator of average prudence and intelligence, acting with ordinary diligence under the same or similar circumstances.[112]

The expanded statement of conduct in the 2015 Model Form instructs that the "Operator shall conduct its activities under this agreement as a reasonably prudent operator, in a good and workmanlike manner, with due diligence and dispatch, in accordance with good oilfield practice, and in compliance with applicable law and regulation."[113]

C. The "Exculpatory Clause":

1. Preface.

While the performance of the operator in executing its duties is guided by the "workmanlike" standard specified in the operating agreement, any action against the operator by a non-operator must be evaluated in light of the operating agreement's "exculpatory clause."

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[111] *Crimson Expl. Operating, Inc. v. BPX Operating Co.*, 2021 WL 786541 (Tex. App.—Houston [14th Dist.] 2021, *pet. den'd*) (applying Texas law). *See* Jonathan D. Baughman, *The Prudent Operator Standard in the 21st Century*, 58 ROCKY MT. MIN. L. INST. 12-1 (2012).

[112] *See, e.g., Shell Oil Co. v. Stansbury*, 401 S.W. 2d 623, 629 (Tex. App.-Beaumont), *writ ref'd NRE*, 410 S.W. 2d 187 (Tex. 1966) and *Good v. TXO Prod. Corp.*, 763 S.W. 2d 59, 60 (Tex. App.-Amarillo 1988), *writ den'd* (June 14, 1989).

[113] Article V.A, 2015 Model Form.

Although the drilling of an oil or gas well is not *per se* ultrahazardous,[114] no one can contend that it is not hazardous or, as noted, multi-faceted. It is for this reason, among others, that an operator would understandably desire to limit its liability to its partners, particularly with respect to the consequence of the operator's decisions that entail the exercise of prudent discretion, skill or judgment on its part. This is done through the inclusion of an "exculpatory clause."

Depending on the version of the Model Form involved, the "exculpatory clause" might provide significant protection to an operator sued for an alleged breach of the COPAS Accounting Procedure attached to a JOA, particularly where a legitimate dispute exists regarding the proper interpretation to be given to various provisions of the accounting procedure.[115] Indeed, few parties would be willing to serve in this capacity, amenable as it often is to "second guessing," without a degree of immunization and protection.

The 1956 Model Form Operating Agreement states that the Operator shall conduct operations "in a good and workmanlike manner, but it shall have no liability as Operator to the other parties for losses sustained, or liabilities incurred except such as may result from gross negligence or from breach of the provisions of this agreement."

The "exculpatory clause" appearing in both the 1977 and 1982 Model Form reads, as follows:

> _____ shall be the Operator of the Contract Area, and shall conduct and direct and have full control of all operations on the Contract Area as permitted and required by, and within the limits of, this agreement. It shall conduct all such operations in a good and workmanlike manner, but it shall have no liability as Operator to the other parties for losses sustained or liabilities incurred, except such as may result from gross negligence or willful misconduct.[116]

Notably, the 1977 and 1982 Model Form agreements no longer refer to any notion of immunization from a "breach of the provisions of this agreement" in the relevant "exculpatory clause."

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[114] *Ainsworth v. Shell Offshore, Inc.*, 829 F. 2d 548, 550 (5th Cir. 1987) (applying Louisiana law, court concludes "that drilling operations are not ultrahazardous.").

[115] "The other agreement was an 'Operating Agreement,' which attached an accounting procedure referred to by the parties as 'COPAS,' the acronym for the Council of Petroleum Accountants Societies." *Mack Energy Co. v. Expert Oil & Gas, L.L.C.*, 159 So. 3d 437, 439 (La. 2015). "The Council of Petroleum Accountants Societies (COPAS), a national organization since 1961, has issued a succession of accounting forms which serve as the primary source of oil and gas accounting standards in the industry." *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.*, 11 Cal. Rptr. 3rd 412, 417 (Cal. Ct. App. 2004).

[116] Article V.A, 1977 and 1982 Model Forms.

The "exculpatory clause" appearing in the 1989 Model Form is essentially as set forth in the first sentence of the previous editions of the Model Form, but with this relevant addition (and other added language not here pertinent), so as to read, as follows:

> Operator shall conduct its activities under this agreement as a reasonable prudent operator, in a good and workmanlike manner, with due diligence and dispatch, in accordance with good oilfield practice, and in compliance with applicable law and regulation, but in no event shall it have any liability as Operator to the other parties for losses sustained or liabilities incurred except such as may result from gross negligence or willful misconduct.[117]

Professor Smith has written that the "progressive changes in the wording of the [exculpatory] clause indicate an intent to require a showing of willful misconduct in order for a nonoperator to recover for a contractual breach of the 1977, 1982 or 1989 JOA."[118]

Professor Smith continued:

> Construed both literally and in its historical perspective, the exculpatory language of the three more recent model forms applies to *any* cause of action that a non-operator may assert against the operator, regardless of whether the claim is based on improper drilling or improper accounting. The clause no longer makes an express distinction between claims based on negligence and those based on breach of contract. The 1989 form is quite explicit in this regard: liability, other than that resulting from gross negligence or willful misconduct, will "*in no event*" be imposed upon the operator.[119]

The relevant verbiage in the 2015 Model Form of agreement reads, as follows:

> _____ shall be the Operator of the Contract Area, and shall conduct and direct and have full control of all operations conducted under this agreement as permitted and required by, and within the limits of this agreement. . . .. Operator shall conduct its activities under this agreement as a reasonably prudent operator, in a good and workmanlike manner, with due diligence and dispatch, in accordance with good oilfield practice, and in compliance with applicable law and regulation. However, in no event shall it have

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117 Article V.A, 1989 Model Form.

118 Ernest E. Smith, *The Operator: Liability to Non-Operators, Resignation, Removal and Selection of a Successor, supra* note 7, at 6.

119 *Id*.

> any liability as Operator to the other parties for losses sustained or liabilities incurred in connection with authorized or approved operations under this agreement except such as may result from gross negligence or willful misconduct.[120]

2. Touchstones of the "Exculpatory Clause."

Although the performance of the operator is tempered by the "exculpatory clause" in the operating agreement, this limitation is not open-ended. Indeed, most clauses place a limitation or "carve-out" on the conduct of the operator--whether asserted by way of an action or an inaction--as to which the operator will not be exculpated. Principal among these are actions or inactions that allegedly constitute or involve "gross negligence," "willful misconduct," and a "lack of good faith."

a. "Gross Negligence."

Under Louisiana law, gross negligence is willful, wanton and reckless conduct that falls between intent to do wrong and ordinary negligence. As was stated in *Orthopedic & Sports Injury Clinic v. Wang Laboratories, Inc.*,[121] "[g]ross negligence is substantially and appreciably higher in magnitude than ordinary negligence."[122]

In *Houston Expl. Co. v. Halliburton Energy Servs., Inc.*,[123] the Fifth Circuit took up the meaning of "gross negligence" under Louisiana law and stated, as follows:

> Under Louisiana law, gross negligence is willful, wanton and reckless conduct that falls between intent to do wrong and ordinary negligence. We stated in *Orthopedic & Sports Injury Clinic v. Wang Laboratories, Inc.,* that "[g]ross negligence is substantially and appreciably higher in magnitude than ordinary negligence." Other courts have defined gross negligence as the "entire absence of care," the "want of even slight care and diligence," and the "utter disregard of the dictates of prudence, amounting to complete neglect of the rights of others." At least one Louisiana court stated that one is grossly negligent when he "has intentionally done an act of unreasonable character in reckless disregard of the risk known to him, or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." Mere

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120 Article V.A, 2015 Model Form.

121 922 F. 2d 220, 224 n. 3 (5th Cir. 1991) (applying Louisiana law).

122 *Id*.

123 269 F. 3d 528 (5th Cir. 2001) (applying Louisiana law).

> inadvertence or honest mistake does not amount to gross negligence.[124]

"Gross negligence" was explained by one Louisiana appellate court,[125] thusly:

> Our research reveals a complete absence of Louisiana civil cases defining gross negligence. Traditionally, gross negligence has been defined as an extreme departure from ordinary care or the want of even scant care. W. Page Keeton, et al., Prosser and Keeton on the Law of Torts, § 34, at 211 (5th ed. 1984); 65 C.J.S. Negligence § 8(4)(a), at 539–540 (1966 & Supp.1993). However, the terms "willful," "wanton" and "reckless" have been incorporated into this definition by courts.[126]

"Gross negligence" became a highly controverted issue in litigation arising out of the 2010 Deepwater Horizon incident. It is a touchstone in the Oil Pollution Act of 1990[127] as pertains to the amount of fine that a court is authorized to assess against a "responsible party" who violates that law. Professor Emeritus Patrick H. Martin wrote a very important Article addressing that topic, which examines the meaning of that term for purposes of OPA liability.[128]

As the foregoing authorities establish, it has been stated that "Louisiana jurisprudence also has struggled for a singular definition of gross negligence,"[129] an observation vaguely reminiscent of Supreme Court Associate Justice Potter Stewart's famous statement that, in reference to the inability to define "pornography," "I know it when I see it."[130]

The Colorado Supreme Court has announced that:

> The terms willful and wanton misconduct, willful and wanton negligence, gross negligence, reckless conduct, and reckless negligence were adopted in various formulations by virtually every jurisdiction to combat the injustice brought about by the affirmative defense of

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124 *Id*. at 531–32. (Internal citations omitted.).

125 *Falkowski v. Maurus*, 637 So. 2d 522 (La. Ct. App. 1st 1993).

126 *Id*. at 528.

127 33 U.S.C. §§ 2701-62.

128 Patrick H. Martin, *The BP Spill and the Meaning of "Gross Negligence or Willful Misconduct,"* 71 LA. L.REV. 957 (2011). As the respected Commentator noted, "This Article does not attempt to cover interpretation of 'gross negligence' and 'willful misconduct' in contracts." *Id*. at 957, n. 1.

129 *Rosenblath's, Inc. v. Baker Indus., Inc.*, 634 So. 2d 969, 972 (La. Ct. App. 2d), *writ den'd* 640 So. 2d 1348 (La. 1994).

130 *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964).

> contributory negligence. The common thread that separates these fault concepts from ordinary negligence is that the defendant's conduct is so aggravated as to be all but intentional.[131]

In *Fox v. Oklahoma Mem'l Hosp.*,[132] the Oklahoma Supreme Court defined "gross negligence," as follows:

> The intentional failure to perform a manifest duty in reckless disregard of the consequences or in callous indifference to the life, liberty or property of another [which] may result in such a gross want of care for the rights of others and the public that a finding of a willful, wanton, deliberate act is justified.[133]

The concept of "gross negligence" under Texas law, as is involved in an operating agreement's "exculpatory clause," was addressed in *IP Petroleum Co. v. Wevanco Energy, L.L.C.*,[134] as follows:

> To support a finding of gross negligence, there must be evidence that IP had "actual subjective knowledge of an extreme risk of serious harm." [*Transp. Ins. Co. v.*] *Moriel,* 879 S.W.2d at 22. The magnitude of the risk is judged from the viewpoint of the defendant at the time the events occurred. *Id.* at 23. The harm anticipated must be extraordinary harm, not the type of harm ordinarily associated with breaches of contract or even with bad faith denials of contract rights; harm such as "death, grievous physical injury, or financial ruin." *Id.* at 24; *Bluebonnet Sav. Bank, F.S.B. v. Grayridge Apartment Homes, Inc.,* 907 S.W.2d 904, 911 (Tex.App.—Houston [1st Dist.] 1995, writ denied).[135]

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131 *White v. Hansen*, 837 P. 2d 1229, 1233 (Colo. 1992).

132 774 P. 2d 459 (Okla. 1989).

133 *Id*. at 461. *See also Bays Expl., Inc. v. PenSa, Inc.*, 2012 WL 4128120, at *18 (W.D. Okla. Sept. 18, 2012) (applying Oklahoma law) (requiring the non-operator to "offer evidence to show that [the operator] intentionally failed to perform its duty in a manner that reflects 'actual subjective knowledge of an extreme risk of serious harm.'"). *Id*. at * 18.

134 *IP Petroleum Co., Inc. v. Wevanco Energy, L.L.C.*, 116 S.W. 3d 888 (Tex. App.--Houston [1st Dist.] 2003, *pet. den'd*).

135 *Id*. at 897.

b. "Willful Misconduct."

In the recent case of *Apache Corp. v. Castex Offshore, Inc.*,[136] the court elucidated on the meaning of "willful misconduct" in an operating agreement's "exculpatory clause."

Apache served as operator under two operating agreements for Louisiana properties, one for a natural gas processing plant and the other for a mineral lease. Castex was a non-operator.

Both operating agreements stipulated that the operator was required to conduct operations in a good and workmanlike manner, but would not be responsible for losses sustained or liabilities incurred except those resulting from gross negligence or willful misconduct.

Suit was brought by Apache after Castex failed to pay its proportionate share of costs incurred in expanding the gas plant and in drilling a failed gas well. Castex filed a counterclaim, averring that Apache's mismanagement had led to significant cost overruns in the construction of the gas plant and to irreversible reservoir damage in the case of the gas well.

The jury found that Apache had not committed gross negligence but had engaged in willful misconduct in its administration of both projects. On appeal, the appellate court took up the issue whether the evidence was legally and factually sufficient to support the jury's finding of willful misconduct.[137]

Despite the fact that the co-owned properties (a gas plant and mineral lease) were in Louisiana, the parties' operating agreement governing the gas plant contained a choice of law provision stipulating Texas law as the governing law, while the second agreement (governing the mineral lease) used Louisiana law.

Rejecting Apache's argument that the jury should have been instructed that "willful misconduct requires a subjective, intentional intent to cause harm," the court concluded that intentional injury is not required and applied what it considered the ordinary meaning of willful misconduct.[138] The court stated that "a plaintiff can show that a defendant is liable for willful misconduct," "if the evidence [shows] that the defendant intentionally or deliberately engaged in improper behavior or mismanagement, without regard for the consequences . . . ."[139]

The evidence was to the effect that Apache personnel in charge of the construction project on the gas plant, particularly in its early stages, were well aware that costs were vastly exceeding estimates and were consciously indifferent to them, deliberately ignoring procedures

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136 2021 WL 1881213 (Tex. App.-Houston [14th Dist.] May 11, 2021, *no pet. h.*).

137 *Id*. at *1.

138 *Id*. at *5.

139 *Id*.

intended to control cost overruns.[140] The court deemed that such evidence sufficiently demonstrated willful misconduct.[141] The court held that Apache failed to "articulate a clear argument for why the evidence is factually insufficient," other than suggesting "that the judgment must be reversed because 'no sane company would purposefully increase its own costs.'"[142] The court observed that the relevant touchstone is whether the defendant engaged in misconduct without regard for the consequences, not whether the defendant sought to bring those consequences upon itself.[143]

As noted above, the operating agreement had a Louisiana choice of law provision.[144] The court found that Louisiana law would apply the same standard as that of Texas, such that, in order to support a finding of willful misconduct, there must be some evidence that Apache intentionally or deliberately engaged in improper behavior or mismanagement without regard for the consequences.[145]

The court concluded that the evidence did not support a finding of willful misconduct in the case of Apache's administration and operation of the gas well.[146] Although "Castex could have overcome [the operating agreement's] exculpatory clause with legally sufficient evidence that Apache knew, but did not care, that it was mismanaging the drilling operation," it had not done so.[147] Instead, the evidence showed that, although Apache knew of the repeated difficulties and failures it encountered during the drilling, it demonstrably made active efforts to address those.[148]

The court was unpersuaded by Castex's contention that, the fact that Apache was agnostic as to whether the well was successful, constituted evidence that Apache did not care about the success of the operations.[149]

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140 *Id*. at *6.

141 *Id*. at *7.

142 *Id*.

143 *Id*.

144 *Id*. at *11.

145 *Id*.

146 *Id*. at *15.

147 *Id*.

148 *Id*. at *14.

149 *Id*.

c. "Good Faith."

Also encountered at times is an "exculpatory clause" which provides that the operator cannot be held liable to a non-operator for damages resulting from any act(s) done "in good faith" in the performance of any of the provisions of the Operating Agreement.[150]

In a non-oil and gas case,[151] the Fifth Circuit undertook to ascertain the meaning of "good faith" under the Louisiana Civil Code. The Fifth Circuit adopted the district court's rationale and definition of "good faith," as follows:

> The Louisiana Civil Code does not define "good faith," but it does define "bad faith" as "an intentional and malicious failure to perform." La. Civ. Code Ann. Art. 1997 cmt. c (West 1987). Following Louisiana law, the district court equated "good faith" with the lack of "bad faith." *See, e.g., Great Southwest Fire Ins. Co. v. CNA Ins. Cos.*, 557 So.2d 966 (La. 1990); *Bond v. Broadway*, 607 So.2d 865, 867 (La.Ct.App.1992), *cert. denied*, 612 So.2d 88 (La. 1993); *see also Commercial Nat'l Bank of Audubon Meadow Partnership*, 566 So.2d 1136, 1139 (La.Ct.App.1990) (analyzing bad faith as the mirror image of good faith); *Heirs of Gremillion v. Rapides Parish Police Jury*, 493 So.2d 584, 587 (La. 1986) (implying that a party has acted in good faith unless he has acted in bad faith). The court held that the FDIC's action may have been negligent, imprudent, or bumbling, **but because they were not intentionally malicious the banks could not state a claim**.[152]

III. SURVEY OF JURISPRUDENCE ON "EXCULPATORY CLAUSES"

A. Preface:

Most litigation involving the Model Form's "exculpatory clause" concerns the issue of whether the conduct or activity in question is (or is not) within the ambit of the provision such that the operator is absolved of liability to its non-operators unless the latter establishes through

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[150] Such a clause was involved in *Oryx Energy Co. v. Tatex Energy*, *supra* note 37, at 146 ("Article 15.3 of the Operating Agreement effectively limits the unit operator's liability to operations conducted in bad faith. Article 15.3 provides that the 'Unit Operator shall not be liable to any party for anything done or omitted to be done by it in the conduct of operations hereunder except in case of bad faith.'").

[151] *American Bank & Trust of Coushatta v. F.D.I.C.*, 49 F. 3d 1064 (5th Cir. 1995) (applying Louisiana law).

[152] *Id*. at 1066. (Emphasis added).

proof and evidence that the touchstones of the clause are met—gross negligence or willful misconduct.

In particular, courts have considered whether the "exculpatory clause" only immunizes the operator from responsibility to the non-operator arising out of the physical conduct of operations, or whether it also protects the operator for the consequences of a contractual breach, including administrative or accounting duties enumerated in the JOA. In some cases, the nature of the alleged breach by the operator related only to *physical* operations, thus not requiring a consideration of the potential scope of the clause to contractual breaches not involving physical operations.

Hence, cases tend to fall into two distinct interpretive buckets: A bucket of "broad" scope or of a "narrow" reach, depending upon the nature of the function or activity as to which the operator seeks to invoke the "exculpatory clause" in an attempt to be relieved of responsibility to a non-operator.

The "broad bucket" encompasses cases involving any sort of a non-operator's claim against an operator for all manner of alleged fault, including a breach of the administrative or accounting duties under the JOA.

In contrast, the "narrow bucket" is typically limited to claims pertaining to the manner in which the operator executed "operations" on a well, yet excluding breach of contract claims.[153]

B. Cases Holding that the "Exculpatory Clause" is to be Broadly Applied, Including Breach of Contract Claims:

In *Huggs, Inc. v. LPC Energy, Inc.*,[154] the Fifth Circuit disallowed a non-operator's claim for damages arising out of the operator's alleged violation of its "contractual duty to perform as a reasonable and prudent operator," contending that the loss suffered "constituted gross negligence."[155] The particular breach of the operator, LPC, pertained solely to its failure to main-

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[153] The reference to the "narrow bucket" might be a bit of a misnomer. It is apt to note that there is occasion to discern and classify the scope of an "exculpatory clause" as being either narrow or broad *only* in a case where the court construes the provision in reference to a breach of contract claim. As a general statement, and given the essential purpose of the provision, it is inconceivable that it would not be universally understood to have application to a non-operator's claim that the operator imperfectly performed a physical activity associated with operations on a well drilled or reworked on the Contract Area. A chart of jurisprudence on the "exculpatory clause" is available for download at this URL: https://www.ottingerhebert.com/wp-content/uploads/Exculpatory-Chart-of-Cases.pdf.

[154] 889 F. 2d 649 (5th Cir. 1989) (applying Louisiana law).

[155] *Id*.

tain mineral leases by payment of delay rentals and shut-in payments, no physical operations being involved.[156]

The operating agreement contained the following unique "exculpatory clause," to-wit:

> It is understood that [LPC] shall diligently attempt to make proper payments of delay rentals and shut-in gas royalty payments, but shall not be held liable to Huggs for the loss of a lease or interest therein through mistake or oversight if any delay rental or shut-in gas royalty payment is not paid or is erroneously paid.[157]

The court did "affirm the district court's finding that the exculpatory clauses of Paragraph IX of the contract and Paragraph 17 of the J.O.A. shield LPC from liability for loss of the leases."[158] This means that a non-operator's claim of breach of the operating agreement is disallowed under the "exculpatory clause" if the failure to pay delay rentals or shut-in payments was due to "mistake or oversight."

The Fifth Circuit again took up an issue under an "exculpatory clause" in the following year. Thus, in *Caddo Oil Co., Inc. v. O'Brien*, the court held that the "exculpatory clause" applied to non-operator's claim that the operator had charged excessive producing overhead rates.[159] It should be noted that the court's analysis or discussion of the import of the "exculpatory clause" was quite minimal, providing no particular guidance in future situations.[160]

In the early case of *Stine v. Marathon Oil Co.*,[161] a diversity case involving "an oil patch joint operating agreement to which Texas law applies,"[162] the Fifth Circuit extended the protection of the "exculpatory clause" to alleged breaches of contract, including particularly the accounting and administrative duties performed by the operator under the operating agreement. The court stated, as follows:

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156 "McRae lost Leases 290(a) and (b) because it failed to pay the required delay rentals and LPC lost Lease 245 because it failed to recommence drilling or reworking operations within ninety days after the cessation of production from the lease well. Huggs filed suit against LPC . . ., seeking damages for loss of the leases." *Id*. at 651.

157 *Id*. at 652.

158 *Id*.

159 908 F. 2d 13 (5th Cir. 1990) (applying Louisiana law).

160 "Under the terms of the Operating Agreement, the Operator is liable to the Owners only in cases of the Operator's willful misconduct. The terms of the Operating Agreement control, and Caddo's actions are to be judged by a prudent operator standard, not by that of a fiduciary." *Id*. at 17.

161 *Supra* note 25.

162 976 F. 2d at 256.

> Thus, in the present case, Marathon is not liable for any action taken in connection with the completion, testing or turnover, or any well drilled under the provisions of the JOA unless Stine can prove that Marathon's actions were grossly negligent or willful. **This protection extends to Marathon's various administrative and accounting duties, including the recovery of costs under the authority of the JOA**.[163]

While the precise version of the Model Form is not disclosed by the opinion, the language seems to suggest that the parties operated under the 1977 or 1982 version. The non-operator, who opposed the applicability of the "exculpatory clause" to administrative matters performed by the operator, argued that the operator enjoyed immunity only in reference to operational activities. As noted by the court, "Stine would have us limit the operation of the clause to physical acts by the operator within the geographic limits of the contract area of the operating agreement."[164]

Citing prior Texas case law,[165] the court observed that the "tenor of the wording of the exculpatory clause is that Marathon is not liable for good faith performance of 'duties under this agreement,' but is liable for acts 'outside the scope of [its] power under the agreement.'"[166]

The court held that the "protection [afforded the operator by the "exculpatory clause"] clearly extends to breaches of the JOA."[167] Hence, the court held that the "exculpatory clause" "protects [the operator] from liability for any act taken in its capacity 'as Operator' under the JOA (except for gross negligence or willful misconduct)."[168]

In *Palace Exploration Co. v. Petroleum Dev. Co*.,[169] the Tenth Circuit held that, in a breach of contract claim against the operator under the AFE provisions of the joint operating agreement, the "exculpatory clause" limits the operator's "potential liability to willful acts or acts that resulted from gross negligence."[170] The breach alleged by the plaintiff pertained to the

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163 *Id*. at 261 (emphasis supplied).

164 *Id*. at 259.

165 *Spiritas v. Robinowitz*, 544 S.W. 2d 710, 718 (Tex. App.-Dallas 1976), *writ ref'd NRE* (June 8, 1977).

166 976 F. 2d at 261.

167 *Id*.

168 *Id*.

169 316 F. 3d 1110 (10th Cir. 2003) (applying Oklahoma law).

170 *Id*. at 1114.

placement of a well, but the court in a subsequent appeal after reversal and remand, agreed with the determination that "the record does not support a finding of gross negligence."[171]

In a case arising out of New Mexico,[172] Ricks, the operator, located a well in an incorrect location, and Matrix, the non-operator, sued for damages. The non-operator's claim was disallowed under the operating agreement's "exculpatory clause," with the court finding neither gross negligence nor willful misconduct. The court explained, as follows:

> We agree with the trial court that "[t]he facts are undisputed that the discrepancy in the location of the Burrus # 3 well resulted from an honest, unintended, non-negligent mistake during operations that does not rise to the level of gross negligence or willful misconduct." Matrix presented no evidence supporting an alternative conclusion. We therefore hold the trial court correctly concluded that Ricks is shielded by the exculpatory clause from liability for any losses caused during operations.[173]

The case of *PYR Energy Corp. v. Samson Resources Co.*,[174] involved a non-operator suing the operator, Samson, for damages resulting from contractual breaches of the operating agreement. The Federal district court engaged in an analysis of Texas state law so as to make an "*Erie* guess."

The court noted that, while questioning the correctness of *Stine v. Marathon*,[175] it nevertheless believed that "the preconditions for departing from *Stine* are not shown to exist in this case."[176] It thus felt itself duty bound under Fifth Circuit precedent to continue to subscribe to *Stine*, but denied pending motions without prejudice pending additional discovery.

A Federal district court decision addressed the scope of the "exculpatory clause" under Louisiana law, albeit rendered in a case pending in Texas wherein the district judge undertook to make an "*Erie* guess" as to what the Louisiana Supreme Court would rule.[177] In *Chesa-*

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171 374 F. 3d 951, 954 (10th Cir. 2004) (applying Oklahoma law).

172 *Matrix Prod. Co. v. Ricks Expl. Inc.*, 102 P. 3d 1285 (Ct. App. N.M. 2004).

173 *Id*. at 1290.

174 470 F. Supp. 2d 709 (E.D. Tex. Jan. 10, 2007) (applying Texas law).

175 "Although the Texas Supreme Court has not ruled on this issue, *Stine* may not accurately forecast Texas law. First, no Texas court has followed or even cited *Stine's* substantive holding in the almost fifteen years since the Fifth Circuit made its '*Erie* guess.' Second, subsequent holdings and statements by three separate Texas courts of appeals suggest that *Stine* may no longer correctly state Texas law." *Id*. at 724.

176 *Id*. at 725.

177 *Supra* note 72.

peake Operating, Inc. v. Sanchez Oil & Gas Corp.,[178] the plaintiff, as operator, sued the defendant, a non-operator, for failure "to pay its entire proportionate working interest share of the costs associated with drilling and completion" of a well located in Louisiana.[179] The defendant asserted certain affirmative defenses, essentially alleging that Chesapeake, as operator, "breached the JOA in several different ways."[180]

When Chesapeake, as operator, brought a summary judgment seeking to dismiss the affirmative defenses as being barred by the "exculpatory clause," Sanchez asserted that "the exculpatory provision only applies when a party is seeking to hold the operator *liable* under the JOA, and [noted] that it has not asserted a counterclaim against Chesapeake seeking to hold it liable; [that] it has merely asserted affirmative defenses."[181] The court disallowed this defense, stating that the non-operator "cannot escape the exculpatory clause by filing affirmative defenses rather than a counterclaim."[182]

The court then proceeded to determine if it was bound by the Fifth Circuit's decision in *Stine* which had held that the "protection [of the "exculpatory clause'] extends to [the operator]'s various administrative and accounting duties, including the recovery of costs under the authority of the JOA."[183]

Sanchez sought to resist the application of the holding in *Stine* on the basis that "*Stine* is an outlier and at odds with subsequent Texas appellate decisions that hold that an oilfield exculpatory clause should apply to tort-based claims but does not impair affirmative claims for breach of contractual covenants."[184] The court reviewed each of the cited decisions, but held that it "could only rely on subsequent appellate decisions if 'such precedent comprise[d] unanimous or near-unanimous holdings from several-preferably a majority-of the intermediate appellate courts of the state in question."[185]

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178 2012 WL 2133554 (S.D. Texas June 12, 2012) (applying Louisiana law).

179 *Id*. at * 1.

180 *Id*. at * 1.

181 *Id*. at * 3.

182 *Id*. To the same effect is *Crimson Expl. Operating, Inc. v. BPX Operating Co.*, *supra* note 111, at * 5.

183 976 F. 2d at 261.

184 2012 WL 2133554 at * 4.

185 *Id*. at * 6. The court cited *F.D.I.C. v. Abraham*, 137 F. 3d 264, 268-69 (5th Cir. 1998) as authority for this rule.

Finding that "three [separate appellate courts in Texas] . . . is clearly not a majority" of fourteen intermediate courts of appeal in Texas,"[186] the court felt constrained to apply *Stine* as applicable in the State of Louisiana under an "*Erie* guess." Hence, "the exculpatory clause at issue applies to all of the breaches of the contract asserted as affirmative defenses."[187]

In a very significant decision of the Texas Supreme Court, it was held that the "model form transformation [from the 1977 and 1982 AAPL model forms, to the 1989 AAPL model form] is significant, as the change in language broadens the clause's protection of operators."[188] Important to the court was the fact that the "exculpatory clause" in the relevant 1989 Model Form referred to "its activities under this agreement" instead of "all such operations" as appeared in the 1977 Model Form at issue in prior cases.[189] Indeed, the decision in *Abraxas Petroleum Corp. v. Hornburg*[190] was distinguished on the basis of the different formulation contained in the Model Form at issue.

Thus, the court held that the "exculpatory clause" "exempts the operator from liability for its activities unless its liability-causing conduct is due to gross negligence or willful misconduct."[191] In other words, the operator is exculpated from liability whether arising from its physical operations or a breach of contract, unless it is shown that the operator was grossly negligent or acted with willful misconduct.

The *Reeder* decision was not well received by the industry or, more precisely, by non-operators. Among other things, the 2015 Model Form addresses the decision in *Reeder* by adding the following sentence, to-wit:

> Operator shall conduct its activities under this agreement as a reasonably prudent operator, in a good and workmanlike manner, with due diligence and dispatch, in accordance with good oilfield practice, and in compliance with applicable law and regulation.

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186 2012 WL 2133554 at * 6.

187 *Id*. at * 7.

188 *Reeder v. Wood County Energy, LLC*, 395 S.W. 3d 789, 792 (Tex. 2012), *opinion supplemented on reh'g* (Mar. 29, 2013).

189 The cases to which the court referred included *Abraxas Petroleum Corp. v. Hornburg*, 20 S.W. 3d 741 (Tex. App.–El Paso 2000, *no pet.*) (refusing to apply "exculpatory clause" to claims against operator under the AFE provisions of the JOA); *Castle Texas Prod. Ltd. Partnership v. Long Trusts*, 134 S.W. 3d 267 (Tex. App.–Tyler 2003) (refusing to apply "exculpatory clause" to claims against the operator under the gas balancing attachment to the JOA); *IP Petroleum Co., Inc. v. Wevanco Energy, L.L.C.*, *supra* note 134 (construing "shall conduct such operations," and applying *Abraxas*), and *Cone v. Fagadau Energy Corp.*, 68 S.W. 3d 147 (Tex. App.–Eastland 2002) (refusing to apply "exculpatory clause" to claims against the Operator under the COPAS accounting attachment to the JOA).

190 *Supra* note 196.

191 395 S.W. 3d at 790.

The rationale for this change was explained by members of the AAPL Task Force formed in 2011 to revise the Model Form 610,[192] as follows:

> The language of the next sentence, which sets out the Operator's standard of performance, has been modified, in response to *Reeder v. Wood County Energy, LLC*, which the court applied the gross negligence/willful misconduct more broadly than the Task Force felt was appropriate. Under the revised language, it is clear that the limitation of the Operator's liability to its gross negligence or willful misconduct only applies to authorized or approved operations, as distinguished from breach of the Operating Agreement, itself.[193]

The intention of the Task Force in making this change to the "exculpatory clause" in the 2015 Model Form was more forcefully stated in a PowerPoint presentation where the authors explained:

> Reworked the sentence dealing with the operator's standard of conduct/exculpatory clause. Close to a reversion back to the 1982 standard for exculpatory provision, which now applies only "in connection with authorized or approved operations under this agreement."
>
> **Intent is to focus the exculpatory language just on operations, reversing the effect of the decision in Reeder v Wood County Energy, LLC (citation omitted). No more "get out of jail" free card.**[194]

C. Cases Holding that the "Exculpatory Clause" is to be Narrowly Applied, Inapplicable to Breach of Contract Claims:

In *Amoco Rocmount Co. v. The Anschutz Corp.*,[195] the non-operator sued the operator for damages resulting from the unilateral actions of the operator in instituting a "change in mode" of operations, apparently in an attempt to induce the non-operators to agree to certain workovers that were proposed by the operator, but not agreed to by the non-operators. The operator resisted liability based upon the "exculpatory clause," which read, as follows:

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192 The membership of, and actions taken by, the Task Force are discussed in Frederick Macdonald and Dorsey Roach, *The AAPL Form 610-2015 Model Form Joint Operating Agreement—Commentary on the Form 610 Task Force*, Paper No. 1 (Rocky Mt. Min. L. Fdn./AIPN/COPAS 2016).

193 *Id*., at p. 1-9.

194 *Id*., at p. 1-55. (Bold emphasis in Article).

195 *Supra* note 23.

> The Unit Operator shall conduct all operations hereunder in a good and workmanlike manner and in accordance with prudent operating practices but the Unit Operator shall not be liable to the Parties for any losses, costs or expenses resulting from any act or omission on the part of the Unit Operator, its agents or employees, save and except such losses, costs or expenses which shall result from the gross negligence or willful misconduct of the Unit Operator, its agents or employees.[196]

Citing no law pertinent to the scope of the "exculpatory clause," the court refused to relieve the operator from liability for the consequences of its breach of contract resulting from "actions taken deliberately." Said the court:

> We would have no trouble upholding the application of § 13.3 if this case involved tortious acts related to the performance of the contract, such as an error in dealing with a third party that caused loss to the whole operation. But the issues in the instant counterclaim, and in the two other counterclaims to which Amoco seeks to apply the clause, relate to actions taken deliberately and, as the district court found, in breach of the contract involving shifting costs between the contracting WIOs. Applying strict construction, we do not believe the exculpatory language applies to these counterclaims. The breaches at issue here are nonperformance of duties imposed by the contract, and do not hinge on whether the breaching party's failure to perform was negligent, grossly negligent, or willful. Here, Anschutz alleges that Amoco unilaterally and intentionally instituted a "substantial change" in unit operations by reducing production, thereby violating § 15.1.1 and breaching the contract. The district court, aware of but not citing § 13.3, apparently held that section is not implicated; we agree.[197]

One court has held that the operator had breached the operating agreement where it issued an AFE to which the non-operators-considering the proposed operation to be "routine repairs" rather than a "reworking" operation as characterized by the operator-did not respond.[198] Contending that the failure of the non-operators to respond to the notice gave rise to the imposition of the 300% non-consent recoupment factor, the operator deemed the non-operators to have relinquished their interest and thus applied the revenue to itself. The jury found the proposed operation to be "routine repairs," rather than a "reworking" operation as to which an election to participate

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196 7 F. 3d at 922.

197 *Id*. at 923.

198 *Abraxas Petroleum Corp. v. Hornburg*, *supra* note 196.

or not was necessary, and awarded damages to the non-operators.[199]

The operator argued that "the mere sending of the AFE letter did not result in any damages to [the non-operators]."[200] The court rejected this contention, saying:

> However, the sending of the AFE letter triggered Appellees' contractual obligation to elect whether to participate in the cost of the proposed operations or suffer the 300 percent penalty specified in the JOA. When Appellees did not respond to the AFE, Abraxas immediately seized Appellees' interests in the Cleo Smith lease and began appropriating their earnings. Abraxas continued to withhold the earnings even though it did not complete the operations as specified in the AFE. Still further, Abraxas retained their interests until the lease had no value. Consequently, the evidence is both legally and factually sufficient to establish that sending the AFE resulted in damages to Appellees. [201]

The court also rejected the operator's contention that its actions were protected by the "exculpatory clause" contained in the operating agreement,[202] finding that such clause "is limited to claims based upon an allegation that [the operator] failed to act as a reasonably prudent operator and does not apply to a claim that [the operator] breached the JOA."[203]

Said the *Abraxas* court,[204] "[w]e have found no cases discussing exculpatory clauses exempting a party from liability for breach of contract."[205] Inexplicably, the court did not consider the Fifth Circuit decision in *Stine v. Marathon Oil Co.*[206]

Other courts have declined to follow *Stine*, holding that the "exculpatory clause" does *not* apply to breach contract claims. Illustrative is *Cone v. Fagadau Energy Corp.*,[207] wherein the court noted that the "gross negligence/willful misconduct requirement applies to any and all

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199 This phase of the case was discussed in Patrick S. Ottinger, *Be Careful What You Ask For: Subsequent Operations Under the Model Form Operating Agreement*, 63 INST. ON OIL & GAS L. & TAX'N., Ch. 7 (2012).

200 20 S.W. 3d at 754.

201 *Id*. at 758.

202 *See* Article V.A (lines 8-10 of Page 4) of the 1982 Model Form.

203 20 S.W. 3d at 759.

204 *Id*. at 759.

205 *Id*.

206 Cited *supra* note 25.

207 Cited *supra* note 196.

claims that the operator failed to conduct operations in a good and workmanlike manner," but not to claims of "alleged breaches of specific terms of the agreement and [which] are in the nature of an accounting."[208] The court did not cite *Stine*, but did not follow its conclusion to the contrary.

In another case out of a Texas appellate court,[209] the non-operator contended that the operator had failed to drill the test well to a sufficient depth to test the Lower Ellenburger Formation as required by the relevant operating agreement. The court took up the issue of whether the "exculpatory clause" of the operating agreement precluded the non-operators' claim against Wevanco, the operator, unless gross negligence was established. This contention was framed, as follows:

> The plaintiffs globally contend that this clause can never apply to any breach of contract claim against an operator and therefore the clause does not apply to its claims against IP. We disagree.[210]

Rather, the court said that "the exculpatory clauses in the JOA applied, and the plaintiffs had to establish that IP was grossly negligent or acted with wilful (sic) misconduct when it breached the contract."[211]

The court found the evidence insufficient to support the conclusion that the operator had acted in a manner that was grossly negligent or constituted willful misconduct, thus applying the "exculpatory clause" to claims against operator for the manner in which it conducted drilling operations as it constituted a breach of the contract to drill to a specified formation.

The decision in *Wevanco* is internally inconsistent in the characterization of the non-operator's claim, a necessary precursor to discern if the case fits into the "narrow" or "broad" bucket. Thus, the court seemed to characterize the claim as operational in nature:

> Here, the basis of the plaintiffs' claims is alleged misconduct arising from the manner in which IP, as operator, conducted drilling operations on the lease. Unlike in *Cone* and *Abraxas*, the plaintiffs alleged that IP failed to conduct operations in good and workmanlike manner and failed to act as a reasonably prudent operator.[212]

This characterization would seem to identify the claim as one that is a candidate for the "narrow bucket."

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208 68 S.W. 3d at 155.

209 *IP Petroleum Co., Inc. v. Wevanco Energy, L.L.C.*, *supra* note 134.

210 116 S.W. 3d at 895.

211 *Id*. at 896.

212 *Id*. at 895-96.

Yet, as noted above, the court then set forth its conclusion as to the applicability of the "exclusionary clause," characterizing the non-operators' claim as pertaining to a "breach of contract." Although this would relegate *Wevanco* to the "broad bucket," it is probable that the court alluded to a breach of contract as pertaining to the duty of the operator to operate as a reasonably prudent operator, not to any sort of administrative duty.

In the *Reeder* case,[213] the Supreme Court cited *Wevanco* as one of four cases of the Texas courts of appeal holding "that the clause extends only to claims that the operator failed to act as a reasonably prudent operator for operations under the contract, and not for other breaches of the JOA."[214] Consistent with the view of the Texas Supreme Court, this author places this case in our "narrow bucket."

Setting this aside, the actual holding in the *Wevanco* case did not assess liability to the operator as the court held that the "evidence is legally insufficient to support the jury's finding" of gross negligence, so the finding of liability as to the operator's action was reversed.[215]

The next case to take up the import of an "exculpatory clause" is *Castle Texas Production Ltd. Partnership v. The Long Trusts*.[216] In that case, the non-operator sued the operator for damages resulting from the latter's failure to pay proceeds of production to the non-operator. Among other defenses, the operator resisted liability by invoking the "exculpatory clause" of the JOA. Citing *Abraxas*, the court held that provision to be "limited to claims that Castle failed to act as a reasonably prudent operator in its operations in the contract area and does not apply to a claim that it otherwise breached the JOAs."[217]

In *Shell Rocky Mountain Prod., LLC v. Ultra Res., Inc.*,[218] the non-operator alleged that "Shell, acting as operator, breached the competitive rate provision of section D by charging drilling costs to the nonoperating working interest owners in excess of the prevailing rates in the area. Shell's defense is that section A absolves it of all liability under the JOA unless its actions amount to gross negligence or willful misconduct."[219]

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213 *Reeder v. Wood County Energy, LLC*, *infra* note 195.

214 395 S.W. 3d at 793.

215 116 S.W. 3d at 898.

216 Cited *supra* note 196.

217 134 S.W. 3d at 283.

218 415 F. 3d 1158 (10th Cir. 2005) (applying Wyoming law).

219 *Id*. at 1168.

In this case asserting a breach of contract claim against the operator, the court held that the "exculpatory clause" afforded no protection to the operator, noting particularly, as follows:

> Incurring costs at a rate commensurate with those of other operators in the area is clearly one of those "administrative duties" that does not "involve extraordinary risks" to Shell. *Id.* Moreover, it would make little sense for the parties to include detailed directives concerning what the operator can and cannot do in incurring costs if the parties did not intend to be legally bound by them. While a higher standard for breach might apply to drilling, extraction, and other risky "operations" because most operators have the same incentive as non-operators to do well in physical operations, it is nonsensical to apply such a standard to administrative and accounting duties where the operator can profit by cheating, or simply overcharging, its working interest owners. We hold that the exculpatory clause does not bar Ultra's counterclaim for breach of the JOAs.[220]

The district court in *Forest Oil Corp. v. Union Oil Co.*,[221] was presented with a claim by a non-operator that the operator had miscalculated charges for the disposal of NORM.[222] The court found that Unocal, as operator, "did not follow the procedures specified" in the COPAS attached to the JOA,[223] but then considered Unocal's contention that its actions were protected by the "exculpatory clause" in the operating agreement. The relevant JOA provided that the operator "shall not be liable to the Parties for damages, unless such damages result from Operator's gross negligence or willful misconduct."[224]

The court then noted that "Alaska courts have [not] considered the reach of such exculpatory clauses,"[225] but observed that the Fifth Circuit (in *Stine v. Marathon Oil Co.*) and the Tenth Circuit (in *Shell Rocky v. Ultra*) "have considered the reach of clauses very similar to the ones at issue here, and reached differing results."[226]

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220 *Id*. at 1171.

221 2006 WL 905345 (D. Alaska Apr. 7, 2006) (applying Alaska law).

222 "NORM" is the acronym for Naturally Occurring Radioactive Material. *See Grefer v. Alpha Tech.*, 901 So. 2d 1117, 1125 (La. Ct. App. 4th 2005). It "is 'any waste that has a naturally occurring radioactive reading equal to or greater than 50 microRems per hour.'" 2006 WL 905345 at * 1.

223 2006 WL 905345 at * 3.

224 *Id*.

225 *Id*.

226 *Id*.

The court accepted the Tenth Circuit's decision in *Shell Rocky Mountain Prod., LLC v. Ultra Res., Inc.*,[227] saying, as follows:

> While a higher standard for breach might apply to drilling, extraction, and other risky "operations" because most operators have the same incentive as non-operators to do well in physical operations, it is nonsensical to apply such a standard to administrative and accounting duties where the operator can profit by cheating, or simply overcharging, its working interest owners.
>
> This Court agrees with the holding and reasoning of the Tenth Circuit. A broader reading of the clause would allow a party to act negligently (just not grossly) in following its express contractual administrative and accounting duties. As a result, the court applies the prudent standard and holds that Forest breached the contract regarding its duties to charge for NORM disposal.[228]

An array of contractual breaches under an operating were before the court in *MDU Barnett Ltd. Partnership v. Chesapeake Exploration Ltd*.[229] The operator sought to immunize itself from the non-operator's claims by invoking the "exculpatory clause" of the operating agreement.

The court noted that it was required, in a diversity case, to "apply state law as construed by the state's court of last resort."[230] The court engaged in a review of Texas jurisprudence, including *Reeder*, and noted, as follows:

> The Texas intermediate appellate courts have uniformly found that the phrase "all such operations" referred back to "operations on the Contract Area," and held that the exculpatory clause was limited to the operator's activities at the wellsite and did not extend to other breaches of the agreement.[231]
>
> The court concluded, as follows:
>
> The court concludes that *Reeder* clearly abrogates *Stine,* and the court defers to the Texas Supreme Court's construction of state law. Plaintiffs' allegations in this case are limited to accounting breaches

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227 *Supra* note 225.

228 2006 WL 905345 at * 3.

229 2014 WL 585740 (S.D. Tex. Feb. 14, 2014) (applying Texas law).

230 *Id*. at * 8.

231 *Id*. at * 7.

> and do not concern defendants' conduct as the well operator in the Barnett Shale Prospect Area. The exculpatory clause of the Operator (sic) Agreement thus does not apply, and the plaintiffs' purported gross negligence/willful misconduct claim will be dismissed.[232]

In a post-*Reeder* case in Federal court in the Eastern District of Louisiana,[233] the court considered the operator's motion to dismiss claims asserted by the non-operators on the basis that the "exculpatory clause" of the operating agreement precluded such claims unless the non-operator established that the operator was guilty of gross negligence or willful misconduct.[234]

The operator sued the non-operator for "payment of joint interest billings related to the abandonment of four wells."[235] The defendants filed a counter-claim asserting claims for "bad faith breach" of the relevant operating agreement.[236] These were subsequently incorporated into defendants' answer to an amended and supplemental complaint. Plaintiff responded by filing a partial motion to dismiss based upon the proposition that, "even if SOI did breach the UOA, the exculpatory clause in UOA section 6.2 requires any claims against the designated operator be proven by a standard of 'gross negligence or willful misconduct.'"[237]

Of course, the court had before it a particular "exculpatory clause," and it provided that "Operator shall not be liable to the Parties for losses sustained or liabilities incurred as a result of its actions as Operator except such as may result from its gross negligence or willful misconduct."[238] In reaching its decision that the "exculpatory clause" did not immunize the operator from breach of contract claims, the court made the following cogent observation, to-wit:

> The language of this provision is consistent with the distinction between field operations and administrative duties. The reference to "Workmanlike Conduct" in the subheading of section 6.2 clearly applies to the conduction of field operations: the standard for performing drilling, production, exploration, and well abandonment is

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232 *Id*. at * 8.

233 *Shell Offshore Inc. v. ENI Petroleum USA LLC*, *supra* note 73.

234 The case involving offshore properties, the OA was not a Model Form, but was a Unit Operating Agreement governed by Louisiana law pursuant to OCSLA. *See supra* note 67.

235 2017 WL 4226154 at * 1.

236 *Id*.

237 *Id*. at * 2.

238 *Id*. at * 4.

> considered "workmanlike." On the other hand, accounting or administrative conduct is not normally described as "workmanlike."[239]

The court conducted a thorough review of existing jurisprudence on "exculpatory clause," and concluded that it was not bound by the decision of the Texas Supreme Court in *Reeder v. Wood Cnty. Energy LLC*.[240]

The court concluded, as follows:

> The text of section 6.2, the contract as a whole, and the purpose of exculpatory clauses in joint operating agreements, all lead this Court to conclude that the UOA distinguishes between field operations and administrative conduct. The Court finds that section 6.2's exculpatory clause applies only to claims for breach of the operator's duty to prudently conduct field operations.[241]

Further, the court observed, as follows:

> Applying the exculpatory clause to the operator's administrative duties and the rights of the non-operators, particularly as set forth in Exhibit C, would undermine the force of these provisions. As noted by one authority on oil and gas operating agreements, "it is difficult to perceive why the parties would include explicit and detailed directions on administrative matters that are supplemental to 'operations' if they did not intend the operator to be liable for breach of those matters." It makes far more sense to read the exculpatory clause in section 6.2 to refer only to actions taken pursuant to the grant of field operational rights and duties found in section 6.1.
>
> Finally, the underlying justifications for exculpatory clauses are not advanced by extending the scope of the clause to cover administrative duties. Exculpatory clauses in joint operating agreements essentially govern the distribution of liability in response to the inherently risky nature of oil and gas exploration and production. Were operators held to a simple negligence standard for all conduct in the oilfield, "[t]he prospect of liability for massive losses resulting from difficult and inherently hazardous operations for which one is

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239 *Id*.

240 *Id*. at * 2.

241 *Id*. at * 5.

not compensated for the risk assumed would quickly discourage many industry parties from serving as operator."[242]

IV. CONCLUSION

The operator would have great regard for an "exculpatory clause" residing in the "broad bucket" in that it provides a shield of immunity for *any* claim of the non-operator unless the claimant can meet the high standard of proof of gross negligence or willful misconduct on the part of the operator. Certainly, an "exculpatory clause" inuring to the "broad bucket" imposes significant barriers to being held responsible from some alleged misdeed.

Indeed, if an operator were asked to identify a song that embodies its view of the "exculpatory clause," it would likely be "Under My Thumb" by The Rolling Stones. On the other hand, depending on the Model Form involved, the non-operator put to the same challenge to "Name That Tune" would probably select "I Can't Get No Satisfaction," with a close second being anything by Dire Straits, probably "Money for Nothing." Such is the divergent view of the critically important provision contained in the Model Form, depending upon one's perspective as being an operator or non-operator.

The "exculpatory clause" of the Model Form operating agreement supplies an important motivation to a party to serve as operator, particularly at the nascent stages of a prospect when parties might contemplate that multiple wells are to be drilled. It is certainly an ineluctable proposition that the overhead compensation to the operator is an insufficient inducement to undertake the myriad of duties expected of the operator.

A determination that the "exculpatory clause" does not immunize an operator from a claim of breach of contract (*i.e.*, a case in the "narrow bucket") is a determination that the non-operator may pursue such claim of contractual breach without the necessity to prove either gross negligence or willful misconduct.

In the situation where the "exculpatory clause" does apply to a claim or assertion of a non-operator, it results in no displacement of the essential premise of the operating agreement that each party "shall be liable only for its proportionate share of the costs of developing and operating the Contract Area."[243] Any departure from the "No Gain, No Loss" principle should be grounded in language that clearly justifies such result.[244]

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242 *Id*. at * 6.

243 Article VII.A, 2015 Model Form.

244 *See* text associated with note 83 *supra*.

If this Article demonstrates anything, it is that case law interpreting the "exclusionary clause" has been less than uniform, with the two polar positions being staked out by the early case of *Stine v. Marathon Oil Co.*, and perpetuated in *Reeder v. Wood County Energy, LLC*, cases which held that the clause provides immunity for even a breach of contract claim, and its opposite conclusion, *Abraxas Petroleum Corp. v. Hornburg*, which espouses the position that a breach of contract claim is not precluded by such clause.

The clause is not an undertaking of indemnity, it is an exculpation to the operator, more akin to a "Get Out of Jail Free card," with respect to cases assigned to the "broad bucket," as pertains to the operator's actions (or inactions) of which the non-operator might complain. Yet any conclusion as to the import of the "exculpatory clause" is always subject to a future contrary judicial determination if the facts change significantly, or the language of the operating agreement points to a different result.