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Supreme Court of Texas.
SONAT EXPLORATION COMPANY, Petitioner,
v.
Cudd Pressure Control, Inc., Respondent.
No. 06-0979.

February 6, 2008.

Appearances:
Joel Thollander, and Sam Baxter, McKool Smith, PC, Marshall, Texas,for appellant.
David M. Gunn, Beck, Redden & Secrest, LLP, Houston, Texas, for respondent.

Before:

Chief Justice, Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, and Don R. Willett, Supreme Court Justices.

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CHIEF JUSTICE JEFFERSON: Be Seated. The Court is ready to hear argument in 06-0979, Sonat Exploration Company versus Cudd Pressure Control, Inc. [SONAT EXPLORATION COMPANY, Petitioner, v. CUDD PRESSURECONTROL, INC., 2007 WL 460237, Supreme Court of Texas].
SPEAKER: May it please the Court. Mr. Thollander and Mr. Baxter will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal. Mr. Thollander will open with the first 15 minutes.Mr. Baxter will present rebuttal.

ORAL ARGUMENT OF JOEL THOLLANDER ON BEHALF OF THE PETITIONER

MR. THOLLANDER: May it please the Court. As time permits, I will address both petitions filed in this case starting with the choice of law issues raised in Sonat's petition and then turning to the issues raised in Cudd's petition.
Concerning choice of law, the Court's analysis should be guided by two principles. The first is the need to focus on the issue in dispute, an indemnity agreement. The Court is presented with a choice betweenthe oilfield indemnity acts of Texas and Louisiana, both of which are designed to prevent inequitable [inaudible]. The question is whether the Texas Act should apply to this agreement that was prepared and

executed in Texas and performable in Texas when injured Texans sued Sonat in Texas.

JUSTICE BRISTER: What is the dispute about where Cudd is domiciled?

MR. THOLLANDER: Your Honor, there was conflicting evidence in -- in the record. The -- there was evidence that Cudd's Web site listed Houston as its -- Texas -- principal place of business. And its records with the Texas secretary of state listed Texas as principal place of business. There was an affidavit filed in this case that said it was Louisiana. There's also evidence that there were -- affidavits in other cases in which Cudd claimed their principal place of business in Oklahoma and Georgia as well.

JUSTICE BRISTER: Where -- where is it? I mean, doesn't it have a headquarters?

MR. THOLLANDER: It's --

JUSTICE BRISTER: I'll ask them again.

MR. THOLLANDER: Yeah. The -- the -- the -- I -- I can -- I can tell you that the Volume 2-574, there's an affidavit there, which explains it in some detail and basically says that they -- Cudd has an accounting office in the Houma but they -- but no senior management there at all.

The -- the court did not -- the -- the trial court did not make a finding on that particular issue. And the Court of Appeals didn't either.

JUSTICE HECHT: I'm a little confused. Is the -- did the parties try -- in Exhibits A and B to the MSA -- to comply with both Texas and Louisiana law?

MR. THOLLANDER: That's --

JUSTICE HECHT: Was -- was that the point?

MR. THOLLANDER: I think -- I think that's exactly the point, your Honor. It was a belt-and-suspenders approach. It was where we --we want indemnity. That's clear. We both agree for indemnity. There's an understanding that in Louisiana that's a problem. Now, they didn't select Louisiana law. Why that is? I'm not -- you know, I -- I'm not entirely sure, but I assume the reason is because Louisiana law may be favorable in some circumstances but not in others.

So that, you know, with a recognition that under other circumstances, given the facts that may arise, it's certainly possible a suit in Louisiana with a Louisiana court applying Louisiana choice of law principles would apply Louisiana law. And then the parties would have -- would have --

JUSTICE BRISTER: If you pick Louisiana law, there's no indemnity.

MR. THOLLANDER: That's right, your Honor.

SPEAKER: Well --

JUSTICE BRISTER: And so there's -- if you want indemnity, there's no reason to pick Louisiana law even if you're drilling in Louisiana.

MR. THOLLANDER: That's exactly -- that's exactly right. As -- as to the -- as to an indemnity provision, I think that's right.

JUSTICE HECHT: Well, that's the part I'm confused about because it looks to me, like, if the parties have done what Exhibit B says, they would have effectively had indemnity. Is that true or not?

MR. THOLLANDER: If -- well, that -- that -- that was -- that was the lawsuit, your Honor, that was dismissed. But Cudd -- Cudd had an obligation to bill Sonat as an additional insured for any work in Louisiana. And there's a -- there's a case -- there's a case created -- a judge-created exception for the Louisiana statute which says that, basically, you can come in as -- as an insured, even if you don't --

even though you can't get indemnity from Cudd, we would have an action against Lumbermens as an additional insured.

JUSTICE HECHT: But -- but that's what -- that's effectively the same as indemnity. Isn't it or not?

MR. THOLLANDER: They -- it -- it could get you to the same point. That's exactly right.

JUSTICE HECHT: And -- and that's what Exhibit B said. It said, you don't -- you know, an indemnity may be -- may not be enforceable in Texas either if you don't comply with the Act.

MR. THOLLANDER: That's right.

JUSTICE HECHT: But part of B was to comply with the Act in Texas and the rest of B was to comply with the Act in Louisiana. Is that right?

MR. THOLLANDER: I -- that -- that's right. The --the Exhibit -- the Exhibit B provision that -- that Lumbermens talks about was specifically directed to work in Louisiana. That's -- that's correct.

JUSTICE HECHT: And so if -- if the party said, got me insurance that B calls for, you would have effectively had indemnity in Louisiana?

MR. THOLLANDER: That's -- I think that's right.

JUSTICE BRISTER: Not from Cudd.

MR. THOLLANDER: What's that?

JUSTICE BRISTER: Not from -- not from Cudd.

MR. THOLLANDER: That's right.

JUSTICE BRISTER: You wouldn't have had. It's just--

MR. THOLLANDER: We wouldn't --

JUSTICE BRISTER: It -- does Louisiana case say anything other than you can get insurance in Louisiana? I mean, if by adding --by paying for a policy and adding it, really, you just get an indemnity against an insurance company?

MR. THOLLANDER: That -- that's right -- that's right.

JUSTICE BRISTER: Which is the same as just getting insurance. I suppose even in Louisiana, you can get insurance.

MR. THOLLANDER: I -- I was a little -- that --that -- you're -- you're exactly right, your Honor. And I was -- I was answering in terms of -- as a practical matter, that's true. But looking at the facts in this case, it actually makes a dispositive difference, which is why Lumbermens intervened in the first place. So, I do think it's very important.

JUSTICE HECHT: Well, just so I'll understand.

MR. THOLLANDER: Hm-hmm.

JUSTICE HECHT: To get indemnity in Texas, it's got to be backed up by insurance.

MR. THOLLANDER: That's right. Well, there has to be an agreement.

JUSTICE HECHT: Right. And then --

MR. THOLLANDER: In Panatrol [Panatrol Corp. v. Emerson Elec. Co., 163 S.W.3d 182, 187 (Tex. App.--San Antonio 2005, pet.denied)], it says there's an agreement to provide -- to provide insurance. So we clearly have that. There's -- there's no question that -- that -- that has been complied with.

Now, I would say, since we're talking about the-- the choice of law, I think it's -- it's critical to understand that under the restatement, especially in - - and when you're talking about contracts, the restatement is -- is very concerned with protecting the expectations of the parties. And the -- the relevant rules quoted in the briefs are -- from the --the most relevant is restatement Section 200, which provides that the validity of the contractual provision

should be sustained whenever possible provided that, in so doing, the interest of the State, with a materially greater interest, are not seriously infringed.

That means the question here: Even if the parties -- even if the court decides, you know what, the parties intended for Louisiana law to apply to this -- to this agreement. Then in -- even if the court decides that, the question -- that doesn't answer -- that doesn't answer the -- the question.

The question is then: Well, okay, does Louisiana-- given that Louisiana invalidates the indemnity agreement, does Louisiana law have a materially -- does Louisiana have a materially greater interest in the indemnity dispute? And would Louisiana's interest be seriously infringed by application of Texas law to that dispute?

JUSTICE HECHT: But before you -- I want you to talk about that -- but the -- but the premise I'm still concerned about, which is,you know, you read this and you think, oh, why didn't the parties pick a law? I just wonder if they were -- didn't think about it or -- or what. But it looked to me as I read it all through that by the time you get to the end of it -- if the parties had done what they said they were gonna do, it didn't make any difference what law applied. They were going to get to the same end in Louisiana and Texas no matter what.

MR. THOLLANDER: And, your Honor, that -- that is-- that is the point of the belt-and-suspenders argument. I think that was the point. Now, as -- as things have turned out, Sonat is -- is caught in the middle here. And we sort of lost both -- both agreements because of the Rule 11 agreement with Cudd.

JUSTICE BRISTER: Well, yeah, but you let that one go. You let that one go on purpose.

MR. THOLLANDER: That's right. That's right. That one's gone for us but -- but we still have --

JUSTICE BRISTER: That was clear. The parties intended in this circumstance for Cudd to indemnify -- either through insurance or otherwise, to indemnify Sonat. If Louisiana law applies, they don't get indemnified. And the reason is because they let go of the other lawsuit.

MR. THOLLANDER: That's -- that's right. If -- if-- if -- if that's what the Court decides, that Louisiana law applies here, then-- then we will lose -- we will lose that -- the indemnity against against Lumbermens and -- and Cudd with those -- those claims.

Now, I think the -- and the -- the belt-and-suspenders approach, that -- that point is important because Lumbermens' argument is essentially that the existence of suspenders proves that there's no belt. And they want to say, because we agreed to this in -- this additional insured provision, then you just read the indemnity out of the contract. But if-- but if you read, actually, Cudd's petition, it makes very clear that Cudd understands that the Exhibit A indemnity promise was applicable to work performed in Louisiana says so -- as much in Cudd's -- in Cudd's petition. So the -- so -- so that the Court is really faced with the question of whether to -- whether -- whether this indemnity agreement is going to be upheld or struckdown.

Now, going back to the point about the expectations of the parties and whether or not -- so given that Louisiana lawwill strike down this indemnity agreement, then the question is: Should -- under what circumstances should Louisiana law be applied? And the answer under the restatement is, it shouldn't be applied unless Louisiana has a materially greater interest and those interest would be seriously infringed by application of Texas law under the statute.

Now, there's no dispute among the parties or the Court of Appeals that the policies are congruent. And, basically, the -- the --the underlying policy is to prevent inequitable bargaining. And here, that --that interest just is not implicated in any way. In fact, Cudd's argument, though, addressed in a moment, is that -- is that Sonat was too lenient at the bargaining table because they asked for a reduction in coverage, and we agreed to it.

So there's just -- there -- there's no implication of -- that Louisiana's interest would be infringed by application of Texas law here. So I think, really, on that basis alone, the Court can -- the Court can decide to apply Texas law to this -- to this agreement.

I also -- I -- I wanted to point out -- just so that there's no confusion, Sonat's position is not that the place of performance is absolutely dispositive and that once you decide that issue, that's it. There is -- the Court still needs to go through the Section 188 and Section 6 factors, which is done in Sonat's briefing. But I think when you do that, it'll be clear that Texas has a more substantial relationship --

JUSTICE BRISTER: Is the place of performance of an indemnity where you defend the lawsuit filed by the workers? Or is it where you pay the indemnity agreement? Is it a lawsuit with the workers or is it a lawsuit between the two of you all? I know it's the same in this case --

MR. THOLLANDER: Right. I -- I've --

JUSTICE BRISTER: -- but if it's not.

MR. THOLLANDER: Right. I mean, my answer is, it is the same here, so that's easy.

I think typically it would probably where --where you -- where you asked for defense and it was refused. That's -- that's abreach of the contract there.

JUSTICE BRISTER: What Maxus [Maxus Exploration Co. v. Moran Bros., Inc., 817 S.W.2d 50 (Tex. 1991)], seems to say.

MR. THOLLANDER: I think that's right. To the extent that there -- another case comes up where it's split, I think the reality is the restatement realizes that contacts can shift. And so, you know, depending on the particular facts on the case, that -- that -- that issue might be less important -- that contact might be less important if there's a real question about whether the performance was at the defense side or at the actual payment side. I think --

JUSTICE HECHT: What -- what a -- what -- I wonder about that, though, is if -- suppose you sued each other in both states the same day wherein one filed a suit for indemnity and one filed a suit for declaratory judgment each in a different state, ideally, the courts are going to pick the law that should, in some sort of jurisprudential sense, apply --

MR. THOLLANDER: Uh-huh.

JUSTICE HECHT: -- to the case. But if it's just the law or the form, it's going to depend on which case goes forward.

MR. THOLLANDER: And, your Honor, that's why it's not just the law or the form. And in this -- and -- in these facts, it's pretty clear that if you - - if both courts apply the restatement -- which you kind of need to assume that -- but if both -- both courts apply the restatement, then they would look at the interest. And they would say -- if one -- if one -- if one state's law is going to invalidate that agreement and one is going to uphold it, then we need really good evidence that this state's interest are greater and would be seriously infringed in order to apply that law.

So I think it's very easy to -- it's very easy to imagine a scenario where you could have your scenario, but it's -- both --both states would still choose Texas law. In fact, I would -- I would point the Court to -- to a -- a just released decision from Louisiana, King v. Miller, [King v. I.E. Miller of Eunice, Inc., 976 So.2d 1285, La. 2008], 977 2nd 703. It's a -- it's a Louisiana Court of Appeals case that just came out. And there -- actually the well and the indemnity suit were both from Louisiana.

The court said that because there was no inequitable bargaining implicated at all, the Texas interest in upholding the agreement outweighed Louisiana's interest and invalidate it. So I think that's -- to the extent, the Court is somewhat concerned about Louisiana's reaction to the -- a decision that Texas law should apply here, I think that case enunciated [inaudible].

If I could turn very quickly to Cudd's arguments. Cudd's -- Cudd's first argument is that the agreement is not mutual because Cudd agreed to reduce the -- because Sonat agreed to reduce the scope of Cudd's indemnity exposure by not requiring Cudd to indemnify Sonat's other third-party contractors, which included Brooks Well Servicing and Halliburton in this case.

Now, that argument is inconsistent with legislative intent. Ken Petroleum [Ken Petroleum Corp. v. Questor Drilling Corp., 24 S.W.3d 344 (Tex. 2000)], held that there were two principal intentions for this Act. One was to permit enforcement to the extent of mutuality and the second was to prevent overreaching.

Now, the statute does not require parties to push coverage to the full extent permissible under the definition. And I know that because Section 127.005(b) says that you can only enforce agreement to the extent of mutual coverage. So it envisions the possibility that parties will carve out coverage -- coverages from -- from the, sort of, universe permitted by the definition.

Second, the legislature could not have required a small contractor without any contractors of its own to agree to indemnify a host of third-party contractors -- could include large companies like Halliburton -- in order to secure indemnity for itself.

JUSTICE HECHT: And -- and you think we should address these issues rather than send them back to Court of Appeals?

MR. THOLLANDER: Your Honor, the -- the Court has granted both petitions. And I think that Sonat has no objection to getting this case completely resolved at this point.

Cudd's second issue about the evidence -- about the evidence of insurance. The key -- the key point here is that there was no dispute concerning whether Sonat had more insurance than Cudd. In fact, as Cudd well knew, Sonat's insurance had paid out already more than $100 million dollars to settle the claims brought by Cudd's and Brooks' employees. So, there --that's why there was never any question about whether or not Sonat had more insurance than Cudd. It was completely resolved.

CHIEF JUSTICE JEFFERSON: Any further questions? Counsel.

The Court is now ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Gunn will present argument for the respondent. Mr. Landry will present argument for the intervenor. Mr. Gunn will present the first ten minutes of argument.

ORAL ARGUMENT OF DAVID M. GUNN ON BEHALF OF THE RESPONDENT

MR. GUNN: If I could start with the question Judge Hecht just asked about the decision tree. Let's be honest, this is a complicated twist of fact pattern. And I want to go away leaving the Court one message today, which is to tell you what I want, what I'm asking you to do, and why. And even to be so bold as to say, here is how I think the opinion ought to read if you rule for me, which is: Never mind what you just heard about choice of law and what you're about to hear. Just render or take nothing on my Texas law point, on my no evidence point.

The reason I'm asking for that -- and I'll tell you how I want to do that. That -- the -- well, let me tell you now.

Right in the opinion, if you go my way and say, let's assume Sonat is absolutely right about choice of law, absolutely right that the contract is mutual, and that Ken Petroleum governs, we don't have any evidence of their insurance coverage. That's what I'm asking. The urgency is this: If we had two or three years to finish this case here or send back the Texas Points, the Texas Arkana, then come back here, that would be fine.

But this blowout happened ten years ago. And Mr. Landry represents Lumbermens, our insurer, an insurer that you're not gonna see again. Lumbermens' part of the Kemper Group. You're not gonna have any more Lumbermens cases. You're not gonna have any more Kemper cases. They're gone when Osama hit the World Trade Centers. He hit Kemper's offices in New York. They got hit with a lot of World Trade Center claims. The financial turmoil that came after 9/11, which was right at the time of this judgment, destabilized their investments. Kemper is in runoff. That means they are on life support with no feeding tube. They have no premiums coming in. They're gonna be gone, so --

JUSTICE BRISTER: What's -- what's the relevance of this?

MR. GUNN: Well, the relevance is to your discretionary decision. How to dispose of this case -- you got to decide. Do I go Texas? Do I go Louisiana? Do I send it back to the Court of Appeals? I want you to know we're in borrowed time, that the judgment is about to hit roughly the -- the amount of the bond. I don't know if we're here a year from now, if the bond is going to be up. And I'm gravely concerned about the consequences to Cudd.

Right now, we're okay. The verdict you see in the briefing is for $20 million dollars. It is 38 now, almost 40, depending on how you calculate costs. So, the analytical framework that I am putting on the table for the Court to consider is, basically, the analytical framework that Sonat gave the Court of Appeals in its briefing, which was about this no-evidence point. They said that's a Rule 279 finding because there were no jury verdict on the amount of Sonat's insurance. It's a Rule 279 finding.

They're right about that. That's what it is. It's a Rule 279 finding. The problem is it's got to have evidence. And there's no evidence.

JUSTICE BRISTER: Tell me, where -- where is Cudd's senior management?

MR. GUNN: Today?

JUSTICE BRISTER: No, at that time.

MR. GUNN: The record is somewhat mixed on that. I think the nerve center of the parent company that really ran operations was in Atlanta, Georgia. It had an operational office in Houma, Louisiana. It had an office in Oklahoma.

JUSTICE BRISTER: CEO's usually don't work out of Houma, Louisiana.

I mean, where -- where was the people that ran the company?

MR. GUNN: Well, CEO's of a -- of a --

JUSTICE BRISTER: [inaudible]

MR. GUNN: -- of an underwritering bank don't, they work at Wall Street, but -- but in the oil patch, it's not unusual. I'm taking orders from the New Orleans guys behind me, who are Cudd's regular trial lawyers. But -- and I don't mean to deny that there is any Cudd presence at Texas at all. To be honest, Judge, it's been several years since I'd worked on the choice of law issues and since we've walked away from -- I don't know.

JUSTICE BRISTER: I'm just -- I'm just puzzled. I mean, a company is where it is. I'm just puzzled at why we have -- why there's conflicting evidence about where you -- where you're domiciled at.

MR. THOLLANDER: I -- I agree it's a mixed bag in the record. And if -- if this were an issue, I still had -- I'd have a direct answer for you. It's frankly mixed. And Mr. Landry may know better than I because that's -- that's the issue --

JUSTICE BRISTER: We're -- so we really don't know what -- where -- where Cudd was domiciled back then?

MR. GUNN: I think that's right, your Honor. I mean, frankly, they got operations in different places. And it's -- it's blurry to me from the record, but I haven't looked at that in several years.

JUSTICE BRISTER: Why are these -- can you tell me why these suits -- injury suits are -- when workers get injured in Louisiana, why they're filed in Texas? Is it just my perception --

MR. GUNN: Punitive.

JUSTICE BRISTER: -- or do they always get filed in Texas?

MR. GUNN: Punitives. Punitives. You can get punitives here.

JUSTICE BRISTER: No punitives there in Louisiana?

MR. GUNN: That's basically right. There's no punitives in Louisiana. So, they're likely to come here and -- and --

JUSTICE BRISTER: Again, so this is going to happen again and again?

MR. GUNN: It probably would. It's happened before. The -- you know, this is the usual dance. Now, there are offsetting considerations. The way settlement credits work in Louisiana is totally different. And it's disadvantageous. So, plaintiffs have to choose.

And what you see in this record is, you know, the evolving course of multiparty -- the twister game, right hand blue. And people took different positions as they went. I'm not involved in any of that on the choice of law issue.

JUSTICE BRISTER: You're not taking a position?

MR. GUNN: We're not. And we affirmatively disclaim a position. We want to be honorable to our word. I'm trying to win and have been trying to win for years on Texas law. And we ask you to simply say, all right. Sonat, we'll give you everything. You get Ken Petroleum. And it can be this -- don't look at the face of the contract -- just tell me this floating number, your insurance and my insurance, and which one's lower.

The answer is: There is nothing in there. It's a Rule 279 finding without evidence. And don't take the bait that you just heard asecond ago about everybody knows we've got insurance.

That is not true. That is absolutely not true. We don't know to this day what their insurance is. We've never seen the policies. I cited in the briefs what we asked them over and over in discovery, Give us your -- your policies. They stonewalled us. They wouldn't tell us. Their answer is Trust us. We've got insurance. We're not going to show

you.

And they asked for a summary judgment before a trial on it. They didn't get the summary judgment. What they got was a summary judgment on other issues that said, summary judgment on mutuality, Texas law, and we're going to trial on -- on remaining issues. So we're thinking, okay, fine. And we didn't sandbag them. We objected when they filed that fishy affidavit saying, well, we have a lot of insurance.

We objected under part (f) after the summary judgment rule and said, give me your best evidence. Show me the documents. Nothing. So we're going to trial thinking we're in good shape. They had plenty of notice. In the middle of trial, they got to prove our insurance, their insurance. We stipulated our insurance. When they're resting their case, there's a joint stipulation. We stipulate. Here's our insurance. Our policy is in the record. If you read the clerk's record, you'll see it.

Ask them on rebuttal, where's their policies? Why -- seven years later after this judgment, why do we not have any policies from them. It's not a technical gotcha argument. That's the road map that I'm asking the Court to -- to take to dispose of the case before our friends at Lumbermens are just gone. You don't have to do it, but that's what I'm asking for. That's what I'm trying.

CHIEF JUSTICE JEFFERSON: Now, on the choice of law --

MR. GUNN: Yes, your Honor.

CHIEF JUSTICE JEFFERSON: -- what's your argument there?

MR. GUNN: Have none at all. [Laughter] Have none at all. May I be excused?

In fact, your Honor, we have another argument. We have mutuality argument. There's a third argument, which I briefed in the Court of Appeals. It is theoretically before you. I didn't brief it in the merits brief because I can win on either of these first two points.

It's a third one. And it goes back into Louisiana, and Texas, and the Texas Act. It's in the Court of Appeals briefing. If you choose to address all the Texas issues, you can do it. But as it says in the New Testament, whatsoever thou doest, do quickly.

If the Court has no more questions, I'll just sit down.

CHIEF JUSTICE JEFFERSON: Thank you.

MR. GUNN: Thank you.

ORAL ARGUMENT OF ARTHUR W. LANDRY ON BEHALF OF THE INTERVENOR

MR. LANDRY: If the Court please. I had the honor of appearing before you once before in connection with the intervention. And I thank the Court for allowing me to appear here again, especially on Ash Wednesday.

One thing I'd like to say quickly with respect to what Mr. Gunn says and it ties in to some of the concerns that you've expressed, Justice Brister and, you, Justice Hecht. Let there be no doubt, there's $40 million dollars in appellate security on post in the Court of Appeals to cover this judgment. That money is Lumbermens' money. It's not Cudd's money. It's Lumbermens' money.

The indemnity claim against Cudd or the indemnity judgment against Cudd is insured by Lumbermens liability policy issued to Cudd under the contractual liability coverages. That's never been in doubt.

But the question is here and the question that we intervened in

order to preserve because it had been presented at the district court by Cudd. It was just dropped. And we wanted to preserve it to say -- to ask the Court to say, does this contract reflect the intention of the parties? Does it reflect -- does it give the clear implication that the parties understood that the law of the state where the well was drilled would be the law that would govern the indemnity rights of the parties?

I submit to you there's no question. Now, 187(a)2 does not require it to say Louisiana law's can govern this.

JUSTICE BRISTER: It looks -- it looks like the clear intent -- I mean, this is a big, long indemnity agreement. And, clearly, the intent of both parties was each is gonna indemnify the other if their own workers got hurt.

MR. LANDRY: If I may take exception with, your Honor, just briefly.

The intent of the parties expressed by the contract is not that you will have indemnity. With respect to Texas wells and Louisiana wells, all we can say is that the intent of the parties is that Sonat needed to do what it had to do to invoke the exceptions to the anti-indemnity acts of each state.

JUSTICE BRISTER: And you wouldn't do that if you intent of the parties that everybody would have indemnity? You wouldn't -- you wouldn't care that they were struck down under Louisiana, Texas, or New Mexico law if you didn't intend to indemnify each other?

MR. LANDRY: Of that -- there's no question about that. But this is as -- as, your Honors, recognize, this is a contract that calls for a contractor to indemnify the owner against its own fault. Now, those contracts --

JUSTICE BRISTER: Common--common in the oilfields?

MR. LANDRY: Common in the oilfields.

JUSTICE BRISTER: In fact, in every contract at the oilfield, right?

MR. LANDRY: Common in every contract in the oilfield, but those contracts are never favored unless specific stipulations in the contract are made. And in the oilfield, they're never favored unless specific exceptions to the invalidation are met.

Now, in Texas, those exceptions are set by the statute. In Louisiana, they're set by the case called Marcel [Marcel v.Placid Oil Co., 11 F.3d 563 (5th Cir. 1994)]. Now, Marcel is so frequently used and cited, it's entered the vernacular. It's like the Erie doctrine or the Daubert analysis.

It's the Marcel exception. And what it says is Louisiana has the same policy as Texas. We want to protect the oilfield contractor against onerous indemnity obligations. Texas chooses to do it by requiring mutual indemnity, mutually secured by promises to obtain insurance. Louisiana will protect the contractor even more. We'll take the contractor out of the mix. And we will provide that if you, Sonat, paid the premium charge, could be an additional insured on the Cudd's liability policies, you become an insured.

Now, what does a liability policy do except indemnify its insured against the consequences of its own fault?

JUSTICE BRISTER: That's not an in -- that's not an indemnity between the parties. Does that say anything other than, if you go to Louisiana, you can get insurance?

MR. LANDRY: Oh, yes, it does say because under the Louisiana Anti-Indemnity Act, you can't. And an owner like Cudd can't make the contractor buy its insurance for it unless it pays the price.

JUSTICE BRISTER: But -- but they went over. If Sonat went over,

drilled it themselves, they could get insurance if anybody got injured?

MR. LANDRY: Oh, certainly.

JUSTICE BRISTER: And how's Marcel say anything different than that?

MR. LANDRY: It doesn't say anything different that -- it -- that -- it simply says that -- that the purpose of the Louisiana statute is to protect you from --

JUSTICE BRISTER: So, my question is why is that a choice? I mean, the Court of Appeals basically held that impliedly it was a choice of Louisiana law.

MR. LANDRY: No question.

JUSTICE BRISTER: And why is that if all that it said was that you can insure yourself when you go to Louisiana? Push your case.

MR. LANDRY: No, no. Sonat as it -- is at pains to say in the Texas case, has its own insurance. But it allows you to buy insurance through your contractor for whatever that premium charge might be. And the contract stipulates -- Sonat puts in the contract -- it stipulates: Your insurance, Cudd, will be primary to mine.

So what that means is that Lumbermens, under Sonat's contract, is supposed to step in the first dollar coverage and -- and indemnify Sonat against its own fault. The exact same thing that Texas law would render the judgment against Cudd but the -- but the judgment would be protected by Lumbermens. That's why it's up $40 million dollars on deposit.

The net result is the same. And the net rights to Sonat are the same. And as Justice Hecht has pointed out, if Sonat has complied with the Marcel exception, they have the insurance claim up and Marcel's still pending. Let them demonstrate compliance with the Marcel exception. And then we'll get the same recovery, the same dollar limit that Texas would allow.

So how was that an invalidating law? It's not. It's an exception to an invalidating law. And that's what they selected. Beyond that, Sonat says --

JUSTICE BRISTER: So does this case come out differently if it'd been an explicit choice of Texas law?

MR. LANDRY: Yes, because that -- or could because then you'd have Chesapeake [Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc., 94 S.W.3d 163 (Tex. App.--Houston [14th Dist.] 2002, no pet.)]. And while I haven't read the King v. Miller case that counsel just cited from Louisiana, if there's a stipulation in that contract and it involves two Texas companies, which is in Chesapeake -- and there's a stipulation in there: All our -- all our disputes are going to be governed by Texas law, then you have a different situation.

JUSTICE BRISTER: Do you have -- do you know whether Cudd was domiciled in Louisiana or --

MR. LANDRY: My understanding based on the affidavit of Gary Zeringue, who is the man whose name assigned to this contract, is that his office -- he was the author or the officer with the authority to sign this agreement and bind Cudd to its provision. His office was at all times in Houma, Louisiana, during the pertinent times.

Cudd is spread out.

JUSTICE BRISTER: We don't normally think that Exxon's domiciled everywhere or somebody from Exxon signs a contract on its behalf.

MR. LANDRY: No -- no question. And if this were Exxon, it might be a more complicated question. The name insured on the Lumbermens policy is RPC Inc, which is domiciled in Atlanta, Georgia. Cudd happens to be a wholly owned subsidiary of that company. So there -- Cudd had

operational offices in Oklahoma as well. It had some in Texas. It had them in Louisiana. There's -- there's no -- there's no question about that.

Insofar as where Cudd signed this contract, binding itself, Mr. Zeringue's affidavit is unchallenged. He signed it in -- in Louisiana, where it was presented.

There are a couple of problems that I would also suggest with respect to this belt-and-suspenders approach that Sonat claims they're taking. For -- in the first part, they say, well, this -- this really only relates to insurance, it doesn't relate to indemnity. Well, as we -- as we discussed in Louisiana, insurance is indemnity. It serves the same purpose. It covers the same risk.

They then say, well, it's intended to guard against the possibility that somebody might sue us in Louisiana regardless of well our -- where our well is located. Because, under this analysis, if we get sued in Louisiana, that sets the place of indemnity. So, the well could be anywhere. This is intended to guard us against the lawsuit in Louisiana.

It makes no sense. Because if that's true then in order to have a prophylactic, protective effect, they've got to comply with Marcel at all their wells around the world.

JUSTICE BRISTER: Well, the reason -- but the reason--this is in all the standard oilfield contracts suppose everybody doing business in the oilfields wants indemnity.

MR. LANDRY: Sure.

JUSTICE BRISTER: And if we agree with the Court of-- if we affirm that Court of Appeals in Louisiana applies then, they didn't --they don't mean indemnity.

MR. LANDRY: Well, your Honor, I -- I cannot say anything more than what I say. They get the net recovery. The only difference is whether the judgment reads Cudd Pressure Control or Lumbermens Mutual Casualty Company. But in both events, they are indemnified against the const-- the results of their own fault. That's what the liability insurer does.

All that Louisiana does is puts Lumbermens in Cudd's place, but they still get indemnity. If the Court -- that's why I said the Court cannot get hung up in my view of the distinction between indemnity and insurance because under the law of both states, the two subjects are intertwined. You can't get to indemnity in Texas unless you can show that you at least promised to get insurance.

And that's the other reason that I think that --and the other point that I would like to make here. You raised the question, Justice Hecht, about the filing of declaratory judgment actions in the effect that this can happen. And that's why we have cited the Court to the Louisiana decisions involving exactly the same case, okay, because Brookes Well Servicing co-contracted with Cudd under an identical service agreement. Don't let anybody tell you it's a different contract. It's a form service agreement. It's in the record, facing identical indemnity claims out of the same Louisiana well, which were consolidated for trial together in March. An order of separate trial was issued and Brookes took that opportunity, that breather, to go to Louisiana --to Arcadia, Louisiana -- and get a declaratory judgment that Louisiana law governs the master service agreement.

The basis for the court's ruling and their judgments are -- of the district court are in the record -- is, number one, it found that this was a selection of Louisiana law implicit. Number two, it found that Louisiana had an interest in applying its law to Louisiana wells, and Louisiana blowouts, and the Louisiana environment. And number three, it

thought that it was following this Court's precedent in Maxus [Maxus Exploration Company v. Moran Bros., Inc., 817 S.W.2d 50 (Tex. 1991)]. It cites to Maxusspecifically.

Now, we have never said that those rulings are binding on this Court, but we do say that they're entitled to consideration because what you have here is a party that's in Marshall. Arcadia is 92 miles away. You have another party identically situated. It's able to drive 92 miles and get a zero verdict, while the party still in Marshall faces a $40 million exposure.

It seems to me that that undermines the whole concept of uniformity, and predictability, and certainty of the law. And under these facts, therefore, those provisions, those decisions should be recognized.

CHIEF JUSTICE JEFFERSON: Any questions? Thank you, Counsel.

MR. LANDRY: And I thank the Court.

REBUTTAL ARGUMENT OF SAM BAXTER ON BEHALF OF THE PETITIONER

MR. BAXTER: Let me start with the no evidence point of insurance, which is probably the most amazing thing I've heard from a -- from a company that paid out $128 million dollars of insurance money because these nine workers died. For Cudd now to say, you didn't show you had any insurance is almost silly.

JUDGE1: Well, did you show you had?

SPEAKER: Well -- well, we did.

MR. BAXTER: Absolutely, we did, your Honor. And -- and we did it this way. The first summary judgment that we filed, we attached an affidavit from our vice president, who is also an assistant general counsel, that delineated we had hundreds of millions of dollars worth of insurance that covered this very fact. It went unchallenged. There was no objection to it. Didn't file a single piece of paper. Absolutely nothing.

Most importantly, insurance, whether or not we had it or they had it, wasn't a jury issue in this case. That was a question for the court on summary judgment and the court ruled. Cudd, as a matter of fact, filed a motion in limine, and this is at the record at 5/14/84 that said, don't get insurance before this jury.

Now, counsel told you, we filed motions. They said to try to get the insurance policy. That's not true. You can search this record from top to bottom. And Cudd never filed a motion at any time requesting our insurance policies. Not one single motion, certainly nothing that was ever granted. Something -- that was not an issue in this case, whether we had insurance. We had already paid.

It wasn't a question is, do you have insurance to back this up? We paid the money out. Those suits had gone away. That wasn't an issue. And they had fought like a tiger to make sure that insurance didn't get in front of the jury. Their motion in limine they had -- we had a long hearing about that. And they wanted no part of insurance before this jury. It was not a jury question. And that's the only time that it could be a no evidence point. The evidence was before the court. And the court ruled on it on summary judgment.

We filed another partial summary judgment. And we had another affidavit that said the same thing. We had written them a letter that said, we got all the insurance. Their policies were never produced to

us. We never saw their policies. They presented a stiff of insurance. We took their word for it that they had $35 million dollars worth of insurance. And we took their word for that. It was not an issue. That was before the jury, was never going to be submitted to the jury. It simply was not an issue in the case. It was an issue on summary judgment. And on summary judgment, they didn't bat an eye and never said they don't have insurance. They knew we had the insurance. We had paid.

Second point about Cudd. When I'm here the last time, I fought like a tiger, Justice O'Neill, to keep that opinion coming out of my time intervention. I lost nine to zip. I couldn't even get a -- a flicker. But now that that opinion's out, with that opinion said, and the Court of Appeals got it wrong. The Court of Appeals said, wait a minute, even if we wanted to do something about Cudd, we can't because you've reversed the case.And -- and you reversed it as to choice of law. And Cudd gets the benefit. And that's not true because after this Court's opinion, in In re Lumbermens [Inre Lumbermens Mut. Cas. Co., 184 S.W.3d 718 (Tex. 2006)], Lumbermens was a party. They were a party for this Court's opinion. When there are two parties and one of them appeals and the other one waives that issue, they don't get the benefit under this Court's precedent of what happens if you reverse as to one but not the other. So at the end of the day, even on the conflict of law, which I -- I think probably -- this Court is gonna ride on and should ride on because this is the most important issue in this case -- that Texas law applies in this situation when you look at the restatement. All that aside, we still get our judgment against Cudd.

But here is the issue about the restatement. The parties -- as Justice Brister pointed out -- what they really wanted and what they always want in the oil patch is they want indemnity. There is not a breath in this case that somebody said, oh, wait a minute. If it's in Louisiana, we don't want indemnity, which is what the Court of Appeals had. But the restatement says is that you ought to look at what the parties intended. And that's going to be paramount. You ought to fulfill the expectations of the parties. What did we expect? We expected to get indemnity

JUSTICE HECHT: Well, but I suppose you expected that each other would get the insurance required by Exhibit B. And if you -- if everybody had done that, then I suppose you'd have the same thing as indemnity.

MR. BAXTER: Well, we did get insurance, Justice Hecht. They got insurance to cover us. We got insurance to cover them. And the most important thing is that we knew how to write. And so did Cudd. If you want Louisiana law -- law to apply to a well in Louisiana, you know how to write that. We wrote it as to Texas, New Mexico, and wells out in the Gulf. We did not write that to Louisiana.

The most important thing to remember is, this is a master contract. We don't know where the wells are gonna be drilled when we signed it, but we know we could choose Louisiana law for Louisiana well. And we did not do that.

JUSTICE HECHT: But why, if you got a policy in which you -- on which you were an additional insured, doesn't that give you the same benefit as indemnity?

MR. BAXTER: Well, it may, your Honor. The problem is, is that we had two lawsuits. And, remember, under that Rule 11 agreement, we gave up our claim against Cudd because we thought their word was good. And we thought we wouldn't be faced with this conflict problem in Texarkana or here. And it turns out that maybe that wasn't quite right. And we

gave that lawsuit up. And so -- but the real point is we expected there was going to be insurance. And we knew how to write. If you're in Louisiana drilling a well, it's Louisiana law. And we didn't write that.

Therefore, you go through all the analysis that Justice Brister went through in Chesapeake. And when you come through that analysis, you find out that Texas law applies. Thank you, Mr. Chief Justice.

CHIEF JUSTICE JEFFERSON: No further questions. Thank you, Counsel. The cause is submitted. That concludes the argument for this morning and the Marshall will adjourn the Court.

SPEAKER: All rise. Oyez, Oyez, Oyez, the Honorable, the Supreme Court of Texas now stands adjourned.

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