A recent case out of the US Court of Appeals for the Fifth Circuit highlights the importance of indemnity agreements in the oil and gas industry. The case, *Certain Underwriters at Lloyd’s v. Axon Pressure Prods.*, 951 F.3d 248 (5th Cir. 2020), involved a well blowout that occurred in 2013 on the HERCULES 265 drilling rig in the Gulf of Mexico. In 2011, Walter Oil & Gas Corporation (“Walter”) chartered the HERCULES 265 drilling rig from Hercules Drilling Company (“Hercules”) to rework a well located about 84 miles south of Houma, Louisiana. The drilling contract (hereinafter “Drilling Contract”) between Walter and Hercules allocated liabilities between the parties. One year prior, in 2010, Axon Pressure Products, Inc., and Axon EP, Inc. (collectively “Axon”), serviced the HERCULES 265 drilling unit by refurbishing and remanufacturing various parts of the rig that were designed to help prevent well blowouts.

Some additional factual background is required. At the time Axon serviced the drilling rig in 2010, the HERCULES 265 was owned by Seahawk Drilling, Inc. (“Seahawk”). Axon and Seahawk entered into a master service agreement (the
“Seahawk Contract”) to perform the workover and refurbishing of the blowout preventer equipment on the HERCULES 265. The Seahawk Contract included an indemnity agreement that required Seahawk to “release, [d]efend, indemnify, and hold harmless [Axon] from and against any and all [l]osses arising out of personal or bodily injury, sickness, disease or death or property damage, destruction or loss suffered by any member of Company Group in connection with this [a]greement.” “Company Group,” as defined by the Seahawk Contract, included Axon, its parent, subsidiaries, affiliates, contractors, and various other parties. The Seahawk Agreement also included a provision that stated the agreement would “remain in force and effect until cancelled by either party by giving the other party ten (10) days prior written notice.”

Axon entered into a different but similar service agreement with Hercules (the “Hercules Contract”) only two days after executing the Seahawk Contract. The Hercules Contract had a separate indemnity requirement that provided that “the parties . . . shall release, protect, defend, indemnify and hold harmless the other party and their insurers and subrogees . . . to the extent in each case . . . that such [liability] is caused by the negligence or other legal fault of the indemnifying party.”

Seahawk eventually filed for bankruptcy and sold its assets to Hercules. Hercules also purchased “all of the interests, rights, [c]laims, and benefits arising or accruing to [Seahawk] under any [c]ontracts to which [Seahawk] is a party” and assumed “the [l]iabilities of [Seahawk] under the terms of any [a]ssigned [c]ontract to the extent that such [l]iabilities are performance obligations, or otherwise attributable to the period from and after the [c]losing.”

By 2011, Hercules owned the HERCULES 265 and entered the Drilling Contract with Walter, which chartered the drilling rig to rework a well in the Gulf of Mexico. The Drilling Contract contained several indemnity provisions that the parties attempted to rely upon in litigation. The first was a general indemnity that stated that “[e]xcept for . . . obligations and liabilities specifically assumed by” Hercules, Walter is “solely responsible and assumes liability for all consequences of operations by both parties while on a daywork basis,” including “results and all other risks or liabilities incurred in or incident to or connected with, directly or indirectly, such operations.” There were also more specific indemnity provisions that required Walter to indemnify not only Hercules, but also its suppliers, contractors, or subcontractors. Walter was required to indemnify Hercules and its suppliers, contractors, or subcontractors for damage to or loss of the hole or downhole property. Walter was required to indemnify Hercules and its suppliers, contractors, or subcontractors for losses caused directly or indirectly by “pollution or contamination.” Walter was also to indemnify “for the cost of removal of all wreck and debris” and to indemnify for loss to the mineral formation or strata and the loss of oil, gas, or other minerals that had not yet “been reduced to physical possession above the seabed.”

Two other contractual provisions in the Drilling Contract bear mentioning. The phrase “be responsible for and hold harmless and indemnify,” as used in a certain section, “shall have no application to claims or causes of action asserted against [Walter] or [Hercules] which arise solely by reason of any agreement of indemnity with a person or entity” not a party to the Drilling Contract. The Drilling Contract
also contained an exclusive remedy provision, which stated that certain provisions of the agreement “shall exclusively govern the allocation of risks and liabilities of said parties without regard to cause.”

Because the contractual relationships are essential to understanding the claims, the court provided the below diagram to illustrate the relationships between the parties.

The blowout occurred in 2013, causing damage to the rig and other property. After the incident, Walter tendered various claims to its insurers, Certain Underwriters at Lloyd’s (“Underwriters”). Walter and Underwriters sued Axon, asserting products-liability claims. Axon responded with a counterclaim against Walter seeking indemnity as a third-party beneficiary under the Drilling Contract between Walter and Hercules. Axon also brought a third-party complaint against Hercules and sued Underwriters for breach of contract for failure to release claims against anyone Walter had released from liability. Hercules tendered its defense and indemnity to Walter. Hercules eventually filed a third-party complaint against Axon and Walter, seeking indemnity and contribution from both parties. The district court granted summary judgment on various indemnity issues, primarily in Axon’s favor. Walter, Underwriters, and Hercules appealed to the Fifth Circuit. Walter appealed the district court’s decision that it owed a duty to release and indemnify Hercules and Axon. Hercules appealed the district court’s decision that it owed duties to defend and indemnify Axon. The Fifth Circuit took up the indemnity issues in turn:

- Axon sought defense and indemnity from Hercules for claims made by Walter and Underwriters pursuant to the Seahawk Contract.
Axon sought defense and indemnity from Walter for claims made by Walter itself pursuant to the Drilling Contract between Hercules and Walter because Axon was a contractor of Hercules.

Hercules sought defense and indemnity from Walter for the claims brought by Axon pursuant to the Drilling Contract between Hercules and Walter.

**Whether Hercules must defend and indemnify Axon against Walter’s claims**

First, the court addressed whether Hercules must defend and indemnify Axon against Walter’s claims. The district court held and the Fifth Circuit agreed that under the applicable contract, the Seahawk Contract, Hercules must defend and indemnify Axon.

As noted previously, the Seahawk Contract provided that the owner of the drilling rig, Seahawk at the time, must “release, [d]efend, indemnify, and hold harmless [Axon] from and against any and all [l]osses arising out of personal or bodily injury, sickness, disease or death or property damage, destruction or loss suffered by any member of Company Group in connection with this [a]greement.”

At issue was whether the Seahawk Contract or the Hercules Contract controlled. The court held that the Seahawk Contract controlled because Axon’s work on the blowout preventer arose out of that contract and the Hercules Contract did not supersede the Seahawk Contract, which remained in force and effect until cancelled by the parties.

The Fifth Circuit held that the indemnity obligation in the Seahawk Contract was triggered by Walter and Underwriters’ suit against Axon because “Company Group” included any entity for whom Hercules was performing services, including Walter. Hercules, therefore, was required to defend and indemnify Axon against Walter’s claims.

**Whether Walter must directly indemnify Axon for Walter’s own claims**

Next, the court addressed whether Walter must directly indemnify Axon for Walter’s own claims. The district court held that Walter must indemnify Axon, but the Fifth Circuit disagreed and reversed, holding that Walter was not required to indemnify Axon.

As described above, under the Drilling Contract between Walter and Hercules, the parties allocated liabilities for specific incidents whereby Walter would indemnify Hercules only and other incidents where Walter would indemnify Hercules and its suppliers, contractors, and subcontractors. For example, the Drilling Contract stated that “[e]xcept for . . . obligations and liabilities specifically assumed by” Hercules, Walter is “solely responsible and assumes liability for all consequences of operations by both parties while on a daywork basis,” including “results and all other risks or liabilities incurred in or incident to or connected with, directly or indirectly, such operations.”
Other provisions in the Drilling Contract required Walter to indemnify not only Hercules, but also its suppliers, contractors, or subcontractors. For example, there was a section that obligated Walter to indemnify Hercules and its suppliers, contractors, or subcontractors for damage to or loss of the hole or downhole property. Another section required Walter to indemnify Hercules and its suppliers, contractors, or subcontractors for losses caused directly or indirectly by “pollution or contamination.” Yet another section required Walter to indemnify “for the cost of removal of all wreck and debris,” and another required Walter to indemnify Hercules for loss to the mineral formation or strata and the loss of oil, gas, or other minerals that had not yet “been reduced to physical possession above the seabed.”

Yet another contractual provision in the Drilling Contract stated that the words “be responsible for and hold harmless and indemnify” as used throughout a particular article in the Drilling Contract “shall have no application to claims or causes of action asserted against [Walter] or [Hercules] which arise solely by reason of any agreement of indemnity with a person or entity” not a party to the Drilling Contract. The Drilling Contract also contained an exclusive remedy provision, which stated that certain provisions of the agreement “shall exclusively govern the allocation of risks and liabilities of said parties without regard to cause.”

The Fifth Circuit, reading and interpreting the contract as a whole, determined that questions of fact precluded summary judgment on whether Walter was required to indemnify Hercules’ subcontractor, Axon, for the claims Walter itself brought against Axon. Specifically, the Drilling Contract does not specifically require Walter to directly indemnify a third party, Axon. Instead, the agreement states that Walter is required to be solely liable for any consequences of operations by both Walter and Hercules where not specifically assumed by Hercules. The court cautioned that accepting a broader interpretation of the indemnity provisions to encompass one where Walter must assume the defense and indemnity of Axon would read out the specific provisions that are limited to indemnifying Hercules, but not its suppliers, contractors, and subcontractors in certain situations. None of those specific indemnity situations applied. Walter and Underwriters sued Axon for the cost of regaining control of the well, plugging and abandoning the well, replacing the original platform, and removing the wreckage of the damaged platform. None of those liabilities were allocated in the Drilling Contract. Because Walter and Hercules agreed to a different scope of indemnification for different risks, where in some instances Hercules’ suppliers, contractors, and subcontractors would be indemnified and in other instances they were not, the court could not extend the indemnity to Axon, one of Hercules’ contractors. Therefore, the court held that Walter was not required to indemnify Axon under the Drilling Contract.

**Whether Walter must defend and indemnify Hercules against Axon’s claims**

Finally, the court considered whether Walter must defend and indemnify Hercules against Axon’s claims. The court described this indemnity as “circular indemnity,” explaining that in this situation “liability is simply passed from Walter, to Axon, to Hercules, and then back to Walter.” The Fifth Circuit held that the Drilling Contract between Walter and Hercules did not support this interpretation.
The Drilling Contract contains a specific exemption whereby Walter does not have an obligation to indemnify Hercules for any claims brought by a third party against Hercules arising “solely by reason of any agreement of indemnity.” Because Axon’s claims against Hercules arise out of the Seahawk Contract, Hercules cannot seek indemnity from Walter for those claims.

Next, as a general principle, the court noted, indemnity agreements require express notice and “should not be read to impose liability for those losses or liabilities which are neither expressly within its term nor of such a character that it can be reasonably inferred that the parties intended to include them within the indemnity coverage.” Corbitt v. Diamond M. Drilling Co., 654 F.2d 329, 333 (5th Cir. 1981). In this case, the court found, the contract was silent as to whether Walter was required to indemnify Hercules for claims brought by third parties against Hercules arising out of the contract. As previously noted, the Drilling Contract provided that “[e]xcept for . . . obligations and liabilities specifically assumed by” Hercules, Walter is “solely responsible and assumes liability for all consequences of operations by both parties while on a daywork basis,” including “results and all other risks or liabilities incurred in or incident to or connected with, directly or indirectly, such operations.” At issue was whether this general catchall provided an avenue for Hercules to seek indemnity for the claims brought by Axon. The court determined that it did not because this catchall provision did not provide express notice to Walter that it had to indemnify Hercules for claims brought by third parties. Without express notice, Walter was not required to defend and indemnify Hercules against Axon’s claims.

**Conclusion**

In sum, the Fifth Circuit held the following:

- Hercules was required to defend and indemnify Axon against claims made by Walter and Underwriters pursuant to the terms of the Seahawk Contract.

- Walter was not required to defend and indemnify Axon against claims made by Walter itself pursuant to the Drilling Contract between Hercules and Walter.

- Walter was not required to defend and indemnify Hercules against claims made by Axon pursuant to the Drilling Contract between Hercules and Walter.

The Fifth Circuit’s detailed contract analysis is important for operators to consider when allocating specific liabilities in contracts. Enforceable indemnity obligations must be expressly assumed in the contract, so parties should take care to ensure they understand the full extent of their obligations at the time of contracting.

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