NO. 05-0202

IN THE SUPREME COURT OF TEXAS

ENERGY SERVICE COMPANY OF BOWIE, INC.,

Petitioner,

v.

SUPERIOR SNUBBING SERVICES, INC.,

Respondent.

BRIEF OF *AMICUS CURIAE*
TEXAS OIL & GAS ASSOCIATION

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TO THE HONORABLE SUPREME COURT:

The undersigned attorneys submit this *Amicus Curiae* Brief pursuant to Rule 11 of the Texas Rules of Appellate Procedure and respectfully request that it be received and considered by the Court.

I. TxOGA'S INTEREST

This Brief is submitted on behalf of the Texas Oil & Gas Association ("TxOGA"), a general, multipurpose trade association representing the Texas oil and gas industry. TxOGA's members, which produce and market more than ninety percent of all of Texas' crude oil and natural gas, are directly and significantly affected by all aspects of Texas oil and gas law. As an organization, TxOGA

participates actively in selected cases as *amicus curiae* to encourage the observance and maintenance of the substantial body of oil and gas law Texas courts have developed over many decades, and to urge caution in departing from the general principles underlying that jurisprudence. TxOGA is especially mindful of the need for consistent application of rules, on an industry-wide basis, to those who are similarly situated. This is particularly true when parties have relied on established and well-known industry practices in entering their contractual agreements.

TxOGA has agreed to pay the undersigned a fee for the preparation and submission of this Brief.[1]

II. TxOGA'S CONCERNS

This case involves the interpretation of an indemnity agreement contained in a Master Service Agreement ("MSA") for oilfield services. Mitchell Energy Corporation ("Mitchell") entered into a MSA with Superior Snubbing Services, Inc. ("Superior"). In the MSA, Superior owed indemnity to Mitchell and its other contractors for injury claims by Superior employees. Energy Service Company of Bowie, Inc. ("Energy") was another contractor of Mitchell. A Superior employee

[1] None of the parties in this case is a member of TxOGA. None of them participated in the preparation of this Brief, and none will contribute to funding the payment of fees to the undersigned.

was injured while performing services under the Superior MSA, and he filed suit against Energy and others.

Energy settled the claim with the injured Superior employee, then filed suit against Superior seeking indemnity. Superior, who was a subscriber under the Workers' Compensation Act, asserted that the indemnity claims were barred by the exclusive remedy provisions of the Texas Labor Code and therefore the contract was unenforceable under the Texas Oilfield Anti-Indemnity Act ("TOAIA").[2]

The trial court granted summary judgment in favor of Energy, enforcing Superior's indemnity obligation to Energy as a third party beneficiary of the Superior MSA. The court of appeals, relying on a minor, non-substantive change in the wording of Section 417.004 of the Texas Labor, reversed the trial court, holding that third party beneficiaries of "pass through" indemnity agreements (such as Energy) are not included as permissible indemnitees absent a specific written agreement between the third party beneficiary and the subscribing employer expressly assuming the third party beneficiary's liability. The court of appeals therefore rejected Energy's indemnity claim against Superior.

TxOGA's members and other oil and gas exploration and production companies ("operators") have entered into literally tens of thousands of these kinds of agreements with oilfield service contractors in connection with exploration and

[2] Tex. Civ. Prac. & Rem. Code § 127.001 *et seq.*

production operations in Texas. In addition, similar indemnity provisions are contained in innumerable drilling contracts executed between operators and drilling contractors, and similar MSAs often exist between service contractors or drilling contractors and their own subcontractors. The proper and consistent interpretation of such indemnity provisions is therefore of major concern to the entire oil and gas industry in Texas, including TxOGA's members. By destroying indemnity obligations to third party beneficiaries, the holding of the court of appeals, if upheld, would disrupt parties' freedom to contract and the entire approach to risk allocation that currently exists. This risk allocation approach has been carefully developed over decades through reliance on the TOAIA and the process of contractual negotiation between all participants in the oil and gas industry.

III. LEGAL DISCUSSION

A. The Issue

This case requires this Court to interpret two statutes in tandem: Section 417.004 of the Texas Labor Code and the TOAIA, each as amended in 1989. The issue is whether the 1989 amendment to Section 417.004, which appears to be a minor, clarifying amendment made during an extensive revision of the Labor Code, was intended to invalidate third party beneficiary obligations despite a complete lack of any legislative history or intent to that effect. The court of

appeals' interpretation of Section 417.004 negates the mutual indemnity section of the TOAIA (which was enacted in 1989, the same year as Section 417.004), and would stand in contradiction of the intent of the TOAIA. It would also have a devastating impact on companies throughout the oil and gas industry (whether operators, service contractors, drilling contractors, or any of their subcontractors) who have relied on the mutual indemnity exception of the TOAIA in structuring their risk management programs since 1989, or who otherwise would be entitled to indemnity as a third party beneficiary.

When faced with a similar legislative intent issue concerning the application of the TOAIA, this Court in *Ken Petroleum Corporation v. Questor Drilling Corporatio*n, 24 S.W. 3d 344, 350 (Tex. 2000), stated, "in determining legislative intent, the Legislature has instructed that we may consider, among other things, ***the object the Legislature sought to obtain, the circumstances under which the statute was enacted, legislative history, and the consequences of a particular construction***." (emphasis added) (citing Tex. Gov't Code § 311.023; *Fleming Foods of Texas, Inc. v. Rylander*, 6 S.W.3d 278, 283 (Tex. 1999); *Phillips v. Beaber*, 995 S.W.2d 655, 658 (Tex. 1999)). TxOGA submits that such an analysis in this case will lead the Court to determine that the 1989 technical amendment to Section 417.004 was not intended to destroy indemnity obligations owed to third

party beneficiaries and that the indemnity provision at issue in this case is enforceable by Energy.

B. Brief History of the Texas Oilfield Anti-Indemnity Act

The Texas Legislature deemed indemnity provisions in oilfield contracts important enough to warrant legislation as early as 1973 when it promulgated the TOAIA.[3] While the Act generally prohibits a party from obtaining indemnity for its own negligence, the Act has always contained exceptions to this rule.[4] Moreover, since the 1989 amendments, Section 127.005 has specifically authorized and approved mutual indemnity obligations properly supported by liability insurance coverage. Section 127.001 defines a "mutual indemnity obligation" as "an indemnity obligation . . . in which the parties agree to indemnify each other ***and each other's contractors*** and their employees ***against loss, liability, or damages arising in connection with bodily injury***, death, and damage to property ***of the respective employees, contractors or their employees, and invitees of each party arising out of*** or resulting from ***performance of the agreement***." Tex. Civ. Prac. & Rem. Code § 127.005 (emphasis added). The language of the

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3 As originally enacted, the TOAIA was found at Tex. Rev. Civ. Stat. Ann. art. 2212b (repealed). It was moved to Chapter 127 of the Texas Civil Practice and Remedies Code in 1985.

4 Certain unilateral indemnity agreements are authorized by Section 127.005 (and have been since the inception of the Act).

mutual indemnity exception expressly contemplates that indemnity will be owed to third party beneficiaries (*i.e.*, "each other's contractors").

C. Risk Allocation in the Oilfield Today

Relying on the TOAIA, operators, service contractors, drilling contractors, and others involved in the oil and gas industry have carefully developed and implemented a generally accepted risk allocation plan. Typically, this plan has attempted to identify and allocate liability exposures through various types of reciprocal indemnity agreements. The mutual indemnity exception of the TOAIA has been at the center of these efforts since 1989, as tens of thousands of agreements have been entered into by which each party (as "indemnitor") agrees to indemnify the other party ("indemnitee") ***<u>and the indemnitee's contractors</u>*** for claims arising from injuries to the indemnitor's employees, regardless of fault. In other words, under the mutual indemnity exception, each party in the oilfield takes care of its own "slice of the risk" (claims by its own employees against the other party ***<u>and its contractors or subcontractors as third party beneficiaries</u>***). In return, the indemnitor and the indemnitor's contractors or subcontractors receive a reciprocal indemnity from the indemnitee as third party beneficiaries (for claims by the indemnitee's employees). This approach to risk allocation provides a level of certainty to all of the parties regarding liability exposure because each company is able to train its own employees as to safe oilfield practices, manage its

performance of the work, obtain insurance, and attempt to control the scope of its liability arising out of what is usually a common workplace.[5] Liability insurers have also written insurance coverage to accommodate such a risk allocation approach inasmuch as policies typically provide contractual liability coverage for indemnity obligations to third parties.

But to understand how these tens of thousands of contracts interact, and how this risk allocation is actually implemented throughout the oil and gas industry, it is critical to understand certain basic premises. To begin with, every contractor (including drilling contractors, service contractors, and all their subcontractors) would like an indemnity from the operator against claims by employees of other contractors. This issue permeates the negotiation of every service contract or drilling contract affecting Texas oil and gas operations, as each contractor wants indemnity protection for claims by other contractors with whom they have no contract.[6] The mutual indemnity exception to the TOAIA was enacted in 1989 to

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[5] Exploration operations commonly have several parties, including the drilling contractor, service contractors, vessels, aircraft, and the subcontractors of many of them, working at the site simultaneously. The different contractors, however, are not in privity of contract with each other.

[6] In many broad reciprocal indemnity provisions, the contractor may be owed indemnity by the operator for claims of its other contractors. However, there are thousands of MSAs in which the operator is not directly obligated for claims by other contractors, but each contractor owes indemnity for claims by its employees, and such indemnity protection is owed to every other contractor as a third party beneficiary. If Section 417.004 is interpreted as invalidating all third party beneficiary rights against a subscribing employer, all of the contractors who relied on such third party beneficiary protection will

address this concern and allow the oil and gas industry to balance the risks associated with exploration and production operations.

D. The Importance of "Pass-Through" Indemnity

However, in order for an operator to consider providing indemnity to one contractor for claims by employees of the operator's other contractors, the operator must: a) first obtain contractual indemnity protection from each of its contractors for claims by the contractor's employees; and b) then be able to pass that protection through to each of its other contractors as a third party beneficiary. Otherwise, the operator would owe indemnity to every contractor except the claimant's employer, but the employer (who contracted with the operator to take the risk of loss to its employees) would not owe indemnity to the other contractors as third party beneficiaries.[7] In the face of such a huge gap and such overwhelming, unsupported liability, operators would be unwilling to extend indemnity for claims by their other contractors, and the mutual indemnity exception to the TOAIA would be rendered meaningless. In other words, the allowance of the third party beneficiary concept is very much in the interest of contractors and operators alike (an important aspect of the TOAIA).

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be left without recourse. Either way, companies throughout the industry will be denied the indemnity protection they have come to expect and rely on.

7 This gap created is particularly significant when the operator, as is often the case, has few employees at the work site, and most of the parties present (and most likely to be causally responsible for an accident) are the various contractors.

Each contractor that benefits from the current approach to risk allocation is a third party beneficiary of the contracts entered into between the operator and the other contractors in the oilfield. In fact, if the injury in this case had been to an Energy employee, Superior (who had a similar MSA with Mitchell) would be seeking indemnity from Energy as a third party beneficiary. To require each contractor to sign a separate indemnity agreement with every other contractor in the oilfield to obtain privity and allow this indemnity protection would create an almost impossible task. There are tens of thousands of oilfield contracts in effect, each addressing the indemnity issues between the parties to the contract with the assurance that the risk allocation plan discussed above provides protection from claims by employees of other contractors with whom there is no privity of contract. While it is theoretically possible to create master agreements that each contractor could sign, no such exercise has ever been required previously. Besides, most companies are not equipped to do that. Moreover, requiring the revision of tens of thousands of contracts would serve no useful purpose and would conflict with the TOAIA and the reasonable expectations of all contractors and operators in the oil and gas industry.

E. Texas Courts Have Recognized This Kind of Indemnity

As discussed at length in Energy's Brief, Texas courts have recognized the importance of the risk allocation plan discussed above. *See Chesapeake Operating*

Company, Inc. v. Nabors Drilling USA, Inc., 94 S.W. 3d 163 (Tex. App. – Houston [14th Dist.] 2002, no pet.). They have even considered the exact third party beneficiary situation raised in this case and upheld the indemnity as valid and enforceable. *See Renegade Casing Crews, Inc. v. Mitchell Energy Corporation*, 2002 WL 449716 (Tex. App. – Dallas 2002, pet. denied) (not designated for publication); *Questor Drilling Corp. v. Schlumberger Technology Corp.*, 1999 WL 33755831 (Tex. App. – Houston [1st Dist.] 1999, no pet.) (not designated for publication). While neither *Renegade* nor *Questor* specifically mentioned Section 417.004 of the Texas Labor Code, each involved the exact same situation – a third party beneficiary (such as Energy) seeking indemnity for claims by an injured employee of the indemnitor (such as Superior) via the pass-through effect of the indemnity provisions found in the employer's contract (in which each contractor owed indemnity to the operator's other contractors). This same situation exists with every mutual indemnity agreement executed since 1989. The fact that there are only two cases addressing the issue (and upholding the indemnity) shows that litigation has not been necessary because the system is working and has been for more than fifteen years.

F. The Court of Appeals Has Created a Void

The court of appeals' decision in this case creates an enormous void in this risk allocation plan. If the Court affirms the court of appeals' holding, all

employers that subscribe to the Texas Workers' Compensation Act would be carved out of this risk allocation plan absent a written agreement with someone with whom they have no other contractual relationship, effectively negating the entire risk allocation approach used in the industry and painstakingly developed in individual contracts for at least the past two decades. This is inconsistent with any reasonable approach to third party beneficiaries. Most oilfield contractors do not know the identities of other potential contractors at the work site, and would be unable to enter into any agreement with such other contractors in advance. The administrative nightmare of attempting to execute such agreements upon arrival at thousands of different work sites is almost unimaginable. The result is that the court of appeals' interpretation of Section 417.004 would protect an employer bound by contract to an operator (such as Superior in this case) from providing indemnity for claims by its own employees, but it would deprive every other subscribing employer (such as Energy) from receiving the intended indemnity protection as a third party beneficiary. In addition, if any of the contractors (such as Energy) had agreed to indemnify their subcontractors for claims by any other contractors' employees, the indemnity obligations to the subcontractor would be enforceable, but the contractor's pass-through indemnity protection from the employer would not, despite the intent of the signatories, the TOAIA, and industry practice.

The reality of the practice in the oil and gas industry is that contractors want operators to provide broad reciprocal indemnity agreements that conform to the TOAIA requirements with the understanding that similar agreements are being entered into with other, often unknown, contractors of the operator. Alternatively, contractors at least want to know that each contractor is indemnifying the other contractors as third party beneficiaries. This allows each contractor the assurance that it will only be responsible for claims by its employees, because each of the other contractors will owe indemnity for claims by their own employees. Under the court of appeals' holding, however, such indemnity agreements would no longer be valid, thus exposing contractors to significant additional liability. In other words, the risk allocation plan that has been carefully developed, designed to eliminate costly battles over determining the responsibility or fault of each party, will be destroyed and the purpose of the TOAIA's specific guidelines on oilfield indemnity and the reasonable expectations of the entire industry will be completely frustrated. As the court discussed in *Chesapeake*, the absence of this risk allocation plan that has worked so well for so many years will result in a significant increase in litigation and judicial resources expended to determine what parties should be held liable based on fault. 94 S.W. 3d at 167-8. This cannot be what the Legislature intended when it amended Section 417.004 in 1989 at the same time that it enacted the mutual indemnity exception to the TOAIA.

G. Subscribing Employers Will Not Be "Devastated," Nor Are the Effects "Narrow"

Superior asserts that allowing third party beneficiaries to reap the benefit of indemnity provisions that pass the obligation through to non-signatory parties will have a "devastating" effect on subscribing employers, subjecting them to "unknown, uncertain, and inestimable liability." This assertion, however, is disingenuous. Subscribing employers, just like everyone else in the oil and gas industry, have been entering into contracts providing exactly the kind of pass-through indemnity to third party beneficiaries for years, all the while knowing the effects of such contracts and usually attempting to insist that such protection be provided with respect to claims by employees of other contractors. The true devastating effect will be to parties who have relied on the language of the TOAIA and the risk allocation approach that has been in place for years, who would be without a remedy or, absent the ability to pass through the indemnity obligations of subscribing employers for claims by their employees, would be saddled with immeasurable, unintended liability exposure.

The assertion that the court of appeals' holding will have a "narrow" effect because it only applies to subscribing employers is likewise misleading, as the indemnity demand at issue in this case is the most common circumstance that occurs in the oilfield – a party sued by another contractor's injured employee seeking indemnity from that employer/contractor based on the

employer/contractor's agreement with the operator. This situation is exactly what the TOAIA contemplates in its "mutual indemnity obligation." Under the court of appeals' holding, all contractors who are subscribing employers would therefore be excluded from any third party beneficiary protection despite such indemnity agreements being expressly permitted by the TOAIA. Moreover, companies will not accept liability for claims by their contractors if they cannot obtain indemnity from each contractor ***and*** pass that protection on to the other contractors. This result would entirely frustrate the purpose of the 1989 amendment to the TOAIA, all on the ground that a technical amendment to another statute, Section 417.004 of the Labor Code, passed in the same year, was allegedly "intended" to do so by the Legislature even though:

a) there is no legislative history stating that intent;

b) the existing legislative history is to the contrary;

c) tens of thousands of contracts have been entered into in reliance on the mutual indemnity exception for more than fifteen years;

d) tens of thousands of other contracts have been entered into by contractors in reliance on third party beneficiary protection; and

e) each subscribing employer would thereby lose the benefit of indemnity protection it would otherwise be owed by every other contractor (each a subscribing employer) for claims by their own employees.

When tested by the standard set forth in *Ken Petroleum*, discussed in detail below, such an interpretation of legislative intent is untenable.

H. This Court has Looked Beyond "Plain Language" Before

Superior's whole case is premised on a two prong contention: a) the language of Section 417.004 of the Texas Labor Code, when given its "plain meaning," appears to require a written agreement between each third party seeking indemnity for a claim by the subscribing employer's employee; and b) the Legislature, by making what otherwise appears to be a clarifying amendment to Section 417.004, must have meant to change existing law and negate all third party beneficiary protection. As to the first prong, to the extent that such a purely grammatical reading may, at first blush, appear to have some merit, it makes no logical sense to anyone experienced in the oil and gas industry It is not in accord with custom and usage in the industry. The second prong of the argument cannot withstand scrutiny when it becomes clear that such a reading, as discussed at length above, completely undermines the 1989 amendment to the TOAIA, enacted during the same legislative session. Such an absurd result could not have been intended by the Legislature and, moreover, contradicts the industry-wide understanding and implementation of oilfield indemnity agreements under the TOAIA.

This Court was faced with a similar question of legislative intent in *Ken Petroleum Corporation v. Questor Drilling Corporatio*n, 24 S.W. 3d 344 (Tex. 2000). In that case, the court of appeals, relying on its interpretation of the "plain

language" of Section 127.005, had held that a valid mutual indemnity agreement required that the written agreement containing the mutual indemnity obligations of the parties likewise had to contain an agreement that the parties would support the obligations with equal amounts of insurance. This interpretation of the statute was not unreasonable under a purely grammatical analysis of the statutory language then in effect, which provided:

> (a) ... an agreement that provides for indemnity ***if the parties agree in writing that the indemnity obligation will be supported by liability insurance*** coverage to be furnished by the indemnitor subject to the limitations specified in Subsection (b) or (c).
>
> (b) With regard to a mutual indemnity obligation, ***the indemnity obligation is limited to the extent of the coverage*** and dollar limits of insurance or qualified self-insurance ***each party*** as indemnitor ***has agreed to provide in equal amounts*** to the other party as indemnitee.
>
> (c) With respect to a unilateral indemnity obligation, the amount of insurance required may not exceed $500,000.

Former Tex. Civ. Prac. & Rem. Code § 127.005 (emphasis added).[8]

This Court reasoned, however, that such a construction did not comport with the legislative intent and concluded that the mutual indemnity obligations in the contracts at issue were enforceable despite the fact that the parties did not require

[8] *See* Act of May 27, 1989, 71st Leg., R.S., ch. 1102, § 3, 1989 Tex. Gen. Laws 4557-58, *amended by* Act of April 9, 1991, 72nd Leg., R.S., ch. 36, § 3, 1991 Tex. Gen. Laws 430, 431 (amended 1995, 1991, 1999) (current version at Tex. Civ. Prac. & Rem. Code § 127.005).

equal amounts of insurance in the contract. As noted above, the Court held that it must look to the purpose of the statute, the circumstances surrounding its promulgation, the legislative history, and the effect of the proposed construction to determine legislative intent. *Ken Petroleum*, 24 S.W. 3d at 350. In both contracts at issue in *Ken Petroleum*, the parties had not agreed to provide insurance in equal amounts, but this Court, noting that the meaning of the Section 127.005(b) "was not as clear as it might have been," analyzed the legislative purpose of the mutual indemnity exception and the potential consequences of affirming the court of appeals' interpretation. Based on that analysis, the Court concluded that a contrary interpretation, one that allowed enforcement of the indemnity even though the parties had not agreed to provide insurance in equal amounts, was in fact appropriate. *Id.*

In reaching its conclusion, the Court stated that the TOAIA had originally been passed to correct an "inequity . . . fostered on certain contractors" that resulted from the contractors' inability to obtain insurance. But the Court also recognized that the situation had changed by the time of the 1989 amendment.

> In 1989, the Legislature ***amended the Act in response to requests by contractors and operators alike. Liability insurance had become readily available*** to contractors to support contractual indemnity agreements, and ***the amendments were intended to make the Act less restrictive***.

Id. at 349 (footnotes omitted, emphasis added).

Recognizing the "damage that would be done to the oilfield industry by severely restricting the ability of parties to agree upon mutual indemnity provisions," *id.* at 350, and observing that the court of appeals' restrictive interpretation of the mutual indemnity provision "simply [made] no sense," *id.* at 351, this Court adopted an interpretation of Section 127.005 that fit with its legislative purpose.

I. "Plain Language" Reading Does Not Comport with Legislative Intent

As was the case in *Ken Petroleum*, the interpretation of Section 417.004 of the Texas Labor Code given by the court of appeals based solely on a hyper-technical, grammatical interpretation of the statute completely frustrates the purpose, effect, and legislative intent behind the TOAIA. As Energy points out, the two statutes were enacted during the same legislative session. As was the case in *Ken Petroleum*, it is unreasonable to conclude that the Legislature would articulate specific requirements for an enforceable indemnity in favor of third party beneficiaries (the parties' contractors), while at the same time destroying the availability of such indemnity for all third party beneficiaries by way of a technical amendment to a different statute (Section 417.004) with no mention of any intent to change the law (and a stated intention to the contrary). This Court cannot conclude that such an absurd and inconsistent result – destruction of third party beneficiary protection – was intended by the Legislature.

J. Section 127.006 Does Not Support the Court of Appeals' Decision

Superior attempts to rely on Section 127.006 of the TOAIA to bolster its argument. Section 127.006, which is mirrored in similar provisions in other states' anti-indemnity statutes, provides that the TOAIA does not effect the validity of an insurance contract or any benefits conferred by Texas' workers' compensation statutes. This provision has been present in the TOAIA since its inception in 1973 and was intended to avoid any question as to whether the TOAIA would affect the contractual relationships between the employer, its employees, and the employer's insurer. It certainly was not intended to prevent an employer from owing contractual indemnity to anyone, whether directly or as a third party beneficiary, and Section 127.006 has never been interpreted in the way suggested by Superior.

IV. CONCLUSION

Risk allocation agreements in the oil and gas industry, including mutual indemnity agreements expressly authorized by the TOAIA, have been carefully developed and implemented over the past two decades. There are tens of thousands of service contracts, drilling contracts, and other oilfield contracts, all of which interact with each other, particularly in common worksites. Reciprocal indemnity agreements that allow each party in the oilfield to "take care of its own" people through a system of mutual indemnities are a critical part of the entire industry's approach to risk allocation. If all subscribing employers are immunized

from such indemnities, the carefully negotiated risk allocation approach will completely break down, leaving other contractors without a remedy and exposing operators and contractors to massive, unintended liability despite reasonable expectations to the contrary. An untold number of operators that acted as the proverbial "middle man" in reliance on the mutual indemnity exception (and many contractors as well) will be left "holding the bag" because their indemnity obligations for their non-employees will still be enforceable, but their ability to pass the indemnity obligations of the employer to the intended third party indemnitee will now be destroyed. Hundreds, if not thousands, of other companies (mainly contractors) will now be deprived of their third party beneficiary right to indemnity. Such a result would have devastating effects on the oil and gas industry and innumerable existing risk allocation agreements put in place in reliance on the TOAIA. In fact, the only possible "winner" with such an interpretation would be insurers who no longer have the exposure for contractual liability for which they have been paid premiums for years. This absurd result cannot have been intended by the Legislature.

For these reasons, the Texas Oil & Gas Association respectfully submits that the court of appeals' decision wiping out third party beneficiary protection and disrupting the carefully negotiated and implemented risk allocation agreements understood by all in the oil and gas industry must be overturned, and that the

district court's ruling that the indemnity provision at issue is enforceable by the intended third party beneficiary should be reinstated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Brief has been sent by certified mail, return receipt requested, and facsimile, today, September 14, 2005, to the following persons:

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