

Overview of Master Service Agreements and Requirements for Contractors and Suppliers

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New Players and Awareness

- All types of Plaintiffs Attorneys/Plaintiffs
 - Much more education
 - Advertising (every day on TV and Radio)
 - Claims becoming bigger in terms of sophistication and numbers
 - Big exposure!!!!
- Many more construction claims!!!!

Litigation Climate in the Marcellus Shale States

Stu's Views

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Many More Claims!!!!

Companies starting to fight between themselves!!!

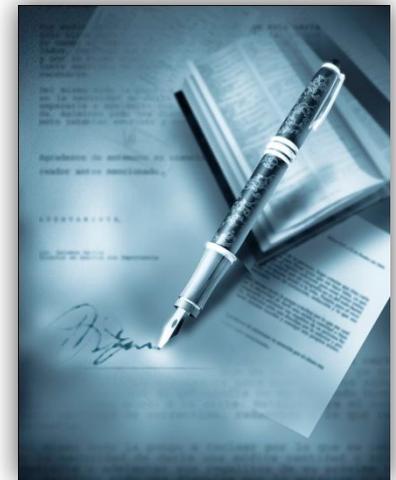
Back to the Basics

- In most simplistic form law of contracts
- All disputes resolved by language of agreement
- Drafting of lease is of paramount importance



MSA is a Contract

- Must be in writing!!!!
 - Rights and protections are controlled by principles of contract law and depend on proper construction.
 - Competent parties
 - Legal subject matter
 - Valuable consideration
 - Mutual assent



Look at Express Terms of Contract

- If language is unambiguous and plain, court **MUST** apply, not construe the contract.
 - Intent of parties is embodied in agreement
 - A “valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation.”

Oral Changes

- Widely recognized that “a party attempting to establish the existence of an oral contract regarding a complex business transaction is saddled with a significant burden.”
 - Ohio’s Parol Evidence Rule





MSA Qualifications

- On most drilling sites, there are many vendors/contracts including:
 - Operations: *drilling, construction, equipment rental, electrical services*
 - Distribution of Materials/Equipment: *supply companies utilizing 3rd party trucking/freight companies (Fed Ex, UPS, Railroad)*
 - Professional Services: *consulting, engineering, surveying, inspection services, general supervision, security, training*
 - General Upkeep: *lawn maintenance, janitorial services, fencing*

Master Service Agreements

- Function and Purpose
- Areas of Focus
 - Terms and Conditions
 - Indemnity Clause
 - Insurance Clause



Function and Purpose

- States the responsibilities and obligations of the parties
 - Including compensation
- Can create blanket contract for entire operations
- Used to limit liability **EXCEPT**
 - Negligence
 - Fraud

Transfer of Liability

Well
Operator

- Well Operator (Owner)
- Liability transfer

Drilling
Contractor

- Accepts liability
- Liability transfer

Drilling Sub-
Contractor

- Sub-Contractor
- Accepts liability

Responsibility for Own Negligence

- OCR § 2305.31 (Ohio's Anti-Indemnity Law)
 - Makes unenforceable any indemnity provision in a construction contract that attempts to shift responsibility to another contractor or subcontractor for own negligence for personal injury or property damage



“Additional Insureds”

- Numerous cases fighting and definition of insured depends on violation of the Anti-indemnity law
 - VALID IF provides coverage to promisee for promisee’s passive, secondary, and vicarious liability of the promisor.
 - If requires the promisor to purchase insurance for the promisee’s own negligence (sole or concurrent) will violate statute
 - If requires promisor to purchase insurance for promisee for liability solely arising out of promisor’s negligence, it will be valid.



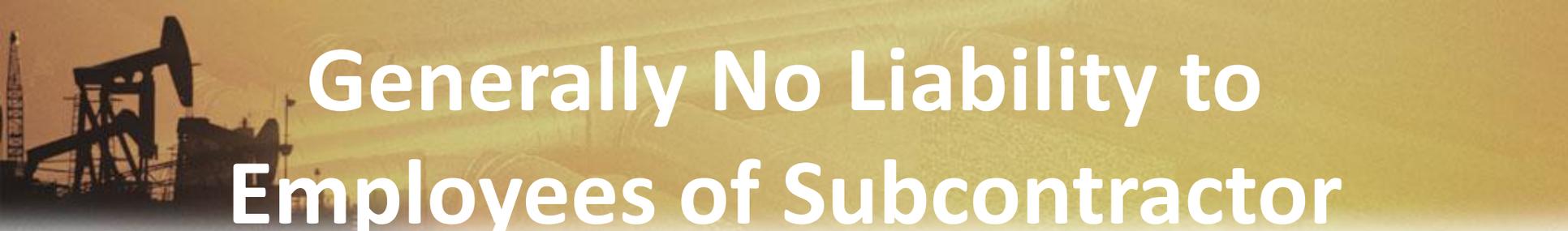
Spearin Doctrine

- 1918 U.S. S.Ct. case states if required to build according to plans and specifications prepared by owner, the contractor will not be responsible for consequences of defects
 - Adopted in Ohio (*Central Oh Joint Voc. V. Petersen Construction*)
- Not overcome by clauses requiring contractor to visit the site, check the plans, and inform itself of requirements of work (*Condo-Cunningham v. Day*)
- *Limitations on delay claims.*

An oil pumpjack silhouette is visible in the top left corner of the slide, set against a warm, golden-brown background that suggests a sunset or sunrise over an industrial site.

Indemnity Clauses

- Depends on whether the clause requires the promisor to defend and indemnify the promisee for claims arising from promisee's negligent (whether sole or concurrent).
- *Kendall v. U.S. Dismantling*



Generally No Liability to Employees of Subcontractor

- Inherently dangerous generally
- No liability ordinary attaches to general contractor or owner for injuries to employee of the subcontractor (*Wellman v. East Ohio Gas Co.* (1953)).
- However, if active participation in job operation of subcontractor and fails to eliminate hazard (may be liable)
 - Supervisory not enough!!!!
 - “Active Participation” had changed over time.



Arbitration Provisions Valid

- OCR §§ 2711.01; 2711.02
 - Ohio public policy favors arbitration
 - Courts will compel arbitration where there is an agreement to arbitrate
 - Ohio wants to encourage arbitration
 - (only an order that denies a stay pending arbitration is appealable)
 - An order compelling arbitration is not appealable



Issues Resolved in Ohio

- If no arbitration provision:
 - OCR § 4113.62 requires
 - Disputes to be litigated in Ohio courts
 - Most MSA's contain forum selection clauses



Ohio Law Applies

- OCR § 4113.62(D)(1) requires:
 - Ohio law to apply when the project is located in Ohio
 - Court's may not honor language in contract



“No damage for Delay Clauses”

- Unenforceable IF:
 - Cause of delay is owner’s
 - Actions OR Inactions
- Part of Fairness in Construction Act (1998)
 - Time Extension without additional compensation is oftentimes inadequate to make a contractor or subcontractor whole.



Final Payment Not a Defense

- OCR § 4113.62(b) prohibits
 - Owners and contractors from asserting clauses in contracts stating all pending claims are waived by receipt of final payment.
- Attempts to get around
 - statute of limitations (generally 2-4 years) and
 - statute of repose (10 years completion)

The background of the slide features a silhouette of an oil pumpjack against a warm, golden-yellow sky, suggesting a sunset or sunrise. The pumpjack is positioned on the left side of the frame.

“Pay if Paid” Provision

- Unambiguous Clauses are enforceable
- Distinction with “Pay when Paid”
 - Also enforceable
 - Reasonable time standard

Insurance Coverage Requirements

- General Liability Insurance
 - Coverage/Legal liability for:
 - 3rd Party Property Damage
 - 3rd Party Bodily Injury
 - Required Limits of Insurance
 - \$1m per occurrence
 - \$2m annual aggregate



Insurance Coverage Requirements

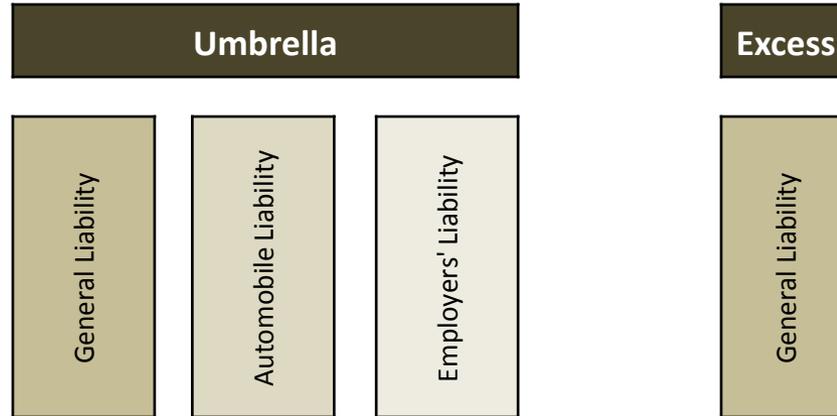
- Automobile Liability Insurance
 - Coverage/Legal liability for:
 - 3rd Party Property Damage
 - 3rd Party Bodily Injury
 - Required Limits of Insurance
 - \$1m per accident

Insurance Coverage Requirements

- **Workers Compensation**
 - Statutory coverage
 - Provide Protection for Employee Injury
 - Ohio employers
 - Directly from the State Fund
 - Qualified Self-Insured
- **Employers Liability**
 - Coverage Intent
 - Provide Protection for Allegations of Employer Gross Negligence
 - Required Limits of Insurance
 - \$1m Disease
 - \$1m Accident
 - \$1m Disease Aggregate

Insurance Coverage Requirements

- Umbrella or Excess Liability Insurance



- Required Limits: Varies

Insurance Policy Endorsements

- Additional Insured Language
 - Primary
 - Non-Contributory
 - Completed Operations
- Waiver of Subrogation



Specialty Insurance Requirements

- Environmental/Pollution Liability
 - Contractors Pollution Liability Coverage
 - Site Pollution Liability Coverage
 - Transportation Coverage
 - Nonowned Disposal Sites

Specialty Insurance

- Professional Liability Coverage
 - Not bodily injury or property damage insurance
 - Errors & Omissions
 - Architects
 - Engineers
 - Surveyors
 - Attorneys
 - Accountants



Specialty Insurance

- Executive Liability/Wrongful acts coverage
 - Directors' & Officers'
 - Employee benefit plan fiduciaries
 - Employment related practices



How To Buy Insurance

- Find a Qualified Agent
 - Industry Expertise
 - Education
 - Service Capabilities
 - Insurance Market Access
- Identify Risk Exposures
- Conduct an Analysis of Current Program



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