WORKING IN THE UNITED STATES OF AMERICA

Offshore Wind Contracting in the United States

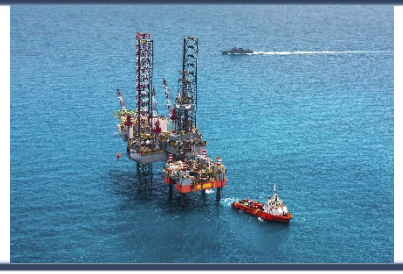
Three Questions

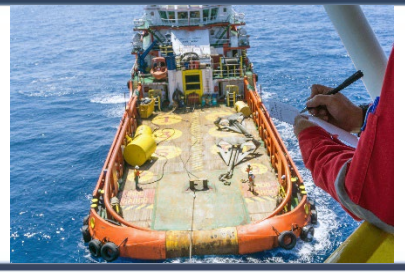
INTRAMAR® INSURANCES International Insurance Brokers

TOM TIPS voor OFFSHORE en MARITIEM

DAVID JENSEN PLLC

MMRL ADVOCATEN

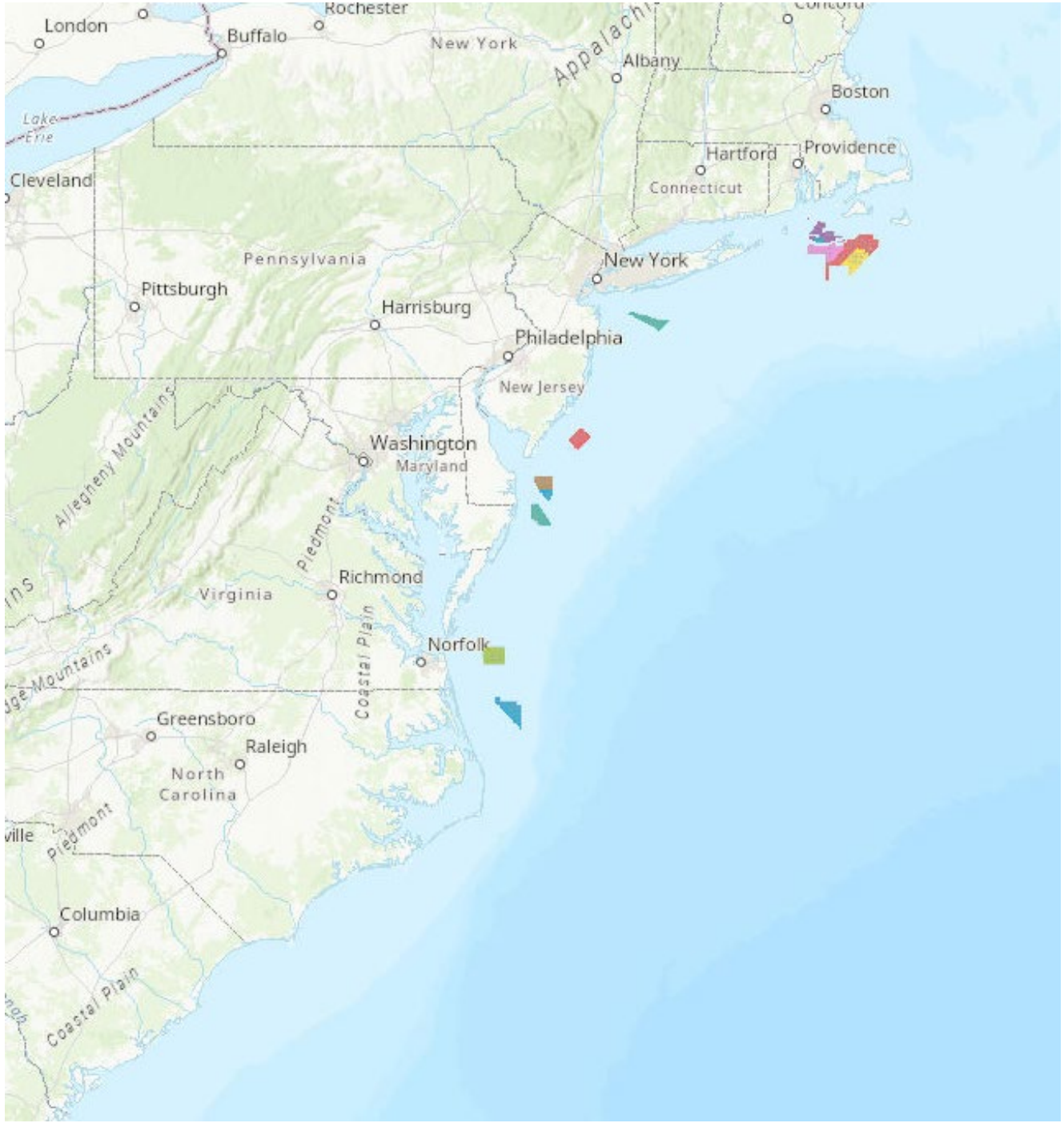


Three Key Questions

1) What is the Jones Act and how does it actually impact your bid?
2) Can you avoid or reduce potential liabilities by changing the structure of your proposal?
3) What other steps can you take to reduce your downside liabilities?

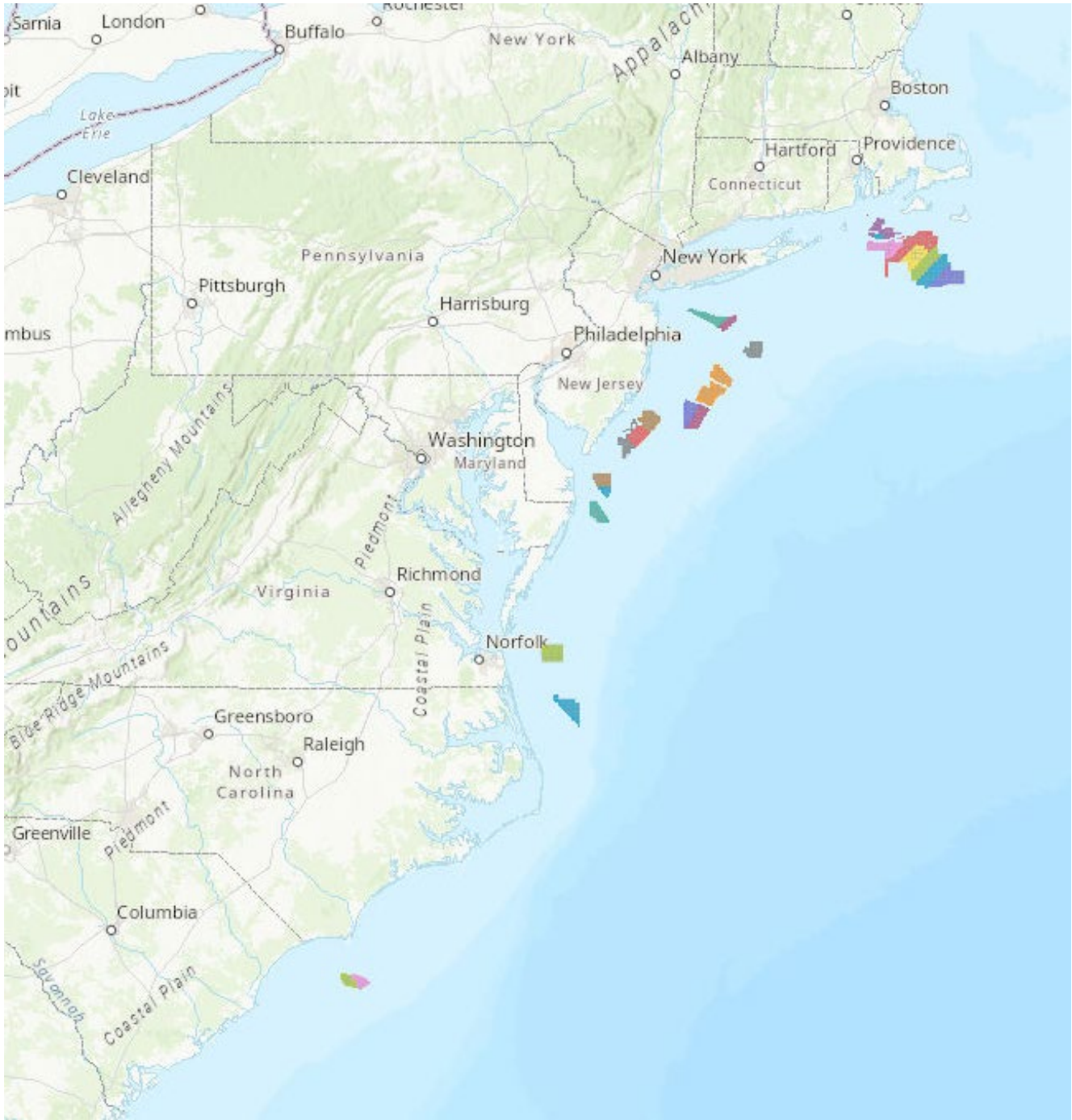
Year 2026 (or so)

- 14 Current Leases/Phases Planned
- Over 13,000 MW

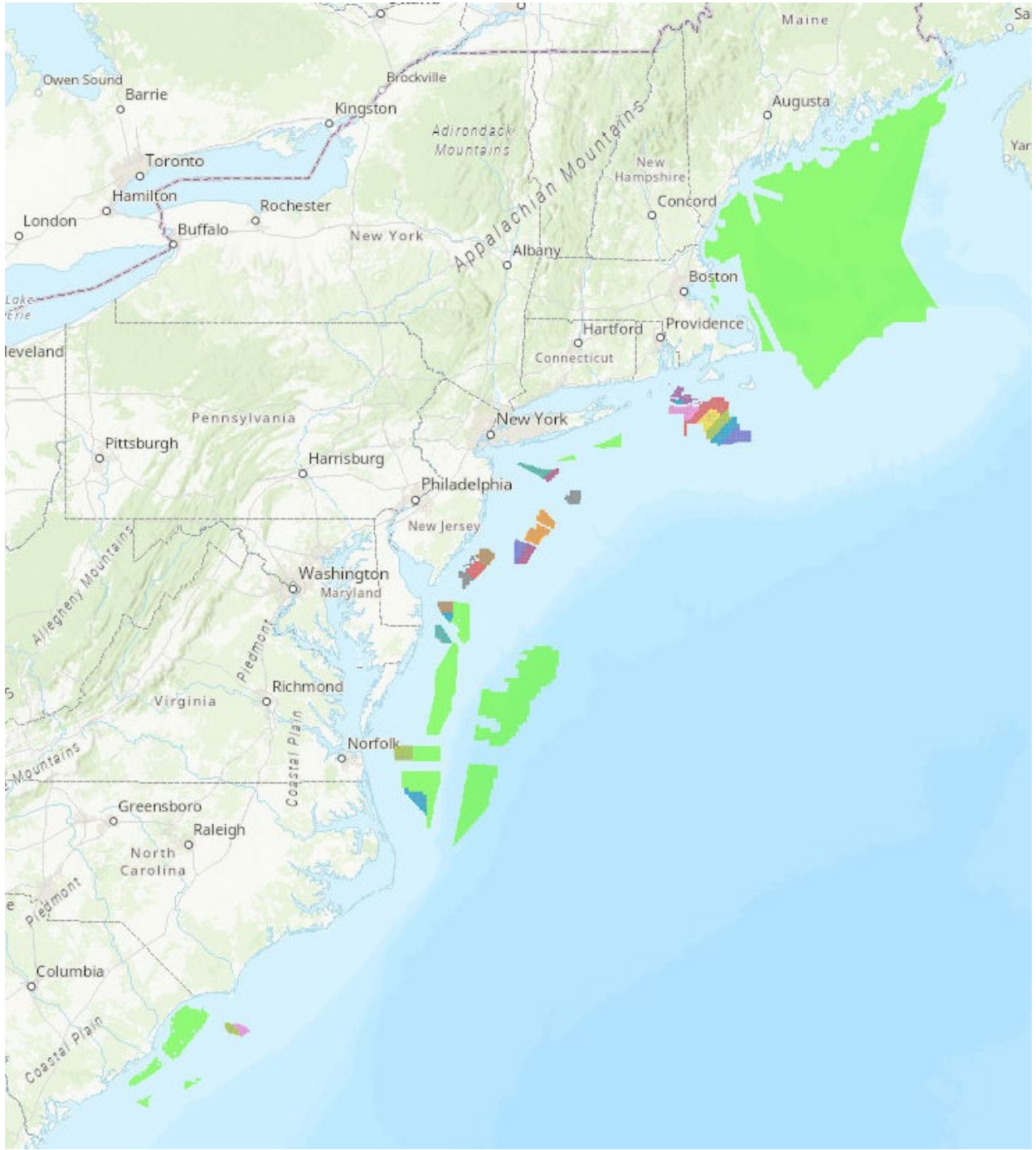


Year 2030 (or so)

- 30 Current Leases/Phases Planned
- South Carolina – Massachusetts
- Over 30,000 MW



And Beyond . . .


Maine
Owen Sound
Barrie
Brockville
Kingston
Augusta
Adirondack Mountains
Appalachian Mountains
Toronto
New Hampshire
Hamilton
Rochester
Concord
London
Buffalo
New York
Albany
Boston
Providence
Hartford
Connecticut
Pennsylvania
New York
Pittsburgh
Harrisburg
Philadelphia
New Jersey
Washington
Maryland
Allegheny Mountains
Piedmont
Richmond
Virginia
Coastal Plain
Norfolk
Greensboro
Raleigh
North Carolina
Piedmont
Columbia
Coastal Plain

The Jones Act

- The Jones Act applies to "the **transportation** of **merchandise** by water, or by land and water, **between points in the United States**." 46 U.S.C. § 55102(b).
- In order to carry "merchandise . . . between points in the United States" a ship must generally have been "built in the United States" and be "wholly owned by citizens of the United States for purposes of engaging in the coastwise trade." See id. §§ 12112(a)(2)(A), 55102(b).
- So, if we're proposing to do work on the OCS using a non-U.S. built and owned vessel, then several questions are particularly pertinent.

Is there “Merchandise”?

- The term “merchandise” is broad. By statute, it “includes” government property and “valueless material.” 46 U.S.C. § 55102(a).
- CBP interprets the term to include “goods, wares, and chattels of every description.” Furie Operating Alaska, LLC v. U.S. Dept. of Homeland Sec., 2014 A.M.C. 1116 (D. Alaska 2014).
- However, CBP does not consider “vessel equipment” to be merchandise. Vessel equipment refers to “includes portable articles necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on board.” Treas. Dec. 49815(4) (Mar. 13, 1939). The term “includes all articles or physical resources serving to equip the vessel, including the implements used in the vessel’s operation or activity.” Customs Bulletin, Vol. 53, No. 45, at 88 (Dec. 11, 2019).

Is there “Transportation”?

- That is, “transportation” – of the “merchandise.”
- Regulations provide that “[a] coastwise transportation of merchandise takes place . . . when merchandise laden at a point embraced within the coastwise laws . . . is unladen at another coastwise point.” 19 C.F.R. § 4.80b(a).
- Thus, CBP’s view is that “the sole use of a vessel in laying pipe or cable between two coastwise points is not considered a use in the coastwise trade of the United States.” The rationale is that the “material is not landed as cargo but is only paid out in the course of the installation operation.” Customs Ruling H318628 (Jun. 30, 2022); see also Customs Ruling H300962 (Apr. 14, 2022).

Is it “Between Points in the United States”?

- A point in the United States is any place that is within the boundaries of the United States (e.g. ports and inland waters), as well as any place that is in or on its territorial seas (which usually extend 3 nautical miles from shore).
- The Outer Continental Shelf Lands Act (“OCSLA”) extends U.S. jurisdiction to certain areas and things are “points in the United States”:
  - the subsoil and seabed;
  - artificial islands;
  - “installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources, including non-mineral energy resources;” and
  - “any such installation or other device (other than a ship or vessel) for the purpose of transporting or transmitting such resources.” 43 U.S.C. § 1333(a)(1)(A)

Lifting Operations

- Previously, CBP's view was that any lateral movement of a vessel during the course of a lifting operation was a Jones Act violation.
- Revised CBP Interpretation – 11 December 2019: "Lifting operations encompass the initial vertical movement of an item from a lower position to a higher position, and any additional vertical or lateral movement necessary (including incidental movement while lifted items are temporarily placed on the deck of the lifting vessel as necessary for the safety of certain lifted items, as well as surface and subsea infrastructure, and the vessels and mariners involved) to safely place into position or remove an item from the vicinity of an existing structure, facility or installation."

When Does a “Point” Come into Existence?

- Generally stated, CBP’s view is that a U.S. “point” comes into existence once work is started when work starts on an “installation or other device” attached to the OCS.
- US Customs Ruling H317289 (25 March 2021): The first vessel delivery of scour material to a “pristine” location on the OCS is not delivery to a ”point” in the United States.
- However, “any subsequent transportation of merchandise to each scour protection area must be conducted by a coastwise-qualified vessel.” Id.

Let's Meet the Jones Act's Older Brother: The Passenger Vessel Services Act

- The PVSA applies to "transport" of "passengers" by "vessel," which takes place "between ports or places in the United States to which the coastwise laws apply." 46 U.S.C. § 55103(a).
- If it applies, a ship must meet the same basic requirements as under the Jones Act—it must be U.S. built and have U.S. owners and a U.S. crew. See id.
- Unlike the Jones Act, it applies whether transportation takes place "either directly **or via a foreign port**." Id.

Are there “Passengers”?

- The scope of the PVSA is often coextensive with that of the Jones Act, but a key question the PVSA brings in is whether there are “passengers.”
- There is no statutory definition. One regulatory definition is found in 19 C.F.R. § 4.50(b): “any person carried on a vessel who is not connected with the operation of such vessel, her navigation, ownership, or business.”

The Dredging Statute

- The **Dredging Statute** provides that “a vessel may engage in dredging in the navigable waters of the United States only if” it meets the same requirements discussed above – U.S. building, ownership and crewing. 46 U.S.C. § 55109(a).
- U.S. Customs Ruling H318628 (30 June 2022): Cable lay operations using a tool that uses water jets and blades “to simultaneously create a fluidized trench and bury the cable” is not ”dredging” (but digging a trench would be).

Key Takeaways

- **Nothing says you need a U.S.-qualified vessel to lay cable, deposit scour, drive piles, or install monopiles, transition pieces and turbines**
- You **do** need U.S.-qualified vessels to transport components from the shore to the worksite **and** between each individual “point” (i.e. each wind turbine or substation location)
  - One exception: First delivery of scour material.
- You **can** move a vessel to the extent necessary to safely complete a lifting operation (e.g. use a dynamic position system)
- Cable lay operations using ”jet” tools is generally ok.

What Law Applies on the OCS?

- The Outer Continental Shelf Lands Act ("OCSLA") extends federal jurisdiction to (pertinently) "**installations and other devices permanently or temporarily attached to the seabed**, which may be erected thereon for the purpose of exploring for, developing, or producing resources, **including non-mineral energy resources**." 43 U.S.C. § 1333(a)(1)(A).
- OCSLA applies if (1) a dispute "arises" on an OCSLA site and (2) maritime law does not apply of its own force. Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969).
- At least in the Fifth Circuit, a contract claim arises "if a majority of the performance called for by the contract is on stationary platforms on the OCS," vis-à-vis "aboard vessels on navigable water on the OCS, this is the situs of the controversy." Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 589 F.3d 778, 781 (5th Cir. 2009) (en banc).

OCSLA's Incorporation of State Law

- OCSLA has **<u>mandatory</u> choice of law provisions** that upend contemporary legal norms:

  To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, **the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States** for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which **would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf**, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf. [43 U.S.C. § 1333(a)(2)(A)]

- When it applies, this "declared to be the law of the United States" language **<u>forces</u>** the application of the laws of the "adjacent State" and **<u>invalidates</u> any choice-of-law provision** to the contrary.

First Problem: State Law Limitations

- State law can invalidate contractual indemnity provisions.
- General requirements:
  - Texas and the “express negligence” rule
  - New York and the “clear statement” rule
- Context-specific requirements:
  - Most states prohibit indemnity against one’s own negligence in construction related contracts:

    A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement **relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith**, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, **caused by or resulting from the negligence of the promisee**, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void. . . . [New York General Obligations Law § 5-322.1(1)]

Damage Limitations

- Many States limit the ability to waive liability for negligence claims that may occur in the future:
  - New York – liability cannot be waived
  - Virginia – liability can be waived for property damage, but not for personal injury
- Contractual provisions that limit damages usually valid, but State law may impose implied warranties (such as merchantability) unless a contract expressly waives them.

Can we work around indemnity limitations?

- Insurance can serve two distinct purposes:
  1. Make the other party get the insurance; and
  2. Contractually delegate the risk to the other party.
- Contractual delegation only works in certain States:
  - Virginia and New York – yes
  - Louisiana and New Jersey – no
- Highly State-specific
  - Do you need to identify particular insurance policies or coverages?
  - What if a contract requires delivery of notices or documents related to the insurance coverage?

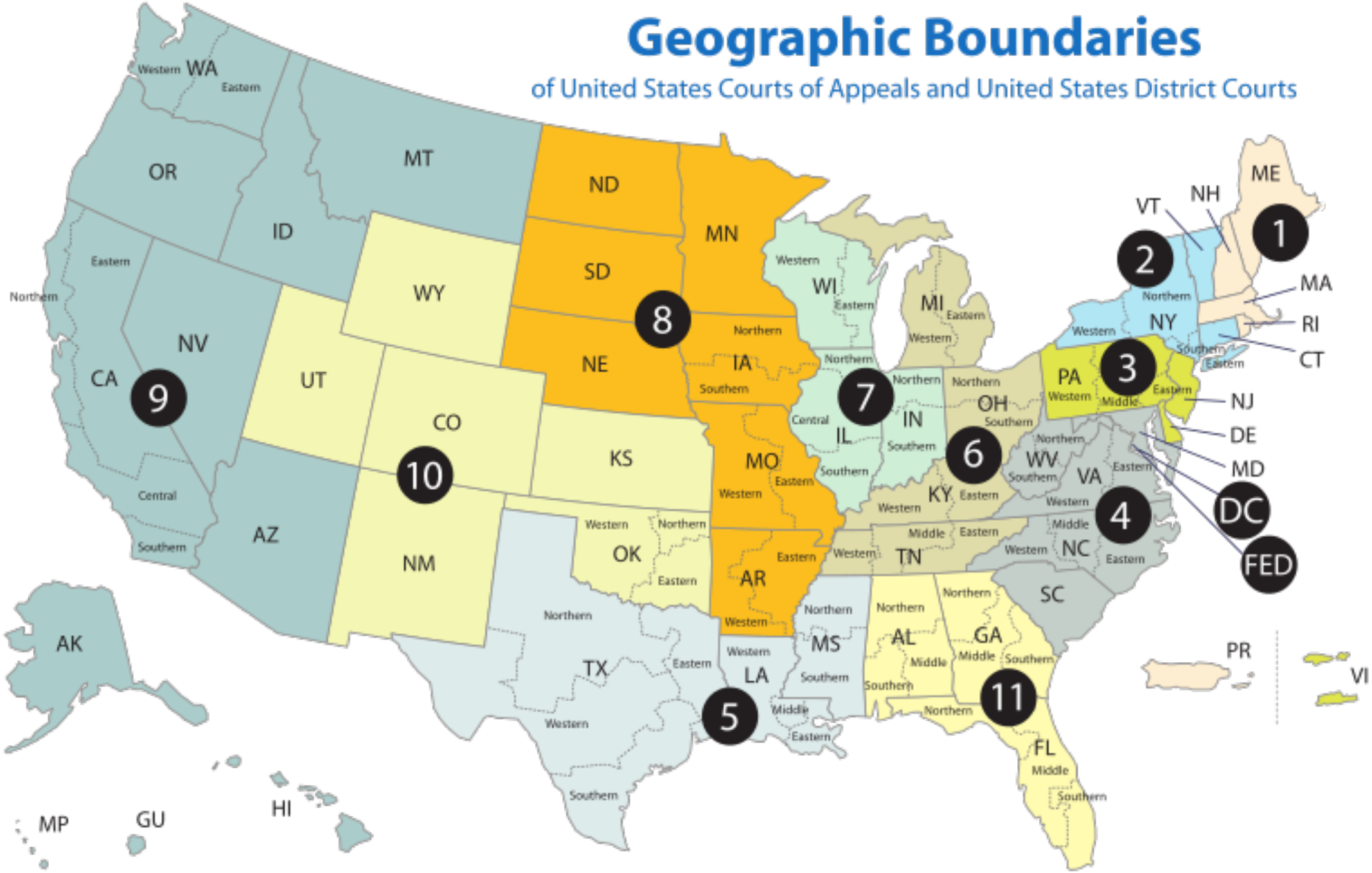
Second Problem: What State's Laws Apply?

- Even though OCSLA says, "the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area" – this has never happened. There is no official guide to determine what the "adjacent" State is.
- The Fifth Circuit has developed a four-factor test to determine what State is "adjacent." The factors are:
  - geographic proximity (straight-line distance);
  - government projections;
  - prior court determinations; and
  - privately developed projections—using both "continuation" and "straight line" approaches.

  Snyder Oil Corp. v. Samedan Oil Corp., 208 F.3d 521, 523-24 (5th Cir. 2000)

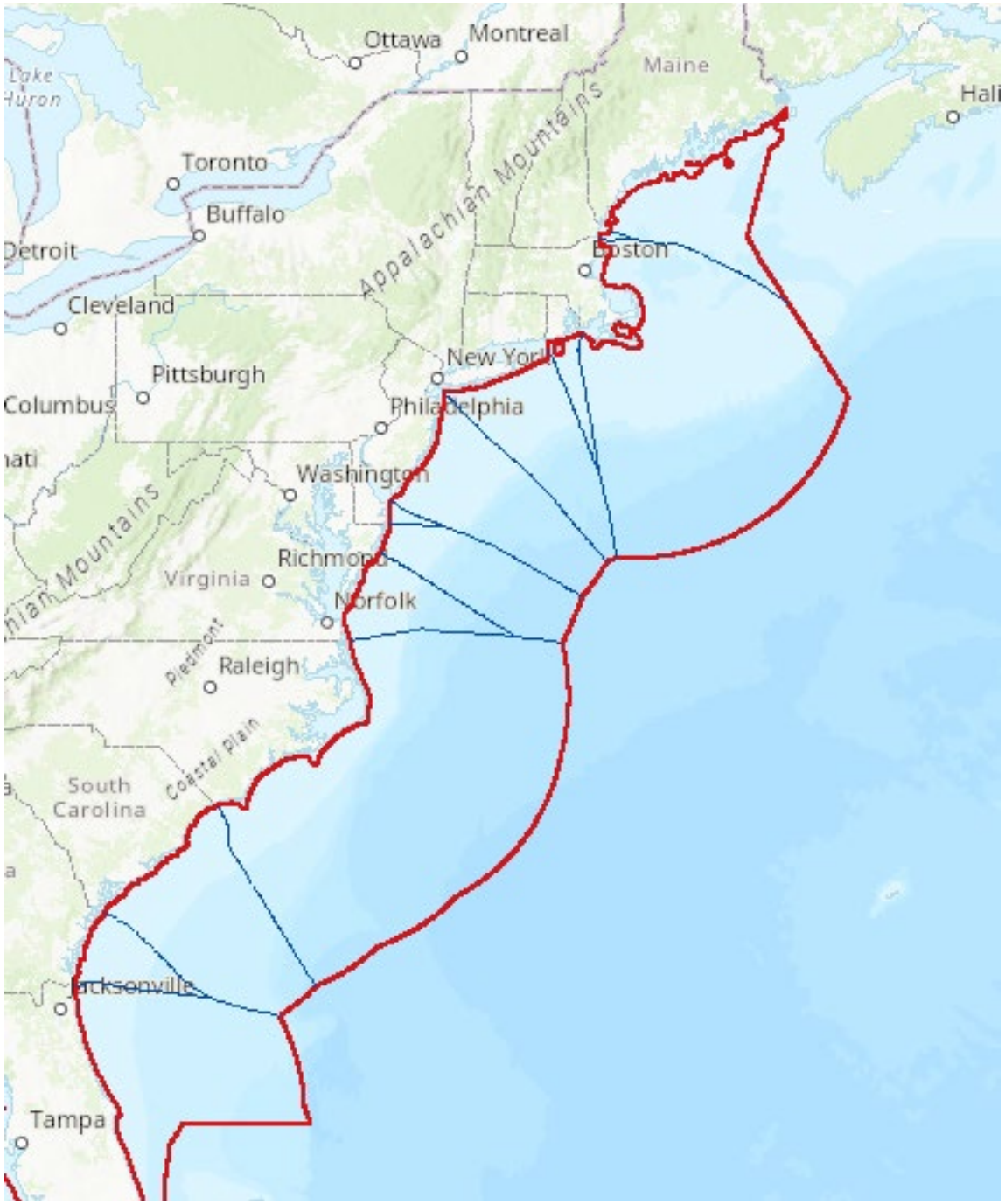
Geographic Boundaries

of United States Courts of Appeals and United States District Courts



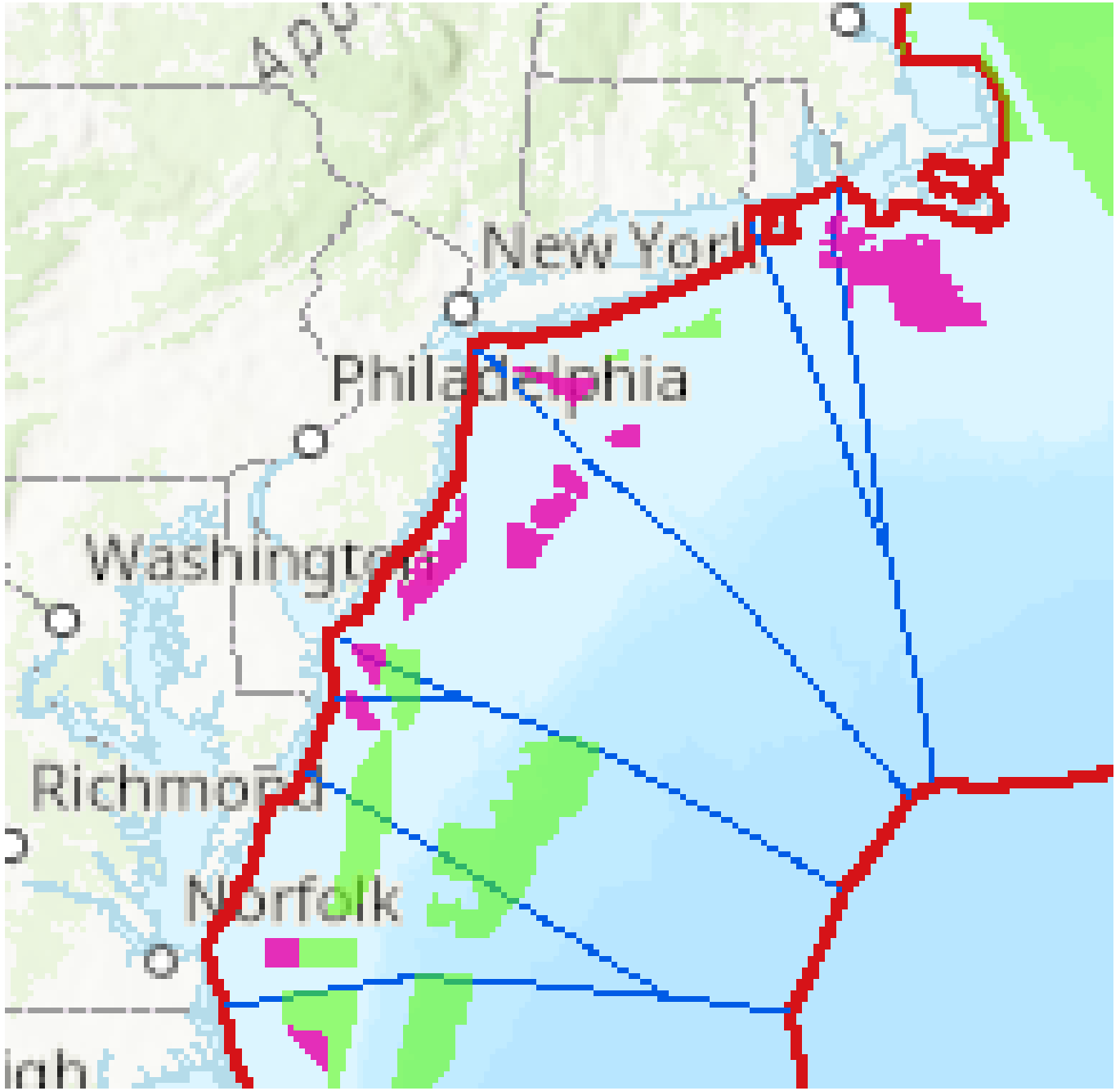
BOEM Map

- Probably the best we have, but . . .
- Will other federal appeals courts take the Fifth Circuit's 4-factor approach?
- Other Approaches:
  - BOEM Map
  - Proximity
  - Straight-line
  - Expectations?



Things get messy

- For some projects—particularly in the Northeast—it will not be certain what State's laws will apply.
- No one-size-fits-all approach
- Will our counterparties know?



How do we manage contract risks?

- Determine whether there is a significant risk of State law uncertainty
  - Use omnibus and/or alternative provisions to address uncertainty
  - Do we raise the issue or not?
- Carefully consider the scope and location of your performance
  - Merely providing equipment or materials may avoid restrictions on indemnity in “construction” contracts
  - Providing equipment, materials or services away from the offshore site may avoid application of OCSLA altogether (i.e. the English law clause survives)
- Contractually obligate other parties to handle matters that could be expected to result in claims or liabilities
- Review the upstream contracts

Use Insurance as Appropriate

- Contractual insurance obligations may be a “back door” around indemnity restrictions--but this is very State-specific.
- Products liability and completed operations coverage.
- Workers compensation.
- Liability insurance.
- Use a subsidiary? Insurance can be the difference that keeps the corporate veil intact.