

MARITIME OILFIELD CONTRACTS RECONSIDERED

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I.INTRODUCTION TO ADMIRALTY JURISDICTION AND CHOICE OF LAW

Article III of the United States Constitution extends the judicial power of the United States to “all Cases of admiralty and maritime Jurisdiction.”¹ This provision in the Constitution marked a significant centralization of admiralty authority from the colonial era and from the period of the Articles of Confederation during which maritime claims were adjudicated in the admiralty courts of each colony or state.²

Although Article III of the Constitution extended the judicial power of the United States to all admiralty and maritime cases,

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1. U.S. CONST. art. III, § 2.

2. See generally Harrington Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460, 460–63, 469–70 (1925) (reviewing the development of maritime courts in the colonies during the colonial and revolutionary eras).

it did not create the lower federal courts or invest them with jurisdiction.³ When the First Congress created the lower federal courts, it granted them “exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction” in the Judiciary Act of 1789.⁴ By this statute, “the entire admiralty power of the Constitution was lodged in the Federal Courts.”⁵

The extent of the investiture of admiralty and maritime authority in the federal courts based on the Constitution and Judiciary Act was addressed in the “learned and exhaustive opinion of Justice Story”⁶ in *De Lovio v. Boit*.⁷ Justice Story, sitting as a circuit judge, was presented with the question of whether a dispute over a maritime insurance contract fell within the admiralty jurisdiction of the federal courts, but he used the case as an opportunity to distance American courts from the English admiralty courts whose jurisdiction had been circumscribed by the expanding authority of the English common-law courts.⁸ Reasoning that Article III of the Constitution “superadded”⁹ the term “maritime” to the word “admiralty,” Justice Story found “no solid reason for construing the terms of the constitution in a narrow and limited sense, or for ingrafting upon them the restrictions of English statutes . . .”¹⁰ He concluded: “The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, authorize us to believe that national policy, as well as judicial logic, require the clause of the

3. U.S. CONST. art. III, §§ 1–2 (creating power within Congress to establish federal courts inferior to the Supreme Court and giving federal courts admiralty jurisdiction).

4. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73 (1789) (codified as amended at 28 U.S.C. § 1333(1) (2012)).

5. *The Belfast*, 74 U.S. (7 Wall.) 624, 631–33, 638 (1869) (addressing the jurisdiction of state courts to enforce liens on vessels in light of the grant of admiralty jurisdiction to the federal courts).

6. *Ins. Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 35–36 (1871) (agreeing with Justice Story’s conclusion in *De Lovio v. Boit* that a policy of marine insurance is within admiralty jurisdiction, and stating that Justice Story’s opinion “will always stand as a monument of his great erudition”).

7. *De Lovio v. Boit*, 7 F. Cas. 418, 418, 441, 444 (C.C.D. Mass. 1815) (No. 3,776).

8. *See id.* at 443.

9. *Id.* at 442.

10. *Id.* at 443.

constitution to be so construed, as to embrace all maritime contracts, torts and injuries”¹¹ Thus, Justice Story’s opinion established a broad reach for federal admiralty jurisdiction and principles of maritime law at the expense of common law courts and state law.

Justice Story also planted the seeds in *De Lovio v. Boit* for the development of divergent principles to determine whether contracts and torts are maritime in nature and fall within the admiralty jurisdiction. After pronouncing that the admiralty and maritime jurisdiction “comprehends all maritime contracts, torts, and injuries,” he added: “The latter branch is necessarily bounded by locality; the former extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea.”¹² Turning to “what are properly deemed ‘maritime contracts,’” Justice Story stated: “All civilians and jurists agree, that in this appellation are included, among other things, charter parties, affreightments, marine hypothecations, contracts for maritime service in the building, repairing, supplying, and navigating ships; contracts between part owners of ships; contracts and quasi contracts respecting averages, contributions and jettisons; and, what is more material to our present purpose, policies of insurance.”¹³ Justice Story found “no more reason why the admiralty should have cognizance of bottomry instruments, as maritime contracts, than of policies of insurance. Both are executed on land, and both intrinsically respect maritime risks, injuries and losses.”¹⁴

It is ironic that only ten years after his expansive analysis in *De Lovio v. Boit*, declining to engraft English limitations onto American admiralty jurisdiction, Justice Story delivered his opinion in *The Thomas Jefferson*,¹⁵ adopting the English Tidewater Doctrine that limited the scope of admiralty jurisdiction to waters at sea or within the ebb and flow of the tide.

11. *Id.*

12. *Id.* at 444.

13. *Id.*

14. *Id.*

15. See *The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 428–30 (1825).

In denying admiralty jurisdiction over a seaman's suit for wages earned on a voyage up the Missouri River, Justice Story reasoned:

In the great struggles between the Courts of common law and the Admiralty, the latter never attempted to assert any jurisdiction except over maritime contracts. In respect to contracts for the hire of seamen, the Admiralty never pretended to claim, nor could it rightfully exercise any jurisdiction, except in cases where the service was substantially performed, or to be performed, upon the sea, or upon waters within the ebb and flow of the tide. This is the prescribed limit which it was not at liberty to transcend In the present case, the voyage, not only in its commencement and termination, but in all its intermediate progress, was several hundreds of miles above the ebb and flow of the tide; and in no just sense can the wages be considered as earned in a maritime employment.¹⁶

Within twenty-six years the Supreme Court scrapped the Tidewater Doctrine in maritime tort cases. As maritime commerce moved inland along with the westward expansion of the United States, the need for admiralty jurisdiction moved inland also.¹⁷ When two ships collided on Lake Ontario, far beyond the reach of the coastal tide, the Supreme Court was presented in *The Propeller Genesee Chief v. Fitzhugh*¹⁸ with the question of whether to continue to limit the scope of admiralty jurisdiction with the Tidewater Doctrine. The Court did not lightly overrule *The Thomas Jefferson*, explaining: "For the decision was made in 1825, when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day."¹⁹ Chief Justice Taney concluded: "The lakes and the waters connecting them are undoubtedly public waters; and we

16. *Id.* at 428–29.

17. See *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 451, 455, 457 (1852); see also *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 611–12 (1991) (explaining that "the admiralty jurisdiction is designed to protect maritime commerce" and holding that agency contracts can be maritime contracts if the services performed under those contracts are maritime).

18. *The Genesee Chief*, 53 U.S. at 450, 456.

19. *Id.* at 456.

think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States.”²⁰

Unlike the situation with maritime torts where the choice-of-law analysis is tied in part to locality,²¹ the application of admiralty law to contracts has evolved on a functional or conceptual basis. After the Supreme Court’s application of the Tidewater Doctrine to the contract for seaman’s wages in *The Thomas Jefferson*, the Court continued to cite the limitations of the Tidewater Doctrine in *New Jersey Steam Navigation Co. v. Merchant’s Bank of Boston*, a case which involved a contract of affreightment on a steamer carrying specie between New York and Providence.

On looking into the several cases in admiralty which have come before this court, and in which its jurisdiction was involved or came under its observation, it will be found that the inquiry has been, not into the jurisdiction of the court of admiralty in England, but into the nature and subject-matter of the contract,—whether it was a maritime contract, and the service a maritime service, to be performed upon the sea, or upon waters within the ebb and flow of the tide. And, again, whether the service was to be substantially performed upon the sea, or tidewaters, although it had commenced and had terminated beyond the reach of the tide, if it was, then jurisdiction has always been maintained. But if the substantial part of the service under the contract is to be performed beyond tide-waters, or if the contract relates exclusively to the interior navigation and trade of a state,

20. *Id.* at 457; *see also* *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1866) (concluding that admiralty jurisdiction over a tort is not determined by the tort involving a ship but by the tort occurring on the high seas or navigable waters); *The Daniel Ball*, 77 (10 Wall.) 557, 563 (1871) (“[Rivers] constitute navigable waters . . . when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.”).

21. *See generally* *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268, 272 (1972) (adding a nexus requirement to the locality test and denying admiralty jurisdiction over a suit arising from an airplane crash into Lake Erie because the flight lacked a significant relationship to a traditional maritime activity); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995) (“[A] tort claim must satisfy conditions both of location and of connection with maritime activity.”).

jurisdiction is disclaimed.²²

In *Insurance Co. v. Dunham*,²³ the Supreme Court finally rejected a locality component, as part of the test for maritime contracts,²⁴ in the context of a policy of marine insurance. Justice Bradley stated:

[I]n England, partly under strained constructions of parliamentary enactments and partly from assumptions of public policy, the common law courts succeeded in establishing the general rule that the jurisdiction of the admiralty was confined to the *high* seas and entirely excluded from transactions arising on waters within the body of a country, such as rivers, inlets, and arms of the sea as far out as the naked eye could discern objects from shore, as well as from transactions arising on the land, though relating to maritime affairs.²⁵

He added that for contracts the "locality was carried so far that, with the exception of the cases of seamen's wages and bottomry bonds, no contract was allowed to be prosecuted in the admiralty unless it was made upon the sea, and was to be executed upon the sea" ²⁶

Justice Bradley rejected application of the English limitations on maritime contracts that would have denied maritime jurisdiction over a policy of insurance that was issued on land. First, he reasoned that it had become settled in the United States that "the place or territory *where* the law maritime prevails, where torts must be committed, and where business must be transacted, in order to be maritime in their character . . . extends

22. *N.J. Steam Navigation Co. v. Merchs.' Bank of Boston*, 47 U.S. (6 How.) 344, 378-79, 392 (1848). The Court added: "It is a maritime court instituted for the purpose of administering the law of the seas. There seems to be ground, therefore, for restraining its jurisdiction, in some measure, within the limit of the grant of the commercial power, which would confine it, in cases of contracts, to those concerning the navigation and trade of the country upon the high seas and tide-waters with foreign countries, and among the several states." *Id.* at 392.

23. *Ins. Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 24 (1871).

24. *See id.*; *see also Exxon v. Cent. Gulf Lines*, 500 U.S. 603, 611 n.6 (1991) (explaining that the removal of restrictions was "part of a larger trend started in the 19th century of eschewing the restrictive prohibitions on admiralty jurisdiction that prevailed in England").

25. *Dunham*, 78 U.S. at 24.

26. *Id.*

not only to the main sea, but to all the navigable waters of the United States”²⁷ Specifically, for contracts, Justice Bradley considered it to be “equally well settled that the English rule which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon (making *locality* the test) is entirely inadmissible”²⁸ Instead, he stated that “the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions.”²⁹

The functional approach for determining whether a contract is maritime has not yielded any precise formulations or tests.³⁰ Thus, in *CTI-Container Leasing Corp. v. Oceanic Operations Corp.*, the Second Circuit addressed a lease of cargo containers between two parties that neither owned nor operated vessels and stated: “The precise categorization of the contracts that warrant invocation of the federal courts’ admiralty jurisdiction has proven particularly elusive.”³¹ The court noted: “Traditional texts have defined a ‘maritime’ contract as one that, for example, ‘relat[es] to a ship in its use as such, or to commerce or to navigation on navigable waters, or to transportation by sea or to maritime employment,’ or as one ‘for the furnishing of services, supplies or facilities to vessels . . . in maritime commerce or navigation.’”³²

The imprecision in the definition for maritime contracts has led to difficult distinctions in traditional maritime matters. Thus, for example, a contract to repair a vessel is maritime,³³ but a contract to build a vessel is not maritime,³⁴ and the Fifth Circuit

27. *Id.* at 25.

28. *Id.* at 26.

29. *Id.*

30. See *CTI-Container Leasing Corp. v. Oceanic Operations Corp.*, 682 F.2d 377, 379 (2d Cir. 1982); *Dupre v. Penrod Drilling Corp.*, 993 F.2d 474, 477 (5th Cir. 1993).

31. *CTI-Container Leasing*, 682 F.2d at 378–79.

32. *Id.* at 379 (quoting 1 E. BENEDICT ON ADMIRALTY § 183, 11-6 (7th ed. 1981) and 7A MOORE’S FEDERAL PRACTICE ¶ 230[3], at 2773 (2d ed. 1948)).

33. *E.g.*, *New Bedford Dry Dock Co. v. Purdy*, 258 U.S. 96, 98–100 (1922) (holding that a contract to convert a car float into a steamer was subject to the court’s admiralty jurisdiction).

34. *E.g.*, *People’s Ferry Co. v. Beers*, 61 U.S. (20 How.) 393, 401–02 (1858) (dismissing for lack of admiralty jurisdiction an action to enforce a lien on a vessel for work and materials in the construction of the vessel’s hull).

has stated: "What constitutes a maritime contract is a highly fact-specific inquiry, not determinable by rubric."³⁵

The courts have particularly struggled with contracts involving land-based performance. In *New Orleans Stevedoring Co. v. United States*, the Fifth Circuit considered two stevedoring contracts, one for "the unloading and loading of cars, barges, or trucks to and from piers, docks, wharves' at New Orleans" and a second in which the stevedoring company "agreed 'to load and discharge cargoes and in connection therewith . . . perform all the duties of a stevedore on any [designated] vessel . . .'"³⁶ The district court held that the contracts "were both essentially maritime in nature" and the Fifth Circuit could not "disagree with this holding."³⁷ However, in *Joiner v. Diamond M Drilling Co.*,³⁸ the court reached the opposite conclusion in connection with an implied contract between a land-based doctor and a seaman's employer to treat a seaman injured on the employer's vessel. The seaman was injured while attempting to clean a mud tank on the vessel and sought treatment from his choice of physician, Dr. C. Babson Fresh.³⁹ After the seaman died, his widow brought suit against the vessel owner, Diamond M, and the manufacturer of the tank, Halliburton. Diamond M and Halliburton settled with the seaman's widow and brought a third-party action against Dr. Fresh for contribution and indemnity,⁴⁰ arguing that "a physician's treatment of an injured seaman creates an implied maritime contract between doctor and a shipowner and that the physician's alleged malpractice constitutes a breach of that implied contract."⁴¹ Rejecting the argument that an "onshore physician who treats an injured sailor has thereby subjected himself to the rules of maritime commerce," the Fifth Circuit held that state law governed the claims against Dr. Fresh.⁴²

35. *Dupre*, 993 F.2d at 477-78 (holding that a contract for the supply and use of a vessel for drilling, completing, and tying back wells was maritime).

36. *New Orleans Stevedoring Co. v. United States*, 439 F.2d 89, 90 (5th Cir. 1971).

37. *Id.* at 92.

38. *Joiner v. Diamond M Drilling Co.*, 688 F.2d 256, 258, 260 (5th Cir. 1982).

39. *See id.* at 258.

40. *See id.* at 259.

41. *Id.* at 259-60.

42. *Id.* at 260-61; *but see Kossick v. United Fruit Co.*, 365 U.S. 731, 731, 742 (1961)

II. INITIAL TREATMENT OF OILFIELD CONTRACTS

The treatment of contracts has been more troublesome when it is not contracts performed at the water's edge that are at issue but rather contracts involving drilling, casing, and wireline operations on navigable waters.⁴³ Oil and gas exploration and drilling on navigable waters, both onshore and offshore, are matters of special concern for admiralty jurisdiction in the Gulf Coast area.⁴⁴ The initial decisions from the Fifth Circuit, holding that tort claims arising out of exploration and drilling from fixed platforms on the outer Continental Shelf are maritime activities, were overturned by the Supreme Court's ruling that state law applied to the tort claims.⁴⁵ After the Fifth Circuit similarly

(holding that an oral agreement between a seaman and his employer about medical treatment is a maritime contract and state law does not apply to the agreement). The Court reasoned: "The principle by reference to which the cases are supposed to fall on one side of the line or the other is an exceedingly broad one. 'The only question is whether the transaction relates to ships and vessels, masters and mariners, as agents of commerce.'" *Id.* at 736 (quoting 1 E. BENEDICT ON ADMIRALTY § 131 (6th ed. 1940)). Justice Harlan also referred to a maritime contract in *Kossick* as having "a genuinely salty flavor." *Id.* at 742.

43. See *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 957 (5th Cir. 1988) (Garwood, J., concurring) ("[I]t seems to me that it may be desirable to consider this issue en banc, in order that we may take a more consistent approach to the question of whether and in what circumstances activities in connection with mineral development in state territorial waters are maritime.").

44. See generally *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083, 1084 (5th Cir. 1990) ("This case confronts us again with . . . whether liabilities arising from offshore mineral exploration are to be determined under federal admiralty or state law. . . . [B]ecause of an apparently contradictory line of cases in our circuit . . . [p]erhaps this court should seek to answer . . . en banc."); *In re Larry Doiron, Inc.*, 879 F.3d 568, 569 (5th Cir. 2018) (en banc) (deciding "to adopt a simpler, more straightforward test" for determining "whether a contract for performance of specialty services to facilitate the drilling or production of oil or gas on navigable waters is maritime").

45. For example, in *Dore v. Link Belt Co.*, 391 F.2d 671, 672–74 (5th Cir. 1968) and *Rodrigue v. Aetna Cas. & Surety Co.*, 395 F.2d 216, 217 (5th Cir. 1968), the Fifth Circuit applied federal maritime law to deaths of oilfield workers on fixed platforms located on the outer Continental Shelf in the Gulf of Mexico. Both decisions were reversed by the Supreme Court in *Rodrigue v. Aetna Cas. & Surety Co.*, 395 U.S. 352, 366 (1969), which held that federal maritime law does not apply to fixed platforms—which are treated like artificial islands—any more than it would to piers, jetties, bridges, ramps, or railways extending over the water. See *id.* at 359–60. Later, the Fifth Circuit held: "Offshore drilling—the discovery, recovery and sale of oil and natural gas from the sea bottom—is maritime commerce." *Herb's Welding v. Gray*, 703 F.2d 176, 180 (5th Cir. 1983). Therefore, oilfield workers on fixed platforms, including welders like Gray, were held by the Fifth

applied maritime law to contracts involving oil and gas exploration activities in maritime locations, the court changed course and reached conflicting results in deciding whether the numerous service contracts related to exploration and drilling from mobile rigs fall within the admiralty jurisdiction, leading Judge Garwood to state that he was "troubled by the tension, or perhaps outright inconsistency, between many of our opinions in this area."⁴⁶

In *Halliburton Co. v. Norton Drilling Co.*,⁴⁷ the Fifth Circuit applied maritime law to the indemnity claims arising out of casing services performed on an inland drilling barge, citing a case involving a stevedoring contract to support the application of maritime law.⁴⁸ The Fifth Circuit also considered an indemnity claim arising out of a contract for drilling and rework from a drilling barge that caused damage to an offshore gas pipeline in *Transcontinental Gas Pipeline Corp. v. Mobile Drilling Barge "Mr. Charlie"* and applied maritime law, citing *Halliburton*.⁴⁹ When the court addressed an indemnity claim arising from a purchase order for casing services to be performed on an inland barge in connection with an injury to a member of the casing crew, the court in *Corbitt v. Diamond M. Drilling Co.* considered that its decisions "established beyond cavil that the [purchase order] is a maritime contract to which federal law is applicable."⁵⁰

The end of the uniform application of maritime law to claims involving oil and gas exploration and development from a vessel on navigable waters originated with Judge Brown's decision in

Circuit to be covered under the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901–950 (LHWCA). *See id.* The Supreme Court, however, reversed the decision of the Fifth Circuit, stating that "exploration and development of the Continental Shelf are not themselves maritime commerce." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 415, 425 (1985).

46. *Thurmond*, 836 F.2d at 957 (Garwood, J., concurring) (agreeing that a contract whose primary obligation was to perform wireline operations was not maritime, despite containing incidental maritime obligations).

47. *Halliburton Co. v. Norton Drilling Co.*, 302 F.2d 431 (5th Cir. 1962).

48. *See id.* at 436–37 (citing *Koninklyke Nederlandsche Stoomboot Maalschappy, N.V. v. Royal Neth. S.S. Co.*, 301 F.2d 741 (5th Cir. 1962)).

49. *Transcon. Gas Pipeline Corp. v. Mobile Drilling Barge "Mr. Charlie"*, 424 F.2d 684, 686, 690–91 (5th Cir. 1970).

50. *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 331–32 (5th Cir. 1981).

*Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*⁵¹ Coastal contracted with Sohyde to perform workover operations with Sohyde's submersible drilling barge in a Louisiana canal.⁵² After a blowout of the gas well, Coastal sought damages for the cost of control, damage to the well, and loss of gas from the well.⁵³ Coastal argued that maritime law applied because its claim involved damage caused by a vessel on navigable waters, but Judge Brown, who had earlier ruled that maritime law applied to a personal injury on a fixed platform,⁵⁴ decided that Louisiana law applied to the property damage caused by the vessel in navigable waters.⁵⁵

In support of the application of Louisiana law to the damages sought by Coastal, Judge Brown stated that the workover operation on the gas well "was hardly of a peculiarly maritime nature."⁵⁶ Although he indicated that the barge would have sufficed as a vessel for a Jones Act claim by a crewmember, Judge Brown did not consider that the specific instrumentalities involved in the workover operation—blowout preventers, tubing, and drilling mud—had "a peculiarly salty flavor."⁵⁷ Instead, he

51. *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1135–36 (5th Cir. 1981).

52. *See id.* at 1134.

53. *See id.*

54. *See Pure Oil Co. v. Snipes*, 293 F.2d 60, 63–66 (5th Cir. 1961), in which Judge Brown applied admiralty law to the injury of a worker who was thrown from a fixed platform on the outer Continental Shelf, struck the platform deck and at least two steel structural members of the platform, and landed in the ocean fifty feet below. Judge Brown reasoned that Congress had adopted maritime law as the applicable federal law for claims arising under the OCSLA:

But whether the injuries received in the fall which caused Snipes first to strike the deck of the platform then fall through the open space after which he banged against two girders and then dropped into the ocean where further distinguishable severe damage was done would, as an academic inquiry on maritime or non-maritime jurisdiction, constitute a maritime injury under the historic standard of 'the substance and consummation of the occurrence which gave rise to the cause of action' is not decisive. This is so because the Outer Continental Shelf Lands Act itself reveals that when it is federal, not adjacent state, law to apply, Congress adopted the maritime standards.

Id. at 65–66.

55. *See Sohyde*, 644 F.2d at 1138.

56. *Id.* at 1136.

57. *Id.* at 1137.

stated that "this case was merely a well blowout with attendant property damage and loss," and had damages that were "indistinguishable from those arising from land-based well blowouts."⁵⁸ He concluded that the case was "simply not of such a character that leaving the parties to pursue state law remedies would disturb the federal interest of maintaining the uniformity of maritime law."⁵⁹

Judge Brown's reasoning in *Sohyde* arguably received support four years later from the decision of the Supreme Court in *Herb's Welding, Inc. v. Gray*,⁶⁰ in which the Court held that a welder injured on a fixed platform off the Louisiana coast was not engaged in "maritime employment"⁶¹ so that he failed the status requirement for coverage under the LHWCA.⁶² The Court in *Herb's Welding* stated that there was "nothing inherently maritime" about Gray's work and added that these tasks "are also performed on land, and their nature is not significantly altered by the maritime environment, particularly since exploration and development of the Continental Shelf are not themselves maritime commerce."⁶³

58. *Id.* at 1138.

59. *Id.*

60. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 424-25 (1985).

61. *Id.* at 416.

62. *See id.* at 426-27.

63. *Id.* at 425. Despite this language in *Herb's Welding*, the context of that decision, involving an injury to a welder on a fixed platform, made the application of its analysis to maritime contracts problematic. First, Justice White explained in *Herb's Welding*:

Offshore oil rigs are of two general sorts: fixed and floating. Hearings on S. 2318 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., 395-396, 480-486 (1972) . . . Floating structures have been treated as vessels by the lower courts. *E.g.*, *Producers Drilling Co. v. Gray*, 361 F.2d 432, 437 (CA5 1966). Workers on them, unlike workers on fixed platforms, *see Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), enjoy the same remedies as workers on ships. If permanently attached to the vessel as crewmembers, they are regarded as seamen; if not, they are covered by the LHWCA because they are employed on navigable waters. Gray is not in a position to take advantage of this line of cases. All, or almost all, the platforms in the field were fixed production platforms rather than floating rigs. . . . There has never been any dispute that Gray was injured on a fixed platform, nor any contention that he should be considered to have been on a vessel at the time of his injury.

Id. at 416-17 n.2 (citation omitted). Thus, Justice White stated: "We cannot assume that

It was a simple step for the Fifth Circuit to extend the *Sohyde* analysis from torts⁶⁴ to contracts. In *Thurmond v. Delta Well Surveyors*,⁶⁵ P&S Well Services entered into a contract with Gulf Oil to perform wireline services for offshore wells and supplied a wireline barge and crew that included the barge operator and his helper, Roosevelt Thurmond. While standing on the wellhead to open a valve to bleed pressure from the well, the stem and seat of a motor valve detached from the wellhead and injured Roosevelt, leading to an indemnity claim by Gulf Oil against P&S pursuant to the wireline contract.⁶⁶

Gulf Oil argued that its contract with P&S was maritime because it “necessitate[d] the use of a vessel, a barge equipped to perform wireline services, the vessel’s only mission.”⁶⁷ P&S contended that state law applied because the wireline work “does not address a ship, navigation, or any traditional maritime activity. The contract instead addresses only an oil production activity that is performed on land and at sea.”⁶⁸ Noting that Thurmond was injured while standing on the jacket of the wellhead and was performing a wireline service at the time of his injury, the court reasoned that the wireline services resembled

Congress was unfamiliar with *Rodrigue* and the Lands Act when it referred to ‘maritime employment’ in defining the term ‘employee’ in 1972. It would have been a significant departure from prior understanding to use that phrase to reach stationary drilling rigs generally.” *Id.* at 422–23 (footnote omitted). Second, the use of the term “maritime employment” is limited by the LHWCA. It is “an occupational test that focuses on loading and unloading.” *Id.* at 424 (quoting *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 80 (1979)). As this term was “not meant ‘to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity,’” *Id.* (quoting H.R. REP. NO. 92-1441, p. 12 (1972); S. REP. NO. 92-1125, p. 13 (1972)), Justice White stated that the Court had “never read ‘maritime employment’ to extend so far beyond those actually involved in moving cargo between ship and land transportation.” *Id.*

64. See *Houston Oil & Minerals Corp. v. Am. Int’l Tool Co.*, 827 F.2d 1049, 1052, 1055 (5th Cir. 1987) (applying Louisiana law to Houston Oil’s claim against fabrication and inspection companies for the cost of sidetracking and redrilling a well being drilled from a jack-up rig when a mud saver sub broke, causing the drill string to break and fall into the hole).

65. *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 953 (5th Cir. 1988).

66. See *id.* at 953.

67. *Id.* at 954.

68. *Id.*

the operations held to be nonmaritime in *Sohyde*.⁶⁹ The court explained:

The principal obligation under this contract was to perform wireline services, clearly a nonmaritime obligation in the sense that it does not concern the operation of the vessel. Such services are peculiar to the oil and gas industry, not maritime commerce. Wireline services are performed on land-based wells and offshore wells, and wireline services present hazards and problems peculiar to the oil and gas industry. "Maritime law in the strict sense has never had to deal with the resources in the ground beneath the sea, and its whole tenor is ill adapted for that purpose." On the other hand, state law is well suited to cope with oil production problems.⁷⁰

Consequently, the court applied Louisiana law to the indemnity agreement.⁷¹

69. See *id.* at 955–56.

70. *Id.* at 955 (quoting *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 365 n.16 (1969) (quoting Outer Continental Shelf Lands Act, Hearings on S. 1901 before the Senate Comm. on Interior and Insular Affairs, 83d Cong., 1st Sess., 668 (1953))).

71. See *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 956 (5th Cir. 1988). The court reiterated its holding that a contract to perform wireline services was not maritime, even when performed from a vessel, in *Domingue v. Ocean Drilling & Expl. Co.*, 923 F.2d 393, 398 (5th Cir. 1991). The court also applied state law in *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223 (5th Cir. 1985) and *Union Tex. Petroleum Corp. v. PLT Eng'g, Inc.*, 895 F.2d 1043 (5th Cir. 1990), in connection with the construction and installation of a platform (*Laredo*) and a gas transportation system (*PLT*), even though the work required vessels and seamen, which the court described as the "instruments of admiralty" in both cases:

The contract involved here . . . did more than charge Laredo with the responsibility of carrying workers and supplies to the well site. Laredo's principal obligation under the contract was the construction of a stationary platform, and, as Laredo conceded at oral argument, it is the alleged breach of this obligation that gave rise to the instant action. While the contract no doubt contemplated the hiring of vessels and seamen to build the structure, the subject matter of this case has no direct relationship with these traditional subjects of maritime law. It is fundamental that the mere inclusion of maritime obligations in a mixed contract does not, without more, bring nonmaritime obligations within the pale of admiralty law. That the contract contemplated in part the use of instruments of admiralty, therefore, is not sufficient to oust OCSLA-adopted state law in this case.

PLT, 895 F.2d at 1048–49 (quoting *Laredo*, 754 F.2d at 1231–32).

At the same time that the Fifth Circuit applied principles from *Sohyde* to conclude that state law governed the wireline contract for service from a vessel, the court continued to follow its existing precedents by holding that maritime law governs other contracts involving drilling and exploration from vessels; this led Judge Garwood to suggest that “it may be desirable to consider this issue en banc, in order that we may take a more consistent approach to the question of whether and in what circumstances activities in connection with mineral development in state territorial waters are maritime (or perhaps ‘maritime and local’).”⁷²

Applying its rulings in *Transcontinental Gas* and *Corbitt*, the Fifth Circuit held in *Theriot v. Bay Drilling Corp.* that admiralty law was applicable to a drilling contract for a barge.⁷³ In *Theriot*, the operator of a torque wrench slipped in mud while involved in the assembly of wellhead equipment.⁷⁴ The court distinguished *Herb’s Welding*, stating: “The Court’s holding that a welder on a fixed platform in Louisiana waters was not engaged in maritime employment because his work did not relate to the loading or unloading of vessels was clearly predicated on the fact that the welder was working on a fixed platform.”⁷⁵ The Fifth Circuit did not believe that the Court in *Herb’s Welding* had held “that oil and gas production from a vessel can no longer be termed maritime commerce.”⁷⁶

In *Lewis v. Glendel Drilling Co.*,⁷⁷ the Fifth Circuit reexamined its analysis of drilling contracts in the wake of *Sohyde* and *Herb’s Welding*. In *Lewis*, the Fifth Circuit addressed “the vexing question whether liabilities arising from offshore mineral exploration are to be determined under federal admiralty or state law.”⁷⁸ Avanti Services entered into one contract with Pioneer Production Corp. to drill a well in Louisiana waters and

72. *Thurmond*, 836 F.2d at 954, 956–57 (Garwood, J., concurring) (quoting *Kossick v. United Fruit Co.*, 365 U.S. 731, 738 (1960)).

73. *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 539 (5th Cir. 1990).

74. *See id.* at 530.

75. *Id.* at 539 n.11.

76. *Id.*

77. *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083, 1086–87 (5th Cir. 1990).

78. *Id.* at 1084.

another contract with Glendel Drilling to furnish a barge rig to perform the drilling.⁷⁹ When a well logger employed by a contractor of Avanti drowned while trying to transfer to a pipe barge next to the Glendel rig, his widow brought suit against Pioneer, Glendel, and Avanti.⁸⁰ Seeking to apply Louisiana law to avoid the contractual indemnity provisions, Avanti had to overcome the line of precedents that drilling and casing services performed from vessel rigs are governed by admiralty law.⁸¹

Analyzing the choice-of-law issue in *Lewis*, the Fifth Circuit cited its most recent decision in *Theriot*, which involved an agreement like the Avanti-Pioneer contract:

The drilling contract in *Theriot*, provided that the drilling company "would furnish the equipment, materials, supplies, and services necessary to the drilling and completion of the well." These terms are substantially similar to the terms of the contract between Avanti and Pioneer. The court's conclusion in *Theriot* that the contract "focused upon the use of a vessel", *i.e.*, the drilling barge identified in an exhibit to the contract, inescapably leads to the same conclusion in this case.⁸²

The court then addressed the issue of whether "*Theriot's* broad characterization of maritime contracts comports with the Supreme Court's decision in *Herb's Welding*."⁸³ The court noted that "Judge Brown's opinion in [*Union Texas Petroleum Corp. v. PLT Engineering, Inc.*] goes on to 'construe *Theriot* narrowly and constrain it to its facts.'"⁸⁴ Judge Brown concluded in *PLT*: "Since

79. *See id.*

80. *See id.* at 1085.

81. *See id.* at 1085–86 (citing *Transcon. Gas Pipe Line Corp. v. Mobile Drilling Barge "Mr. Charlie"*, 424 F.2d 684, 691 (5th Cir. 1970) (involving a "contract for offshore drilling and reworking operations"); *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329 (5th Cir. 1981) (involving a "contract for casing services to be performed on an inland drilling barge"); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986) (involving a "contract for use of 'the drilling barge Rome'")).

82. *Lewis*, 898 F.2d at 1086 (quoting *Theriot*, 783 F.2d at 583) (internal citation omitted).

83. *Id.*

84. *Id.* (quoting *Union Tex. Petroleum Corp. v. PLT Eng'g, Inc.*, 895 F.2d 1043, 1049 (5th Cir. 1990)).

no drilling on navigable waters from a vessel is involved here, *Theriot* is not controlling.”⁸⁵ Despite the fact that *Theriot* had been “[c]onstrained to its facts,” the court in *Lewis* held that “*Theriot* still controls the result in this case.”⁸⁶ The court advised *Avanti* that its “reliance on [*PLT*] must be limited to a plea for en banc review of the *Theriot* line of cases.”⁸⁷

The court in *Lewis* then turned to *Thurmond*, the only case that “arguably runs counter to this authority.”⁸⁸ The court stated that “*Thurmond* applied state law to the construction of an indemnity clause in a wireline service contract, although the contract was performed and the employee injured while working on a wireline barge in Louisiana territorial waters.”⁸⁹ The court was easily able to distinguish *Thurmond* for the simple fact that it involved a “special-purpose” contract for wireline services as opposed to a drilling contract for an offshore well.⁹⁰ However, the court “recognize[d] the logical conflict between holding that such cases are inherently maritime while a contract for wireline services, not specifically referencing the offshore nature of the work, but actually performed from a barge, is not.”⁹¹ The court described the “uncertainty” resulting from these cases:

From these inconsistent lines of authority springs the potential for significant uncertainty in the law applicable to offshore mineral exploration. The application of maritime or state law to a particular contract may turn, as in *Thurmond*, on the degree of specificity with which it identifies operations offshore or on navigable waters.

85. *Id.* (quoting *PLT*, 895 F.2d at 1049).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* The court stated:

Thurmond is, however, distinguishable precisely because the contract there interpreted called solely for the performance of wireline services by a contractor. Because our other cases hold that contracts to drill a well offshore or to provide general services in connection therewith are, when performed from a movable drilling platform, maritime obligations, we must be bound by those authorities rather than by the special-purpose contract in *Thurmond*.

Id.

91. *Id.*

It may turn on whether the particular contractor furnished a "vessel" in connection with his work. It may depend on whether the work is performed from a fixed platform or one of the several types of movable rigs that we have held to be "vessels."⁹²

After describing the uncertainties, the court set forth three possible solutions for the problem:

First, we could hold that no movable offshore oil and gas rig, when moored and engaged in exploration or production, is a vessel. This would apply the realistic view of *Thurmond* and *Sohyde* that (a) federal maritime law was not intended to cover liabilities arising from mineral exploration and (b) the adjective use of vessels to assist in such operations is not sufficient to invoke the law of admiralty.⁹³

Second, we could retain our decades-old holding that movable offshore rigs are nontraditional "vessels" in admiralty, even when moored in place, while attempting to articulate consistent standards for maritime contracts and liabilities. A variation on the second alternative would be to overrule *Thurmond* and [*PLT*] and apply maritime law to all offshore mineral exploration contracts, save those governed by the OCSLA.⁹⁴

Admitting that resolution of "these inconsistencies is perplexing," the court questioned the necessity of taking corrective action:

What appears to us as a serious legal conundrum may have had little effect in the real world. That is to say, oil companies, drilling contractors and oil field service companies, together with their insurers, may already have adjusted to the overlapping applications of maritime and state law by choice of law clauses or adjustments in the rates of coverage. We should not lightly "straighten out" the formal logic of the law where

92. *Id.* at 1087.

93. *Id.* ("Despite our reflexive invocation of admiralty jurisdiction to cover contracts involving movable offshore rigs, we have in the OCSLA context recognized that admiralty law is unsuited to dealing with extraction of minerals from the sea bottom.").

94. *Id.* at 1088.

to do so would upset stable commercial expectations.⁹⁵

Choosing to apply maritime law “by application of settled authority,”⁹⁶ the court decided to leave the resolution of the inconsistent lines of authority “to the decision of the court *en banc*.”⁹⁷

After the Fifth Circuit declined to hear *Lewis en banc*,⁹⁸ there were two lines of authority applicable for oilfield contracts involving work on vessels: those applying maritime law to oilfield services on vessels, as in *Halliburton*, *Transcontinental Gas*, *Corbitt*, *Theriot*, and *Lewis*, and those applying state law to oilfield services on vessels, as in *Thurmond*, *Union Texas*, and *Domingue*. Those lines resulted in contracts for drilling and workover,⁹⁹ casing,¹⁰⁰ catering,¹⁰¹ repair,¹⁰² well-site supervision,¹⁰³ equipment installation,¹⁰⁴ and navigational

95. *Id.* at 1087 (footnote omitted). The court noted that in *PLT* the court had held that the “parties may not contract away choice of law mandated by Congress through OCSLA.” *Id.* n.6 (citing *Union Tex. Petroleum Corp. v. PLT Eng’g, Inc.*, 895 F.2d 1043, 1050 (5th Cir. 1990)).

96. *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083, 1087 (5th Cir. 1990).

97. *Id.* at 1088.

98. *See Lewis v. Glendel Drilling Co.*, 931 F.2d 892 (5th Cir. 1991) (*en banc*). The Supreme Court similarly declined to review the case. *See Avanti Servs., Inc. v. Glendel Drilling Co.*, 502 U.S. 857 (1991).

99. *See, e.g., Dupont v. Sandefer Oil & Gas, Inc.*, 963 F.2d 60, 61 (5th Cir. 1992); *Dupre v. Penrod Drilling Corp.*, 993 F.2d 474, 475 (5th Cir. 1993); *see also Sumrall v. Ensco Offshore Co.*, 291 F.3d 316, 317 (5th Cir. 2002).

100. *See, e.g., Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1117 (5th Cir. 1992); *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 494 (5th Cir. 2002), *overruled*, *Grand Isle Shipyard Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 788–89 n.8 (5th Cir. 2009) (*en banc*).

101. *See, e.g., Lefler v. Atl. Richfield Co.*, 785 F.2d 1341, 1342 (5th Cir. 1986).

102. *See, e.g., Diamond Offshore Co. v. A&B Builders, Inc.*, 302 F.3d 531, 536 (5th Cir. 2002).

103. *See, e.g., Gilbert v. Offshore Prod. & Salvage, Inc.*, No. 95-122 c/w 95-2361, 95-3285, 1997 U.S. Dist. LEXIS 3592, at *5, *6 (E.D. La. 1997), *aff’d*, 134 F.3d 368 (5th Cir. 1997).

104. *See, e.g., Hoda v. Rowan Co.’s*, 419 F.3d 379, 381 (5th Cir. 2005). Hoda tripped over hoses on the deck of Rowan’s jack-up rig while torquing nuts on blowout preventers on the operator’s wellhead. The operator had entered into a Master Service Agreement with Hoda’s employer that “covered hydrostatic testing, hydraulic torque wrench service, nut splitters, casing cutting, pipeline/production and miscellaneous rental tool equipment.” *Id.* at 381. The specific work order involved torquing the nuts in connection with “a project to install and change blow-out preventers.” *Id.* Considering this work to be

services¹⁰⁵ with respect to vessels being maritime,¹⁰⁶ and contracts for services on vessels such as wireline work¹⁰⁷ and testing and completion operations¹⁰⁸ being subject to state law.¹⁰⁹

Recognizing in *Davis & Sons v. Gulf Oil Corp.* that the question of “[w]hether a contract is or is not maritime in nature is a quotidian issue whose resolution is governed by no broad rubric discernible from the numerous decided cases,”¹¹⁰ the Fifth Circuit enunciated six factors to use in characterizing a contract as maritime or nonmaritime:

Determination of the nature of a contract depends in part on historical treatment in the jurisprudence and in part on a fact-specific inquiry. We consider six factors in characterizing the contract: 1) what does the specific work order in effect at the time of injury provide? 2) what work did the crew assigned under the work order actually do? 3) was the crew assigned to work aboard a vessel in navigable waters; 4) to what extent did the work being done related to the mission of that vessel? 5) what

“an integral part of drilling, which is the primary purpose of the vessel,” the court held that the contracted work was governed by admiralty law. *Id.* at 383 (quoting *Demette*, 280 F.3d at 501).

105. See, e.g., *Tullos v. Cal Dive Int'l, Inc.*, 188 F. Supp. 2d 709, 713 (S.D. Tex. 2002) (involving navigational and surveying services to aid diving company in its offshore operations).

106. See, e.g., *Dahlen v. Gulf Crews, Inc.*, 281 F.3d 487, 491 (5th Cir. 2002) (involving a time charter of supply boat); *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888, 891 (5th Cir.) (involving a time charter of vessel to support operations on offshore platform), *modified*, 22 F.3d 568 (5th Cir. 1994), *overruled on other grounds*, *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999) (en banc).

107. See, e.g., *Domingue v. Ocean Drilling & Expl. Co.*, 923 F.2d 393, 394 (5th Cir. 1991). The Fifth Circuit concluded: “Left with the Dimensional-ODECO contract and the undisputed fact that Dimensional was to, and did, perform wireline services exclusively, we hold that this case is controlled by *Thurmond*, and the service contract is therefore non-maritime.” *Id.* at 398.

108. See, e.g., *Houston Expl. Co. v. Halliburton Energy Servs., Inc.*, No. 98-1302, 2002 U.S. Dist. LEXIS 15775, at *8 (E.D. La. 2002) (determining “Halliburton provided non-maritime services in connection with the testing and completion of the well, and played no part in the operation of the drilling rig”), *rev'd on other grounds*, 359 F.3d 777 (5th Cir. 2004).

109. See *Jones v. Berwick Bay Oil Co.*, 697 F. Supp. 260, 262, 264 (E.D. La. 1988) (applying Louisiana law to a contract to supply fuels, oils, greases, and lubricants for vessels to support Shell Oil's offshore exploration and production programs).

110. *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 313 (5th Cir. 1990).

was the principal work of the injured worker? and 6) what work was the injured worker actually doing at the time of injury?¹¹¹

Despite the creation of the six factors in *Davis & Sons*, the determination of the nature of oilfield contracts remained a quotidian issue in the courts serving the marine oilfields. The work in *Davis & Sons* was performed in the Black Bay Field in Plaquemines Parish, Louisiana.¹¹² As such, the choice of law was between state law and admiralty law without additional steps in the process. The choice-of-law inquiry is more complicated when the oil and gas operations do not occur in state waters but on the outer Continental Shelf of the United States where “the OCSLA adopts state law as surrogate federal law, the state law becomes federal law, federally enforced.”¹¹³

In *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*,¹¹⁴ the Fifth Circuit addressed the law applicable to a contract between PLT and Union Texas “to design, fabricate, and install a gas transportation system from a platform owned by [Union Texas] and its partners.”¹¹⁵ When Union Texas learned that PLT had not paid subcontractors of PLT that were performing part of the work, Union Texas withheld funds due to PLT under the contract and brought an interpleader action. The subcontracts included furnishing a barge, use of divers, and work from vessels.¹¹⁶ As the work was performed on the outer Continental Shelf off the coast of Louisiana, the court had to determine whether Louisiana law “applied to these contracts by operation of the Outer Continental Shelf Lands Act (OCSLA)” or whether maritime law applied “of its own force.”¹¹⁷

The OCSLA extends “[t]he Constitution and laws and civil and political jurisdiction of the United States” to:

the subsoil and seabed of the outer Continental Shelf and

111. *Id.* at 316.

112. *See id.* at 314.

113. Kenneth G. Engerrand, *Primer of Remedies on the Outer Continental Shelf*, 4 LOY. MAR. L.J. 19, 35 (2005).

114. *Union Tex. Petroleum Corp. v. PLT Eng'g, Inc.*, 895 F.2d 1043 (5th Cir. 1990).

115. *Id.* at 1045.

116. *See id.* at 1045–46.

117. *Id.* at 1046, 1047.

to all artificial islands, and all 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 therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State¹¹⁸

The Act then provides for the application of state law (as the law of the United States) in the following circumstances:

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 hereby 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 Shelf¹¹⁹

Citing the Supreme Court's decision in *Rodrigue*, Judge Brown, writing for the Fifth Circuit in *PLT*, summarized Congress' determination on the application of state or federal law: "*Rodrigue* made clear that 'for federal law to oust adopted state law, federal law must first apply.'"¹²⁰ Judge Brown then enunciated three conditions for the application of adjacent state law as surrogate federal law under the OCSLA: "(1) The controversy must arise on a situs covered by OCSLA (i.e., the subsoil, seabed, or artificial structures permanently or temporarily attached thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law."¹²¹

118. 43 U.S.C. § 1333(a)(1) (2012).

119. *Id.* § 1333(a)(2)(A).

120. *Union Tex. Petroleum Corp. v. PLT Eng'g, Inc.*, 895 F.2d 1043, 1047 (5th Cir. 1990) (quoting *Rodrigue v. Aetna Cas. & Surety Co.*, 395 U.S. 352, 359 (1969)).

121. *Id.*

Judge Brown easily concluded that the gathering line buried beneath the ocean floor and connected to a platform for the production of resources satisfied the requirement for a situs covered by the OCSLA.¹²² He also found little difficulty in declining to apply maritime law to the contracts. Judge Brown cited Congress' legislative interest in enacting the OCSLA:

In its analysis of the legislative history surrounding OCSLA, *Rodrigue* reflects that Congress was aware that it had the power to treat activities on the artificial islands as though they had occurred aboard ship and were thus maritime and in fact a proposed bill did so. However, in passing the bill that ultimately became OCSLA, "Congress assumed that the admiralty law would not apply unless Congress made it apply, and then Congress decided not to make it apply." *Rodrigue* further explains that "the committee was acutely aware of the inaptness of admiralty law. The bill applied the same law to the seabed and subsoil as well as to the artificial islands, and admiralty law was obviously unsuited to that task."¹²³

Following the direction from Congress and the Supreme Court in *Rodrigue*, Judge Brown concluded that maritime law did not apply in a contract dispute involving the OCSLA "except in those cases where the subject matter of the controversy bears the type of significant relationship to traditional maritime activities necessary to invoke admiralty jurisdiction."¹²⁴

Although "some maritime obligations were undoubtedly contemplated" in the contracts in *PLT*, including the use of seamen and vessels, Judge Brown did not consider the contracts to be maritime as "the principal obligation of *PLT* and the subcontractors was to build the gathering line and connect it to the platform and the transmission line. These activities are not traditionally maritime. Rather they are the subjects of oil and gas

122. See *id.* at 1047–48.

123. *Id.* at 1048 (quoting *Rodrigue*, 395 U.S. at 361, 364–65) (footnote in *Rodrigue* omitted by the court in *PLT*).

124. *Id.* (quoting *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1231 (5th Cir. 1985)).

exploration and production.”¹²⁵ Judge Brown considered that any doubt on the choice-of-law question was “dispelled by *Thurmond v. Delta Well Surveyors* . . . , which following *Herb’s Welding* stated that ‘the principal obligation under this contract was to perform wireline services, clearly a nonmaritime obligation in the sense that it does not concern the operation of the vessel. Such services are peculiar to the oil and gas industry, not maritime commerce.’”¹²⁶

Application of the three elements of the *PLT* test along with the six factors in *Davis & Sons*, which consider the nature and locality of the work being performed by the injured worker, exacerbated the existing confusion in determining whether an oilfield contract was maritime.¹²⁷ When dealing with work involving maritime and nonmaritime locations, such as fixed platforms and support vessels, where the contract may be focused on one facility but the injury occurs on a different structure or vessel, should the contractual analysis focus on the location of the work or the site of the injury or damage? Just as inconsistent lines of authority developed with respect to the nature of the service, so too did inconsistent lines of authority arise on the issue of whether a court should look to the situs of the accident¹²⁸ or the situs where the work was performed under the contract.¹²⁹

125. *Id.* at 1049.

126. *Id.* at 1050 (quoting *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 955 (5th Cir. 1988)).

127. *See, e.g.*, *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512, 1524 (5th Cir. 1996) (noting “[t]he difficulty our case law has created” when trying to apply the three *PLT* factors and the six *Davis & Sons* factors to a contract providing for operation and maintenance of fixed platforms), *overruled*, *Grand Isle Shipyard Inc. v. Seacor Maritime, LLC*, 589 F.3d 778, 788 n.8 (5th Cir. 2009) (en banc).

128. *See id.* at 1527 (assuming that prior decisions of the Fifth Circuit “state a rule in this circuit providing that the situs of the controversy in an OCSLA indemnity clause case is the location of the accident”).

129. *E.g.*, *Wagner v. McDermott, Inc.*, 899 F. Supp. 1551, 1556 (W.D. La. 1994) (holding that a contract to supply laborers to perform welding on a platform was not maritime even though the worker was injured on the deck of a barge), *aff’d*, 79 F.3d 20 (5th Cir. 1996).

III. RECONSIDERATION OF MARITIME CONTRACT JURISDICTION

In *Grand Isle Shipyard Inc. v. Seacor Marine, LLC*,¹³⁰ the Fifth Circuit began the reconsideration of its inconsistent treatment of oilfield contracts by addressing the application of the first element of *PLT* in an OCS contract case—whether the controversy arose on an OCS situs—and clarified whether the situs is determined from the location of the injury or the location of the work performed under the applicable contract.

The question presented by this appeal is what law governs the resolution of a contractual dispute, here enforceability of an indemnity provision, when the act or omission that causes the underlying death, bodily injury, or property damage (hereafter, the “tort”) which triggered the contractual indemnity claim occurred on navigable water on the Outer Continental Shelf (“OCS”), but the contract that creates the indemnity obligation between the parties calls for a *majority* of the work to be performed on stationary platforms on the OCS.¹³¹

Judge Davis began the analysis for the majority in *Grand Isle* by noting that the underlying tort in that case occurred on navigable waters (not on a stationary platform) and would be subject to maritime law.¹³² However, the contract dispute was between two contractors of BP American Production that provided services in support of operations on a BP platform.¹³³ Grand Isle performed repair and maintenance for BP’s platforms, and Seacor Marine transported workers for BP and its contractors.¹³⁴ The contractual indemnity dispute arose when Denny Neil, an employee of Grand Isle, was injured on a Seacor vessel that was transporting Neil from his work platform to a platform with living quarters.¹³⁵ Neil brought suit against Seacor, and Seacor sought defense and indemnity from Grand Isle, which had agreed in its contract with BP to defend and indemnify BP

130. *Grand Isle*, 589 F.3d 778.

131. *Id.* at 781.

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.*

and its contractors (including Seacor) for claims involving injuries to Grand Isle employees.¹³⁶ As the indemnity was valid under the general maritime law but was invalid under state law,¹³⁷ the decision on choice of law was conclusive of Seacor's claim against Grand Isle. The Fifth Circuit agreed to hear the case en banc to resolve the conflict in its case law on the issue of whether the situs for the contractual claim is determined by tort principles (location of the accident) or contract principles (focus of the contractual work).¹³⁸

As an indemnity claim "is a claim based in contract rather than in tort," Judge Davis saw "no reason to apply tort analysis to determine where the contractual controversy arose."¹³⁹ Instead, he believed that "[i]t makes more sense to apply a focus-of-the-contract test and say that a contractual dispute" arises where "a majority of work called for by the contract" is performed.¹⁴⁰ In support of the application of contract principles for a "greater measure of predictability and stability in allocating risk," Judge Davis reasoned:

Applying tort rules would allow the fortuitous location of an accident to determine the situs—and the applicable law—of a contractual controversy. The tort-situs approach prevents commercial parties from reliably allocating risk in their contractual arrangements because they have no way of predicting where "controversies" might arise and thus no way of knowing

136. *See id.* at 782.

137. *See id.* at 781–82 (basing the invalidity on the provisions of the Louisiana Oilfield Indemnity Act, LA. REV. STAT. ANN. § 9:2780).

138. *See id.* at 786–87. Judge Davis described the conflicting lines of authority: To determine situs the *PLT* panel did not focus on where the underlying incident that gave rise to the contract claim occurred (i.e., the nonpayment of the subcontractors) but looked instead to where the work under the contract was performed.

Later cases ostensibly applying *PLT* to contractual indemnity claims have ignored the situs of the contract and looked instead to the situs of the underlying tort. Those cases essentially hold that the location of the underlying tort determines the "situs of the controversy" without regard to where the majority of the work under the contract was to be performed.

Id. at 785–86 (footnote omitted).

139. *Id.* at 787.

140. *Id.*

which law will govern.¹⁴¹

In view of the fact that “a majority, if not all, of the work called for under the contract [between BP and Grand Isle] was to be performed on stationary platforms,” the contractual dispute arose on fixed platforms, and maritime law did not apply to the contract and its defense and indemnity obligations,¹⁴² even though the indemnity was for an injury on a vessel on navigable waters.

Although *Grand Isle* resolved one of the problems presented by the Fifth Circuit’s conflicting cases in determining the applicable law to oilfield contracts, it did not address the “tension, or perhaps outright inconsistency” in the Fifth Circuit’s opinions on the oilfield services that are maritime and non-maritime.¹⁴³ That resolution awaited another en banc intervention from the Fifth Circuit.

“[A] maritime case about a train wreck”¹⁴⁴ provided the impetus for the Fifth Circuit to end the “perplexing” “inconsistencies”¹⁴⁵ in the treatment of oilfield contracts. In *Norfolk Southern Ry. v. James N. Kirby Pty Ltd.*, a shipment of

141. *Id.* (reasoning that the situs of “the underlying incident that triggers the indemnity obligation” is “immaterial”).

142. *Id.* at 789. Judge Davis did explain how the “focus-of-the-contract test” applies in the case of master service agreements and blanket contracts between the parties for oilfield work:

As we discussed in *Davis & Sons v. Gulf Oil Corp.*, 919 F.2d 313, 315–17 (5th Cir. 1990), reh’g denied, 924 F.2d 1054 (5th Cir. 1991), it is a common practice for companies contracting for work in the oilfield to enter into contracts in two stages. Typically, they first sign a “blanket contract” that may remain in place for an extended period of time. Later, they issue work orders for the performance of specific work, which usually incorporates the terms of the blanket contract. As we said in *Davis & Sons*, where the contract consists of two parts, a blanket “contract followed by later work order, the two must be interpreted together.”

Generally, each work order is for a discrete, relatively short-term job. Unless a contrary intent is reflected by the master contract and the work order, in determining situs in a contract case such as this, courts should ordinarily look to the location where the work is to be performed pursuant to the specific work order rather than the long-term blanket contract.

Id. at 787 n.6.

143. *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 957 (5th Cir. 1988) (Garwood, J., concurring).

144. *Norfolk S. Ry. v. James N. Kirby Pty Ltd.*, 543 U.S. 14, 18 (2004).

145. *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083, 1087 (5th Cir. 1990).

machinery was being transported from Australia to Huntsville, Alabama, first by vessel and then by rail, pursuant to two through bills of lading.¹⁴⁶ After the ocean portion of the carriage was completed, the train derailed during the inland leg of the transportation, resulting in damage to the machinery.¹⁴⁷

Kirby had hired a freight forwarder, International Cargo Control (ICC), to arrange for the delivery, and ICC issued a through bill of lading to Kirby listing Huntsville as the ultimate destination.¹⁴⁸ ICC then hired Hamburg Sudamerikanische (Hamburg Sud), an ocean shipping company, to transport the containers. Hamburg Sud issued to ICC a through bill of lading to Huntsville and engaged Norfolk Southern Railway for the land transportation.¹⁴⁹ Kirby's insurer brought suit against Norfolk, which invoked the limitations of liability in the bills of lading.¹⁵⁰ The question presented to the Supreme Court was whether admiralty law or state law governed the provisions of the bills of lading.¹⁵¹

Justice O'Connor noted that "[o]ur cases do not draw clean lines between maritime and nonmaritime contracts,"¹⁵² and "that 'the boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw.'"¹⁵³ She stated that "to ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute, as we would in a putative maritime tort case,"¹⁵⁴ "[n]or can we simply look to the place of the contract's formation or performance."¹⁵⁵ Justice O'Connor reasoned: "Instead, the answer 'depends upon . . . the nature and character of the contract,' and the true criterion is whether it has 'reference to maritime service or

146. See *Kirby*, 543 U.S. at 18.

147. See *id.*

148. See *id.* at 19.

149. See *id.* at 21.

150. See *id.* at 21–22.

151. See *id.* at 22–23.

152. *Id.* at 23.

153. *Id.* (quoting *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961)).

154. *Id.*

155. *Id.* at 24.

maritime transactions.”¹⁵⁶ As the “primary objective” of the bills of lading was “to accomplish the transportation of goods by sea from Australia to the eastern coast of the United States,” they were maritime contracts.¹⁵⁷

Justice O'Connor recognized that “the two bills call for some performance on land; the final leg of the machinery's journey to Huntsville was by rail.”¹⁵⁸ However, “under a conceptual rather than spatial approach, this fact does not alter the essentially maritime nature of the contracts.”¹⁵⁹ Noting that the “fundamental interest giving rise to maritime jurisdiction is ‘the protection of maritime *commerce*,’”¹⁶⁰ Justice O'Connor stated that “the conceptual approach vindicates that interest by focusing our inquiry on whether the principal objective of a contract is maritime commerce.”¹⁶¹ She added:

While it may once have seemed natural to think that only contracts embodying commercial obligations between the “tackles” (*i.e.*, from port to port) have maritime objectives, the shore is now an artificial place to draw a line. Maritime commerce has evolved along with the nature of transportation and is often inseparable from some land-based obligations.¹⁶²

Justice O'Connor addressed the decisions of the lower courts that took “a spatial approach” and that “held that admiralty jurisdiction does not extend to contracts which require maritime and nonmaritime transportation, unless the nonmaritime transportation is merely incidental—and that long-distance travel is not incidental.”¹⁶³ She stated that “to the extent that these lower court decisions fashion a rule for identifying maritime contracts that depends solely on geography,” the decisions “are

156. *Id.* (quoting *N. Pac. S.S. Co. v. Hall Bros. Marine Ry. and Shipbldg. Co.*, 249 U.S. 119, 125 (1919)).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 25 (quoting *Exxon Corp. v. Cent. Gulf Lines*, 500 U.S. 603, 608 (1991) (emphasis added in *Kirby*)).

161. *Id.*

162. *Id.*

163. *Id.* at 26.

inconsistent with the conceptual approach our precedent requires.”¹⁶⁴ Viewing the bills of lading “conceptually,” she stated that “so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract.”¹⁶⁵ Consequently, geography is only useful in a conceptual inquiry “in a limited sense: If a bill’s sea components are insubstantial, then the bill is not a maritime contract.”¹⁶⁶

After the decision in *Kirby*, the Fifth Circuit agreed to grant an en banc rehearing in *In re Larry Doiron, Inc.* to consider modifying the criteria “for determining whether a contract for performance of specialty services to facilitate the drilling or production of oil and gas on navigable waters is maritime.”¹⁶⁷ Following the course charted in *Kirby*, Judge Davis, writing for the unanimous court, “decided to adopt a simpler, more straightforward test consistent with the Supreme Court’s decision.”¹⁶⁸

The controversy in *Doiron* arose from a master services contract between Apache Corp. and Specialty Rental Tools & Supply, L.L.P. that required Specialty to defend and indemnify Apache and its contractors.¹⁶⁹ Specialty was engaged by an oral work order to perform “flow-back” services to remove obstructions that hampered the flow of a well on Apache’s stationary platform

164. *Id.* at 27.

165. *Id.*

166. *Id.* After deciding that the bills of lading were maritime contracts, Justice O’Connor had to “clear a second hurdle before applying federal law in their interpretation.” *Id.* Therefore, she considered the maritime-but-local rule: “Is this case inherently local?” *Id.* Noting that “not ‘every term in every maritime contract can only be controlled by some federally defined admiralty rule,’” *id.* (quoting *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 313 (1955)), Justice O’Connor stated that “[a] maritime contract’s interpretation may so implicate local interests as to beckon interpretation by state law.” *Norfolk S. Ry. v. James N. Kirby Pty Ltd.*, 543 U.S. 14, 27 (2004). In *Kirby*, Justice O’Connor reasoned that “when state interests cannot be accommodated without defeating a federal interest, as in the case here, federal substantive law should govern,” *Id.*, adding that “[a]pplying state law to cases like this one would undermine the uniformity of general maritime law.” *Id.* at 28.

167. *In re Larry Doiron, Inc.*, 879 F.3d 568, 569 (5th Cir. 2018) (en banc).

168. *Id.*

169. *See id.*

in Louisiana waters.¹⁷⁰ The work was to be performed on the platform without requiring a vessel for the work; however, after the work was begun the crew on the platform determined that heavy equipment was needed along with a crane to lift the equipment into place.¹⁷¹ As the platform was too small for the crane, Apache agreed to contract with Larry Doiron, Inc. to provide a crane barge and, while moving equipment, Doiron's crane struck one of the Specialty employees.¹⁷² When the injured worker brought his claim against Doiron, Doiron sought indemnity from Specialty as a contractor of Apache based on the contract between Apache and Specialty.¹⁷³ As the work under that contract was performed in Louisiana waters, it did not present the initial *PLT* question of whether an OCSLA situs was involved, nor was the court presented with the opportunity to reconsider the relationship between the *PLT* factors and the *Davis & Sons* factors. The question presented was whether the contract between Apache and Specialty was governed by maritime law or Louisiana law, the latter of which would invalidate the indemnity.¹⁷⁴

Judge Davis cited the governing principles enunciated by the court in *Davis & Sons, Inc. v. Gulf Oil Corp.*¹⁷⁵ and noted the criticism that had been levied on its "six-factor, fact-intensive test."¹⁷⁶ He also added his own criticism: "For a variety of reasons, most of the prongs of the *Davis & Sons* test are unnecessary and

170. *See id.* at 569–70.

171. *See id.* at 570.

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.* at 572 (citing *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990)).

176. *In re Larry Doiron, Inc.*, 879 F.3d 568, 572 (5th Cir. 2018) (en banc). For example, Judge Davis quoted *Hoda v. Rowan Cos.*, 419 F.3d 379, 380 (5th Cir. 2005):

This appeal requires us to sort once more through the authorities distinguishing maritime and non-maritime contracts in the offshore exploration and production industry. As is typical, the final result turns on a minute parsing of the facts. Whether this is the soundest jurisprudential approach may be doubted, inasmuch as it creates uncertainty, spawns litigation, and hinders the rational calculation of costs and risks by companies participating in this industry. Nevertheless, we are bound by the approach this court has followed for more than two decades.

unduly complicate the determination of whether a contract is maritime.”¹⁷⁷ Although it was appropriate to ask in the first prong of *Davis & Sons* what the contract provided, the second prong asked what the crew was actually doing, which required that the court “parse the precise facts related to the services performed under the contract and determine whether those services were inherently maritime.”¹⁷⁸ As the Fifth Circuit had not previously decided whether flow-back services were “inherently maritime,” the court would have to “compare flow-back services to casing, wireline, and welding services” that had been addressed in its decisions.¹⁷⁹ However, Judge Davis noted: “The fact is that none of these services are inherently maritime.”¹⁸⁰

Judge Davis criticized the third, fourth, fifth, and sixth prongs of the *Davis & Sons* test—whether the crew was assigned to a vessel in navigable waters; whether the crew’s work related to the mission of the vessel; what was the principal work of the injured worker; and what was the injured worker doing when injured—as those factors were related to the claims of the workers but had little relevance to whether the contract entered into by their employer was maritime.¹⁸¹ Following the *Davis & Sons* factors, the initial panel of the Fifth Circuit in *Doiron* “determined that the contract was maritime primarily because a vessel was essential to the completion of the job.”¹⁸²

The en banc Fifth Circuit believed that “*Kirby* lights a path to a simpler, more straightforward method for determining whether a contract is maritime and avoids most of the unnecessary analysis required by *Davis & Sons*.”¹⁸³ “The Court in *Kirby* rejected the mixed-contract theory . . . which was one of the underpinnings of the *Davis & Sons* panel’s rationale in formulating its six-prong test.”¹⁸⁴ Just as he looked to *Kirby* for the reason to replace *Davis & Sons*, so too did Judge Davis find in

177. *Id.* at 572.

178. *Id.* at 573.

179. *Id.*

180. *Id.*

181. *See id.* at 573–74.

182. *Id.* at 574 (citing *In re Larry Doiron, Inc.*, 869 F.3d 338, 345–47 (5th Cir. 2017)).

183. *Id.*

184. *Id.* at 575.

Kirby the principles for replacing the *Davis & Sons* test. Judge Davis declined to adopt a narrow test for maritime contracts,¹⁸⁵ citing the broad statements in *Kirby* that “the true criterion is whether it has ‘reference to maritime service or maritime transactions’”¹⁸⁶ and that “the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce.”¹⁸⁷

Applying the broad principles from *Kirby* for the protection of maritime commerce, Judge Davis noted that the Fifth Circuit had “long held that the drilling and production of oil and gas on navigable waters from a vessel is commercial maritime activity.”¹⁸⁸ Consequently, “[b]ased on the principles laid out in *Kirby*,” the Fifth Circuit adopted a two-pronged test¹⁸⁹ to

185. *Id.* at 574; see *Amicus Curiae Br. of Liberty Mut. Ins. Co., Liberty Int’l Underwriters, and Crescent Energy Servs. L.L.C. in Support of Defs.—Appellants Oil States Energy Servs., L.L.C., Specialty Rental Tools & Supply, L.L.P., and Zurich Am. Ins. Co.’s Br. on Reh’g En Banc*, at 23, Doc. 0051411625 (proposing that “[t]he proper test for determining whether a contract is maritime is whether the principal objective of the contract is activity that has been traditionally governed by maritime law, *i.e.*, activity related to maritime transportation.”).

186. *In re Larry Doiron, Inc.*, 879 F.3d 568, 574 (5th Cir. 2018) (en banc) (quoting *Norfolk S. Ry. v. James N. Kirby Pty Ltd.*, 543 U.S. 14, 25 (2004)).

187. *Id.*

188. *Id.* at 575, 575 n.46 (quoting *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538–39 (5th Cir. 1986) (stating “[o]il and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce”)); see also *In re Deepwater Horizon*, 745 F.3d 157, 166 (5th Cir. 2014) (“[W]e concluded that maritime law applied in reference to the oil spill that ‘occurred while [Deepwater Horizon] was engaged in the maritime activity of conducting offshore drilling operations. . . .’”); *Boudreaux v. Am. Workover, Inc.*, 664 F.2d 463, 466 (5th Cir. 1981) (noting that vessel-related oil and gas drilling is “an industry that provides approximately 40,000 jobs, and untold millions of dollars in revenues and that takes place primarily upon the navigable waters of the United States,” and furthermore “bears ‘a significant relationship to . . . commerce on navigable waters’”); *Pippen v. Shell Oil Co.*, 661 F.2d 378, 384 (5th Cir. 1981) (stating that “offshore drilling the discovery, recovery, and sale of oil and natural gas from the sea bottom is maritime commerce”).

189. *Doiron*, 879 F.3d at 575–76. Although the court adopted a two-pronged test, Judge Davis stated that it “does not mean, however, that some of the *Davis & Sons* factors are never relevant.” *Id.* at 576. He explained:

The scope of the contract may be unclear; the extent to which the parties expect vessels to be involved in the work may also be unclear. In resolving these issues, courts may permit the parties to produce evidence of the work actually performed and the extent of vessel involvement in the job. It is also conceivable, for example, that the seamen status of a crew—which is implicated in two of the *Davis & Sons* factors—could be relevant to whether the vessel involvement was a substantial part of the overall contract. If the

determine whether an oilfield contract¹⁹⁰ is maritime:

First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters? The answer to this inquiry will avoid the unnecessary question from *Davis & Sons* as to whether the particular service is inherently maritime. Second, if the answer to the above question is “yes,” does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract? If so, the contract is maritime in nature.¹⁹¹

contract provided only for work to be done by permanent crewmembers aboard a vessel, the substantial vessel involvement issue would ordinarily be answered. If part of the contract work involves work by crewmembers aboard a vessel and part does not, the work by seamen aboard a vessel would be part of the factual mix that the district court could consider in resolving whether the overall contract involved substantial involvement of a vessel.

Id. at 577.

190. The Fifth Circuit in *Doiron* was only presented with an oilfield contract, but Judge Davis stated: “If an activity in a non-oil and gas sector involves maritime commerce and work from a vessel, we would expect that this test would be helpful in determining whether a contract is maritime.” *Id.* at n.52. In *Lightering LLC v. Teichman Group, LLC*, No. H-17-3374, 2018 U.S. Dist. LEXIS 118281, 2018 WL 3428561 (S.D. Tex. July 16, 2018), the district court considered the effect of *Doiron* and *Kirby* in determining whether a contract to provide wharfage, storage, and dockside services to a company that provided lightering services to transfer liquid cargo between vessels was maritime. The court stated: “Outside the oil and gas context, the test first requires the court to ask whether the activity ‘involves maritime commerce and work from a vessel.’ If so, then the court asks whether a vessel plays a substantial role in completing the contract.” 2018 U.S. Dist. LEXIS 118281 at *28 (quoting *Doiron*, 879 F.3d at 577 n.52). Although lightering and the dockside services of loading and unloading are maritime, 2018 U.S. Dist. LEXIS at *31, the court considered the “maritime components” of the agreement to be “minimal and insufficient to make the entire Agreement a maritime contract.” *Id.* at *44. The court concluded:

The maritime portion of the Agreement—the loading and unloading of vessels—had an attenuated connection to maritime commerce. T&T loaded and unloaded equipment that itself was not bound for maritime commerce, but that was used by OSG Lightering, as part of a separate contract with a third-party, to facilitate maritime commerce through its lightering operations. This is not the “direct and substantial link between the contract and the operation of the ship, its navigation, or its management afloat, taking into account the needs of the shipping industry,” required to transform a maritime activity into maritime commerce. The court concludes that the Agreement did not have a principal objective of maritime commerce.

Id. at *44–*45 (quoting 1 BENEDICT ON ADMIRALTY § 182).

191. *In re Larry Doiron, Inc.*, 879 F.3d 568, 576 (5th Cir. 2018) (en banc).

Judge Davis also provided guidance on the application of the simplified test: "When work is performed in part on a vessel and in part on a platform or land, we should consider not only time spent on the vessel but also the relative importance and value of the vessel-based work to completing the contract."¹⁹² He found support from Justice O'Connor's statement in *Kirby* that "[c]onceptually, so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract."¹⁹³ As to what is "substantial," Judge Davis noted that the Supreme Court had formulated a rule of thumb for deciding whether a worker satisfied the substantial-connection test in order to be a seaman under the Jones Act:¹⁹⁴

[S]ubstantiality in this context is determined by reference to the period covered by the Jones Act plaintiff's maritime employment, rather than by some absolute measure. Generally, the Fifth Circuit seems to have identified an appropriate rule of thumb for the ordinary case: A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act. This figure of course serves as no more than a guideline established by years of experience, and departure from it will certainly be justified in appropriate cases.¹⁹⁵

He then suggested that "[t]he district courts may develop a similar rule of thumb in evaluating substantiality" in the context of oilfield contracts; however, he left "this for further development below."¹⁹⁶ Judge Davis did state that in judging the substantiality of the contribution to maritime commerce, "[t]he calculus would not include transportation to and from the job site."¹⁹⁷

Applying the new test, Judge Davis noted that the work order in *Doiron* was for downhole work on a gas well on a fixed

192. *Id.* at 576 n.47.

193. *Id.* at 576.

194. Jones Act, 46 U.S.C. § 30104.

195. *Doiron*, 879 F.3d at 576 n.47 (quoting *Chandris, Inc. v. Latsis*, 515 U.S. 347, 371 (1995)).

196. *Id.*

197. *Id.*

platform.¹⁹⁸ "The use of the vessel to lift the equipment was an insubstantial part of the job and not the work the parties expected to be performed."¹⁹⁹ Consequently, the contract was not maritime and was governed by Louisiana law.²⁰⁰

IV. REMAINING WORK

After the Supreme Court distanced the choice-of-law analysis in maritime contracts from the locality basis used for tort claims by instead employing a conceptual test based on the "nature and subject-matter of the contract . . . having reference to maritime service or maritime transactions,"²⁰¹ some courts continued to conflate the locality-based choice-of-law principles from tort claims when determining the applicable law for contracts. This was particularly evident in the case of oilfield contracts performed on or over navigable waters where most of the six factors enumerated in *Davis & Sons, Inc. v. Gulf Oil Corp.*²⁰² were more conducive in determining whether the underlying tort was maritime than whether the contract was maritime. The conceptual part of the contract analysis was further complicated by the decision in *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, which held that state law applied to a claim for damage to a well from a workover operation that was conducted from a vessel in navigable waters.²⁰³ Before *Sohyde*, the Fifth Circuit unquestioningly applied maritime law to commercial transactions arising from drilling and exploration activities involving vessels operating on navigable waters.²⁰⁴ After *Sohyde*, the court began applying its tort principles to oilfield contracts, such as the contract for wireline services in

198. *See id.* at 577.

199. *Id.*

200. *See id.*

201. *Ins. Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 26 (1871).

202. *Davis & Sons v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990).

203. *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1136-38 (5th Cir. 1981).

204. *E.g.*, *Halliburton Co. v. Norton Drilling Co.*, 302 F.2d 431, 437 (5th Cir. 1962) (considering claim of third-party beneficiary status to obligations in drilling contract); *Transcon. Gas Pipe Line Corp. v. Mobile Drilling Barge "Mr. Charlie"*, 424 F.2d 684, 691 (5th Cir. 1970) (considering drilling and rework contract).

Thurmond v. Delta Well Surveyors,²⁰⁵ leading to the two lines of cases dividing maritime and nonmaritime oilfield services provided from vessels operating in navigable waters.²⁰⁶

Although judges of the Fifth Circuit decried the “tension, or perhaps outright inconsistency”²⁰⁷ and the “potential for significant uncertainty in the law applicable to offshore mineral exploration,”²⁰⁸ and called for en banc review,²⁰⁹ it took twenty years and the intervention of the Supreme Court in *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.*²¹⁰ before Judge Davis undertook to restore contract choice-of-law principles in determining whether oilfield contracts are maritime. After eliminating the tort-locality component of the analysis in favor of a “focus-of-the-contract” test in *Grand Isle Shipyard Inc. v. Seacor Marine, LLC*²¹¹—138 years after the Supreme Court had done the same in *Insurance Co. v. Dunham*²¹²—Judge Davis then removed the irrelevant tort prongs from the *Davis & Sons* test in *In re Larry Doiron, Inc.*²¹³ and eliminated the two lines of cases dividing oilfield services performed on a vessel on navigable waters in favor of a simple test that asks (1) whether there is a contract to facilitate drilling or production of oil and gas on navigable waters and (2) whether the contract provides or the parties expect that a vessel will play a substantial role in the performance of that contract.²¹⁴ By eliminating the application of

205. *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 956 (5th Cir. 1988).

206. See, e.g., *id.* at 957 (Garwood, J., concurring) (addressing wireline services); *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083, 1086–87 (5th Cir. 1990) (addressing the drilling of a well in state waters and the furnishing of a barge rig for that purpose).

207. *Thurmond*, 836 F.2d at 957 (Garwood, J., concurring).

208. *Lewis*, 898 F.2d at 1087.

209. See *id.* at 1088; see also *Thurmond*, 836 F.2d at 957 (Garwood, J., concurring).

210. *Norfolk S. Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 28 (2004).

211. *Grand Isle Shipyard Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 787 (5th Cir. 2009) (en banc).

212. *Ins. Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 26 (1871).

213. *In re Larry Doiron, Inc.*, 879 F.3d 568, 576–77 (5th Cir. 2018) (en banc) (noting that “[t]his test also removes from the calculus those prongs of the *Davis & Sons* test that are irrelevant, such as whether the service work itself is inherently maritime and whether the injury occurred following a maritime tort”).

214. See *id.* at 576. When applying *Grand Isle* to the first *PLT* factor to determine whether an OCSLA situs is involved, the court looks to where “a majority of work called for by the contract” is performed. *Grand Isle*, 589 F.3d at 787. However, in deciding

Sohyde to oilfield contracts performed on navigable waters, the *Doiron* test supports the goal of maritime law to effectuate maritime commerce from vessels,²¹⁵ not just for transportation, but also for the extensive maritime risks²¹⁶ from drilling, exploration, and other oilfield operations²¹⁷ over navigable waters, and brings a measure of uniformity back to the determination of the law applicable to offshore drilling and exploration.²¹⁸ Placing “the focus on the contract and the expectations of the parties,” the simplified test should “assist[] the parties in evaluating their risks, particularly their liability under indemnification clauses in the contract.”²¹⁹

Despite the clarification by the Fifth Circuit in *Grand Isle* and

whether a contract is maritime, the court looks to whether “the parties expect that a vessel will play a substantial role in the completion of the contract.” *Doiron*, 879 F.3d at 576.

215. See *Kirby*, 543 U.S. at 25 (noting that the “fundamental interest giving rise to maritime jurisdiction is ‘the protection of maritime commerce’”) (quoting *Exxon Corp. v. Central Gulf Lines*, 500 U.S. 603, 608 (1991) (emphasis added in *Kirby*)).

216. See, e.g., *In re Deepwater Horizon*, 745 F.3d 157, 166 (5th Cir. 2014) (noting that “the disaster occurred while the vessel was engaged in the maritime activity of conducting offshore drilling operations, and the disaster had a significant effect on maritime commerce”).

217. See *Mays v. C-Dive LLC*, Nos. 16-13139, 16-13318, 16-13952, 16-13951, 17-668, 2018 U.S. Dist. LEXIS 128539 at *11–*12, 2018 WL 3642005 (E.D. La. Aug. 1, 2018) (applying *Doiron* and holding that a contract whose principal obligation was “to plug and abandon an underwater pipeline used for the transportation of natural gas” that “expressly provided for the use of a vessel to complete the plug and abandon work at issue” was a maritime contract).

218. In *Kirby*, Justice O’Connor emphasized the importance of uniformity in the general maritime law:

Here, our touchstone is a concern for the uniform meaning of maritime contracts like the ICC and Hamburg Sud bills. We have explained that Article III’s grant of admiralty jurisdiction “must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.” *American Dredging Co. v. Miller*, 510 U.S. 443, 127 L. Ed. 285, 114 S. Ct. 981 (1994) (quoting *The Lottawanna*, 88 U.S. 558, 21 Wall. 558, 575, 22 L. Ed. 654 (1875)).

Norfolk S. Ry. v. James N. Kirby, Pty Ltd., 543 U.S. 14, 28 (2004).

219. *In re Larry Doiron, Inc.*, 879 F.3d 568, 577 (5th Cir. 2018) (en banc) (footnote omitted) (noting that it is no longer necessary to “determine whether this service work has a more or less salty flavor than other service work when neither type is inherently salty”).

Doiron of the inconsistencies in determining whether an oilfield contract is maritime, there is still an area of confusion that has not been resolved. In discussing the “difficulties” with the *Davis & Sons* test, Judge Davis cited Professor David Robertson’s criticism of that test and addressed the shortcomings of the *Davis & Sons* factors.²²⁰ However, Professor Robertson also criticized the elements of the *PLT* test, which he described as “flawed.”²²¹ He stated that “*PLT*’s first element affirmatively misrepresents § 1333(a)(2)(A) by putting ‘temporarily attached’ structures within its coverage.”²²² Although *Doiron* does not directly address that criticism, its holding that maritime law applies to contracts to provide services to facilitate the production of oil and gas where vessels play a substantial role in the completion of the contract will partially mitigate that criticism as the temporarily attached structures are usually vessels and maritime law will apply to contracts in which a vessel plays a substantial role in the completion of the contract. However, leaving the *PLT* test in place for OCS cases requires that courts first inquire whether the controversy arose on an OCSLA situs, and *Grand Isle* defined that inquiry by the focus of the contract—whether a majority of work was to be performed on OCS facilities.²²³ The second element of the *PLT* test then addresses whether maritime law applies of its own force, and *Doiron* considers whether a vessel will play a substantial role in the completion of the contract.²²⁴ Thus, in a case involving OCSLA operations, the first two inquiries are whether a **majority** of work was to be performed on OCS facilities and whether a vessel would play a **substantial** role in the completion of the contract.²²⁵ The fact that the focus of the work is on an OCS facility (because a majority of the work is performed

220. See *id.* at 572 (quoting David W. Robertson, *The Outer Continental Shelf Lands Act’s Provisions on Jurisdiction, Remedies, and Choice of Law: Correcting the Fifth Circuit’s Mistakes*, 38 J. MAR. L. & COM. 487, 540–45 (2007)).

221. Robertson, *supra* note 220, at 541; see also *Hodgen v. Forest Oil Co.*, 87 F.3d 1512, 1525 (5th Cir. 1996) (describing the effort of one judge to deal with the conflicting precedent under *PLT* as “heroic”), *overruled*, *Grand Isle Shipyard Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 788 n.8 (5th Cir. 2009) (en banc).

222. Robertson, *supra* note 220, at 541.

223. See *Grand Isle*, 589 F.3d at 781.

224. See *Doiron*, 879 F.3d at 577.

225. *E.g., id.*; *Grand Isle*, 589 F.3d at 781.

on a fixed platform) is not inconsistent with the fact that substantial work is performed on a support vessel. In that situation, the OCSLA would be applicable and maritime law would apply.²²⁶ Could state law also apply to the extent that state law is not inconsistent with maritime law? Ironically, after creating the *PLT* test in 1990, Judge Brown “appeared to short circuit this test entirely”²²⁷ the next year in *Domingue v. Ocean Drilling & Exploration Co.* by applying Louisiana law to a contract to perform wireline services from a jack-up rig on the outer Continental Shelf off the coast of Louisiana without mentioning the *PLT* test.²²⁸

Although the Fifth Circuit has clarified in *Grand Isle* and *Doiron* some of the troubling issues for determining whether oilfield contracts are maritime, “[t]he confusion inherent in” the Fifth Circuit’s case law is still “evident” with respect to the application of the *PLT* factors.²²⁹ Consequently, it is time for the Fifth Circuit to reconsider the *PLT* test in accordance with the terms of the OCSLA and the principles enunciated in *Grand Isle* and *Doiron*.²³⁰

226. *See id.*

227. *See Hodgen v. Forest Oil Co.*, 87 F.3d 1512, 1525 (5th Cir. 1996) (citing *Domingue v. Ocean Drilling & Expl. Co.*, 923 F.2d 393 (5th Cir. 1991)).

228. *See Domingue*, 923 F.2d at 395–98.

229. *Hodgen*, 87 F.3d at 1524.

230. The effect of *Doiron* and the application of the *PLT* test were discussed by Fifth Circuit in its decision, *In re Crescent Energy Servs., L.L.C.*, 896 F.3d 350 (5th Cir. 2018). As in *Doiron*, *Crescent Energy* involved a dispute that arose in state waters, not on the outer Continental Shelf. *See id.* at 352. Carrizo Oil & Gas needed to decommission three wells on small fixed platforms in Louisiana state waters, and it accepted the bid of Crescent Energy Services to plug and abandon the wells. *See id.* Crescent’s bid stated “that the equipment it would use included the ‘5K P&A Equipment Package,’ ‘5K Sand Cutting Casing Cutter Package,’ a five-person crew to perform the P&A work, and three vessels.” *Id.* The court described the vessels:

The vessels included a quarters barge with a thirty-foot long crane, called the “OB 808”; a tug boat named the “SLYE JOSEPH”; and a cargo barge. The OB 808 was a barge that could operate in shallow water where its spuds or footings would be anchored in the mud to create a stable platform. The OB 808 provided living quarters for the crew and operated as an additional platform for the P&A operations. The OB 808 spud barge required use of a tug boat because the barge was not motorized, and Crescent contracted with another entity for use of the SLYE JOSEPH.

Id. at 352–53.

Corday Shoulder, an employee of Crescent, was injured on a platform after attaching a piece of pipe to Carrizo's well, and Crescent filed a limitation-of-liability action for the OB 808. See *id.* at 353. Carrizo then sought indemnity and insurance protection from Crescent's insurers based on the contract between Carrizo and Crescent. See *id.* The validity of the indemnity and insurance claims depended on whether maritime law or state law applied to the contract. See *id.* at 354.

Before addressing whether the contract between Carrizo and Crescent was maritime, the Fifth Circuit considered the argument presented by Crescent's insurers to determine whether state law should apply under the maritime-but-local rule even if the contract was maritime. See *id.* The Supreme Court in *Kirby* had cited the maritime-but-local doctrine, but had "stated that no specific local interest had been identified by the party seeking application of the rule." *Id.* (citing *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 27 (2004)). In determining whether to create an exception to "[t]he usual procedural rule that all issues must first be presented to the district court," *id.* at 354–55, the Fifth Circuit agreed that the court had "altered some of the controlling law since the district court's ruling with [its] en banc decision in *In re Larry Doiron, Inc.*" *Id.* at 355. However, the court did not consider that anything in *Doiron* would "affect[] the applicability" of the maritime-but-local doctrine. *Id.* The court reasoned:

Finally, it is doubtful this issue would alter the outcome of the case. In *Kirby* itself, the Court held both that no local interest had been identified but had a state interest been described, it "cannot be accommodated without defeating a federal interest," thus leaving maritime law in place. *Kirby*, 543 U.S. at 27. The federal interest is "for the uniform meaning of maritime contracts," which applies here as much as it did in *Kirby*. *Id.* at 28. If the contract here is maritime, the fact that it was to be performed in the territorial waters of Louisiana does not justify causing the outcome of this lawsuit to be different than if the contract was for work on the high seas. Consistency and predictability are hard enough to come by in maritime jurisprudence, but we at least should not intentionally create distortions. We do not exercise our discretion to consider this issue.

Id.

Turning to the issue of whether the contract was maritime, the Fifth Circuit described the effect of the opinion in *Doiron*: "Recently, we concluded that a test we had created in 1990 for resolving those questions focused on incidentals that were not altogether relevant to the determination. Removing some clutter, our en banc opinion simplified the mission of identifying such contracts." *Id.* The "simplified" test left "[s]ignificant parts of our prior law . . . explicitly unchanged." *Id.* Thus "[o]il and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce," *id.* (quoting *In re Larry Doiron, Inc.*, 879 F.3d 568, 575 (5th Cir. 2018) (en banc) (quoting *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538–39 (5th Cir. 1986))), and "maritime law generally does not extend to events that are confined to fixed platforms, as those structures are not vessels." *Id.* at 356. Whether the contract to plug and abandon wells on a fixed platform involving the use of three vessels was a maritime contract required the Fifth Circuit to "apply *Doiron* to these facts." *Id.*

The first inquiry from *Doiron* is "whether the activity concerns development of oil and gas offshore." *Id.* Crescent's insurers argued that "the contract did not facilitate the drilling and production of oil and gas because decommissioning of wells is more analogous

to construction of offshore platforms,” which they contended was non-maritime, and that “the services were not on ‘navigable waters’ because the decommissioning work occurred from the fixed platform itself.” *Id.* The Fifth Circuit responded to the first argument by stating that the process of exploration for and production of oil and gas continues through drilling and production until it “ends by plugging and abandoning the well and removing such structures as state law requires.” *Id.* The court then rejected the argument that the plugging and abandoning of the platform wells did not occur on navigable waters because the location of the injury on the platform was not the focus of the inquiry: “We are no longer concerned about whether the worker was on a platform or vessel.” *Id.* at 356–57. The critical inquiry was answered by the facts “that the wells were located within the territorial inland waters of Louisiana and that the vessels involved in this contract were able to navigate to them.” *Id.* at 357. Therefore, the court “conclude[d] that the contract between Crescent and Carrizo was to facilitate the drilling or production of oil and gas on navigable waters.” *Id.*

Crescent’s insurers did ask the Fifth Circuit to read *Doiron* “in conjunction with other law that was not even discussed in that decision.” *Id.* Among the cases from the insurers’ “preferred collection” was *Tetra Tech., Inc. v. Cont’l Ins. Co.*, 814 F.3d 733 (5th Cir. 2016), which involved “[t]he broader question . . . [of] whether under the Outer Continental Shelf Lands Act’s . . . requirements, the court was to apply Louisiana law as surrogate federal law.” *Id.* The court in *Crescent Energy* noted that *Tetra* also involved “[a] subordinate question” from the *PLT* factors—“whether federal law, i.e., maritime law, applied of its own force.” *Id.* The contract in *Tetra* for the salvaging of a decommissioned well’s platform “contained obligations both for work on the fixed platform and on vessels.” *Id.* Although the court in *Tetra* agreed that “contracts for ‘decommissioning, deconstructing, or salvaging a fixed platform used for oil and gas exploration on the [outer Continental Shelf] . . . are not ‘historically treated’ as maritime contracts, and maritime law thus generally would not apply of its own force,” *id.* at 357–58 (quoting *Tetra*, 814 F.3d at 741), the “general law was not conclusive . . . because also relevant was the parties’ specific contract applicable to that specified dispute.” *Id.* at 358. As the contract was not in the record, *id.* at 357, the appeal did not allow the court to discern “the relative scope of the work on the fixed platform and from vessels.” *Id.* at 358.

As the dispute in *Crescent Energy* arose in state waters and not on the outer Continental Shelf, the Fifth Circuit did not have to address the continuing viability of the *PLT* factors:

We are not concerned here with those OCSLA issues of whether to borrow state law as surrogate federal law, which leads to analyzing whether maritime law applies of its own force, which requires determining the historical treatment of certain contracts. We do need to analyze, though, whether this is a maritime contract. *Doiron* now controls that endeavor.

Id. Noting the prior criticism of the *Davis & Sons* factors, the court in *Crescent Energy* stated: “The en banc court in *Doiron*, after 25-plus years of applying *Davis*, at least agreed that a change was due.” *Id.* at 359. The court then explained that *Doiron* led the way going forward:

Finally, regardless of what other Fifth Circuit caselaw there may be, nothing in such caselaw detracts from the clarity of our 2018 en banc decision in *Doiron*. We are here classifying a contract for a certain purpose, a judicial activity that has been done consistently with the 1969 *Rodrigue* decision at

least since our 1990 *Davis* decision. We en banc eliminated most of the factors, narrowing our focus, but we did not fundamentally change the task. *Doiron* is the law we must apply.

Id.

For the second part of the *Doiron* test, the question was “whether the Crescent-Carrizo contract contemplated that a vessel would play a substantial role in the performance of the contract.” *Id.* Crescent Energy’s “insurers argue[d] that measuring the anticipated use of a vessel should follow OCSLA caselaw where, for purposes of deciding the situs of the controversy, we are to consider where the majority of work was performed under ‘the focus-of-the-contract test.’” *Id.* (quoting *Grand Isle Shipyard Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 781 (5th Cir. 2009) (en banc)). Rejecting the attempt to insert the first prong of the *PLT* test for OCS cases into the simplified *Doiron* test, the court in *Crescent Energy* stated:

We do not see the usefulness of that law to our task. *Doiron* did not hold that to be a maritime contract, the parties must have contemplated that a vessel will be used for a majority of the work. Such a rule would be inconsistent with the explicit suggestion in *Doiron* that “substantial” can mean 30 percent, considerably less than a majority.

Id.

The court cautioned that for the second element of the *Doiron* test, “the parties’ expectations are central.” *Id.* Thus, the court began “with examining the contractual obligations.” *Id.* at 360. The first page of the bid identified the equipment with a description of the three vessels, so “a need for vessels was understood.” *Id.* The court noted that the “analysis of ‘substantial’ ignores the need for vessels to transport equipment and crew to the platform and considers only the other roles the vessels played.” *Id.* (citing *In re Larry Doiron, Inc.*, 879 F.3d 568, 576 n.47 (5th Cir. 2018) (en banc)). With that understanding, the court “examine[d] the use of the key vessel, the OB 808,” *id.*, and stated:

The only crane involved in the work was on the barge, moving equipment and materials back and forth from the cargo barge to the well platform. The injured worker, Corday Shoulder, testified that the three well platforms were small and there was not enough room for all the equipment. The wireline unit was among the equipment that remained on the barge. We mention the wireline unit in particular because its purpose is central to plugging and abandoning the well.

Id.

The fact that wireline operations were “central” to the plugging and abandoning operation required that the Fifth Circuit address the effect of *Doiron* on the Fifth Circuit’s precedent “that such work from a vessel is not a maritime activity.” *Id.* at 361 (citing *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 955–56 (5th Cir. 1988)). The court in *Crescent Energy* answered: “We recently criticized that opinion, criticism that matters because it was expressed en banc, because *Thurmond* and its descendants improperly focus on whether services were inherently maritime as opposed to whether a substantial amount of work was to be performed from a vessel.” *Id.* (citing *Doiron*, 879 F.3d at 573). What the court in *Crescent Energy* found important in its application of *Doiron* was “that the use of the wireline unit on the vessel was central to the entire P&A contract.” *Id.*

Although the parties "anticipated the OB 808 would be indispensably involved in performance of the contract," the court recognized that "[a] vessel's being indispensable may not equate to its role of being 'substantial.'" *Id.* Crescent's insurers argued "that a vessel does not play a substantial role when it is being used as a 'work platform' rather than as a navigable, self-propelled water vehicle." *Id.* However, the Fifth Circuit did not see the vessel's "role as being properly demeaned in this way, so long as the vessel is being used for more than transporting between land and the wellsite." *Id.* In fact, the court considered the vessel's "necessity as a work platform" to be particularly relevant," *id.*, stating:

To the extent there was not enough space on the fixed platform for the equipment, such as for the wireline unit, the role of the vessel becomes more significant. Its utility as a work platform comes from its being a vessel, as it could be positioned as needed at the well site, then proceed to the other wells to perform similar functions. According to Carrizo, the OB 808 was being used every day, certainly as crew quarters but also for its crane, the wireline unit, and other equipment that could not be moved onto a platform.

Id. Summarizing the substantial role played by the vessels, the court concluded that the contract was maritime:

[T]his contract anticipated the constant and substantial use of multiple vessels. It was known that the OB 808 would be necessary as a work platform; that essential equipment would need to remain on that vessel, including a crane; that the most important component of the work, the wireline operation, would be substantially controlled from the barge; and that other incidental uses of the vessel would exist such as for crew quarters. This vessel and the other two vessels were expected to perform an important role, indeed, a substantial one, under the Crescent and Carrizo contract. It was a maritime contract.

Id. at 361-62.