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# Grand Isle III's Tarpon Rodeo: The Confused Seas of OCSLA & Maritime Law in the Fifth Circuit

## INTRODUCTION

Difficulty interpreting United States Fifth Circuit Court of Appeals case law pertaining to the Outer Continental Shelf Lands Act (OCSLA) is by no means a novel issue.<sup>1</sup> In fact, the Fifth Circuit has confessed to this shortcoming on more than one occasion.<sup>2</sup> Perhaps the confusion is simply a natural consequence of the Fifth Circuit hearing the lion's share of admiralty and maritime cases.<sup>3</sup> Nevertheless, it may be easier to navigate a jon boat through the Delacroix marsh while blindfolded than to interpret Fifth Circuit OCSLA/maritime case law.<sup>4</sup> With the Fifth Circuit's amount of "maritime judicial ink"<sup>5</sup> and its considerable inconsistency, it is no surprise the office aspirin bottle is empty.<sup>6</sup>

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1. See 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 (2007); E. Stewart Spielman, *Drilling Through the Muddied Waters on the Outer Continental Shelf: An Examination of the Fifth Circuit's Recent Decision in Demette v. Falcon Drilling Co.*, 26 TUL. MAR. L.J. 683, 694 (2002) ("In each new case, a panel of this court must comb through a bewildering array of cases that rely upon inconsistent reasoning in the hope of finding an identical fact situation." (quoting *Smith v. Penrod Drilling Corp.*, 960 F.2d 456, 461 (5th Cir. 1992))); Kenneth G. Engerrand, *Primer of Remedies on the Outer Continental Shelf*, 4 LOY. MAR. L.J. 19, 20 (2005).

2. See, e.g., *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 786 (5th Cir. 2009) ("The opposed positions of the district court and the panel both find support in our case law, which we can all agree is conflicting and confusing."); see also *Domingue v. Ocean Drilling Exploration Co.*, 923 F.2d 393, 393-94 (5th Cir. 1991) ("Once more we embark on a voyage through the familiar marshland area of the law set aside for classifying the oil and gas exploration services contract as wet or dry.").

3. Nicole J. Dulude & Todd Greenwood, *Close-Hauling Toward Simplified Eligibility Under the Longshore and Harbor Workers' Compensation Act: A Proposal for Congressional Action or Judicial Clarification to Rectify Persistent Ambiguity*, 35 TUL. MAR. L.J. 45, 62, 77-78 (2010).

4. A jon boat, more commonly known in south Louisiana as a "flat-bottom" is a small boat generally constructed with aluminum used for various shallow water activities such as fishing or hunting. See [wikipedia.org/wiki/Jon\\_boat](https://wikipedia.org/wiki/Jon_boat) [<https://perma.cc/8AJG-ZR58>]. Delacroix Island, Louisiana, is a small fishing community located southeast of New Orleans, Louisiana in St. Bernard Parish. See [wikipedia.org/wiki/Delacroix\\_Island,\\_Louisiana](https://wikipedia.org/wiki/Delacroix_Island,_Louisiana) [<https://perma.cc/FZ85-MRKN>].

5. Dulude & Greenwood, *supra* note 3, at 77.

6. The prevalence of headaches amongst maritime lawyers has been discussed in Julia M. Adams & Karen K. Millhollin, *Indemnity on the Outer Continental Shelf—A Practical Matter*, 27 TUL. MAR. L.J. 43 (2002).

The Fifth Circuit's holding in *Grand Isle Shipyard v. Seacor Marine, LLC* (hereinafter *Grand Isle III*)<sup>7</sup> is both substantial and extremely controversial, much like the cavorting at the Grand Isle Tarpon Rodeo, Louisiana's notorious annual fishing rodeo.<sup>8</sup> In *Grand Isle III*, the Fifth Circuit sought to overhaul its existing case law and clarify the proper means to determine whether a contract falls within the scope of OCSLA. By the end of it, the *en banc*<sup>9</sup> opinion penned by the Honorable Eugene Davis overruled a number of decisions in the Fifth Circuit and established how the circuit, going forward, would determine OCSLA situs in contract disputes.<sup>10</sup> However, some feel that the decision has done little to clear the muddy waters of Fifth Circuit case law, and instead has exposed companies operating along the Outer Continental Shelf (OCS), under presumably calculated risks, to unsuspected liabilities.<sup>11</sup>

Determining whether federal maritime law or OCSLA applies to the dispute is where the trouble begins.<sup>12</sup> *Grand Isle III* established a test intended to clear up when OCSLA would cause state law to become surrogate federal law.<sup>13</sup> Yet, recent district court decisions, like *Armijo v. Tetra Technologies*,<sup>14</sup> have made it apparent that the water is still muddy. *Armijo* was appealed, presenting a great opportunity for the Fifth Circuit to revisit *Grand Isle III*.<sup>15</sup>

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7. *Grand Isle Shipyard, Inc. v. Seacor Marine LLC*, 543 F.3d 256 (5th Cir. 2008), *reh'g en banc*, *Grand Isle Shipyard v. Seacor Marine LLC*, 589 F.3d 778 (5th Cir. 2009), *writ denied*, *Seacor Marine LLC v. Grand Isle Shipyard*, 560 U.S. 952 (2010). This comment focuses primarily on the *en banc* decision, *Grand Isle*, 589 F.3d 778, commonly known as "*Grand Isle III*."

8. *See, e.g.*, Chris Ortte, *Tarpon Rodeo Proves to be Wild West on Water*, THE DAILY REVEILLE (July 29, 2013), [lsureveille.com/opinion/opinion-tarpon-rodeo-proves-to-be-wild-west-on-water/article\\_6c33e914-f8c1-11e2-b5a5-001a4bcf6878.html](http://lsureveille.com/opinion/opinion-tarpon-rodeo-proves-to-be-wild-west-on-water/article_6c33e914-f8c1-11e2-b5a5-001a4bcf6878.html) [<https://perma.cc/MA7L-LWKE>].

9. When a circuit court sits "*en banc*," this means the case was heard before the entire circuit bench. *En banc*, BLACK'S LAW DICTIONARY (10th ed. 2014).

10. *Grand Isle III* overruled *Diamond Offshore Co. v. A & B Builder*, 302 F.3d 531 (5th Cir. 2002); *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492 (5th Cir. 2002); *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512 (5th Cir. 1996); *Hollier v. Union Texas Petroleum Corp.*, 972 F.2d 662 (5th Cir. 1992); and *Smith v. Penrod Drilling Corp.*, 960 F.2d 456 (5th Cir. 1992).

11. Joseph G. Grasso & Elisabeth A. Pimentel, *Interpretation and Enforcement of Indemnity Provisions in Maritime Contracts: We Really Do Have To Ask, Is It Salty Enough?*, 24 U.S.F. MAR. L.J. 375, 392-94 (2011-12).

12. Federal maritime law will validate such indemnity clauses, whereas OCSLA, which applies state law as a "surrogate" federal law and generally nullifies indemnity clauses. *See, e.g.*, *Baloney v. Ensco Offshore Co.* 570 Fed. App'x 423, 425 (5th Cir. 2014).

13. The "focus-of-the-contract" test determines whether or not the action arises out of an OCSLA situs. It marked a shift from looking at where the claim provoking the tort occurred, to where the work called for by the contract was to be performed. The Comment will address this in further detail below.

14. 936 F. Supp.2d 675 (E.D. La. 2013), *rev'd and rem'd*, *Tetra Technologies, Inc. v. Continental Ins. Co.*, 2016 WL 730824, No. 15-30446 (5th Cir. Feb. 24, 2016).

15. *Id.* *See* discussion *infra* Part III(E).

However, the Fifth Circuit ignored the chance and remanded *Armijo*, instructing the district court to do precisely what it was unable to do initially, given the circumstances.<sup>16</sup>

The irrefutable correlation between the oil patch and the maritime industry makes the application of maritime jurisdiction to a contract vital. Generally, the determination that maritime law—as opposed to state or other substantive federal law—governs a contract has a significant bearing on the legal consequences of the contract. For instance, maritime law prescribes its own procedures, as well as other legalities such as the application of a maritime lien.<sup>17</sup> When it comes to oil and gas production, companies need a reliable way to allocate risk. Contractual indemnity provisions between oil companies and their contractors and subcontractors have become standard practice.<sup>18</sup> However, pendent upon applicable law, these indemnity provisions are not always valid. For example, the Louisiana Oilfield Anti-Indemnity Act (LOIA) nullifies indemnification clauses contained in certain contracts “pertaining to wells for oil, gas or water, or drilling for minerals.”<sup>19</sup>

This comment will address *Grand Isle III*'s misapplication of its endorsed test to determine whether a contractual dispute arose on an OCSLA situs. Part I will provide a background covering the basic origins of maritime law and OCSLA, noting where litigation often arises between the two and how the jurisprudence has developed. Part II will provide background of pivotal cases pertaining to the matter. In Part III the comment will explore some of the problems with the Circuit's relevant test—the *PLT* test<sup>20</sup>—after *Grand Isle III*. The final portion of Part III will analyze the recent *Armijo* and *Tetra* case, which brought to fruition the problems created by *Grand Isle III*. Part IV will proffer a solution to issues created by *Grand Isle III*.

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16. *Tetra Technologies, Inc.*, 2016 WL 730824, at \*6 (*rev'ing and rem'ing Armijo*); see discussion *infra* Part III(E).

17. See ALEX L. PARKS, *THE LAW OF TUG, TOW, AND PILOTAGE* 818–19 (2d ed. 1982):

A true maritime lien may be defined as (a) a privileged claim, (b) upon marine property, (c) for services rendered to it or damage caused by it, (d) accruing from the moment when the claim attaches, (e) traveling with the property unconditionally and (f) enforced by means of an action *in rem*.

Significantly, maritime liens are completely different from the land-based lien, “as virtually all of the rules relating to maritime liens are the exact opposite of the rules relating to land-based liens.”

18. Adams & Milhollin, *supra* note 6, at 48 (2002) (“Risk allocation in the offshore oil and gas industry is an omnipresent issue. The existence of indemnity agreements has become commonplace in both maritime and oil and gas-related contracts.”).

19. See LA. REV. STAT. ANN. § 9:2780 (2016).

20. See *infra* note 63 and accompanying text. *Texas Union Petroleum v. PLT Engineering*, 895 F.2d 1043 (5th Cir. 1990), *cert denied*, 111 S. Ct. 136 (1990) [hereinafter *PLT*].

## I. MARITIME OR OCSLA, SALT OR NO-SALT?

Due to expanding mineral exploration offshore, the federal government recognized the need to assert uniform regulation over territorial waters, which eventually led to the creation of OCSLA in 1953.<sup>21</sup> Naturally, placing regulation over navigable waterways will necessitate the consideration of maritime law, a much older body of law. Because most oil and gas production occurs in the Gulf of Mexico, the Fifth Circuit has been the pioneering court of OCSLA jurisprudence, often as it relates to maritime jurisdiction.

*A. Development of Maritime Contract Jurisdiction*<sup>22</sup>

The laws of the sea are ancient, dating back to the times of Babylon and the Code of Hammurabi.<sup>23</sup> The first generally accepted system of marine rules is typically attributed to the Rhodian Sea Law, though other ancient nations likewise maintained maritime ordinances.<sup>24</sup> Logically, the body of law most important to American Admiralty and maritime law, at its inception, was the English Admiralty.<sup>25</sup> Being that it was the only maritime law with which they were familiar, maritime lawyers in the budding United States turned to English Admiralty.<sup>26</sup> However, true to

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21. See BUREAU OF OCEAN ENERGY MGMT., *OCS Lands Act History* (last visited Sept. 19, 2016), <http://www.boem.gov/OCS-Lands-Act-History/> [https://perma.cc/DUH5-ZJJK]; Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1984).

22. In the United States, there is no practical difference between “admiralty” and “maritime.” For the purposes of this paper, the two are used synonymously, where admiralty and maritime jurisdiction both refer to “the exercise of authority over maritime cases by the U.S. district courts sitting in admiralty.” *Admiralty*, BLACK’S LAW DICTIONARY (10th ed. 2014).

23. 1 BENEDICT ON ADMIRALTY §§ 1-3 (7th ed. 2015).

24. The *Scotia*, 81 U.S. 170, 187–88 (1871). The Rhodian Sea Law is derived from the *Digest*, a portion of Justinian’s *Corpus Juris Civilis*, largely attributed as being the origins of the civil law. *Rhodian Sea Law*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/event/Rhodian-Sea-Law> [https://perma.cc/EXW5-F9F4] (last visited on Sept. 19, 2016).

25. The general origin of English Admiralty is relatively uncertain. 1 BENEDICT ON ADMIRALTY, § 104, p. 7-5 (7th ed. 2015). Ironically, English Admiralty drew from the civil codes of Europe rather than common law jurisprudence. *Id.* Indeed a source of great strife in England was the friction between the English Admiralty and the English Common Law Courts. *Id.* at 31.

26. See, e.g., *N.J. Steam Nav. Co. v. Merchant’s Bank of Boston*, 47 U.S. 344, 358 (1848) (“To what source, then, are we to go to ascertain what cases are committed to the courts of the United States by the terms ‘cases of admiralty and maritime jurisdiction,’ used in the Constitution? . . . to the law of the parent country, England, [ ] the country from whence this was settled, and from whence we derive, in general, all our laws and institutions”).

revolutionary form, early judicial sentiment of American admiralty echoed the cries of a mutinous crew.<sup>27</sup>

In his unapologetically lengthy opinion in *DeLovio v. Boit*, Justice Story initiated a break from English Admiralty.<sup>28</sup> Justice Story, through cordial subscription to methods of the “learned” Mr. Justice Winchester, made it clear that American Admiralty jurisprudence, though of English descent will not be prejudiced against maritime contracts simply because such contracts were confected on land.<sup>29</sup> Rather, he reasoned that maritime contract jurisdiction “extends to all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) [sic] which relate to the navigation, business or commerce of the sea.”<sup>30</sup> In *New England Mutual Marine Insurance Co. v. Dunham*, Justice Bradley furthered the principles established in *DeLovio* by introducing the language “nature and subject matter” as the “true criterion” by which to determine a contract as maritime or non-maritime.<sup>31</sup> Since *Dunham*, courts have accepted the applicability of maritime jurisdiction to a contract as a conceptual, rather than a spatial determination—one that has proved consistent difficulty for the courts.<sup>32</sup>

Admiralty subject matter jurisdiction has been statutorily granted to federal district courts through 28 U.S.C. section 1333(1), which is grounded in the Constitution’s recognition of admiralty jurisdiction as falling within federal purview.<sup>33</sup> As a result, there is an interplay between the legislature and judiciary, whereby both have the ability to create admiralty and

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27. *Supra* note 23, at 7-6 (“not be limited by the restraining statutes or the judicial prohibitions of England—or by the local traditions of that land—but is to be interpreted by an original view.”).

28. *DeLovio v. Boit*, 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (No. 3776) (“I shall make no apology for the length of this opinion.”).

29. *Id.* at 443.

30. As compared to maritime tort jurisdiction, which depends on the locality of the tort committed. *Id.* at 444.

31. 78 U.S. 1, 26 (1870).

32. Despite some two hundred years of precedent and an expressed grant of jurisdiction, it is still apparent that “no grant of jurisdiction to the national courts has been so difficult to define” than admiralty. THEODORE M. ETTING, *THE ADMIRALTY JURISDICTION IN AMERICA*, 2 (1879). Nearly a century after Mr. Etting mentioned the difficulties of admiralty jurisdictional grant, the Supreme Court echoed the same sentiment writing in *Kossick v. United Fruit Co.*, “[t]he boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw.” 365 U.S. 731, 735 (1961), *reh’g denied*, 366 U.S. 941 (1961).

33. See U.S. CONST. art. III, § 2 (extending the judicial power to all admiralty and maritime cases); see also, U.S. CONST. art. I, § 8 (extending the legislative power to admiralty and maritime cases, both specifically and in the Necessary and Proper Clause).

maritime law; Congress through statutory authority and the courts through common law principles.<sup>34</sup>

The *ad hoc* nature of the common law has led admiralty contract jurisdiction law to evolve in a way that has created many fact-intensive cases where jurisdiction is granted. Generally, the particular types of contracts that invoke admiralty jurisdiction are well settled.<sup>35</sup> Some of these well-settled instances of admiralty contracts include contracts to furnish stevedoring services<sup>36</sup> or vessel repairs.<sup>37</sup> Whereas, marine insurance contracts, absent controlling maritime law, are subject to state law.<sup>38</sup> Additionally, contracts to tow,<sup>39</sup> pilot,<sup>40</sup> or for wharfage<sup>41</sup> of a vessel are in admiralty, as are contracts for the carriage of passengers.<sup>42</sup> Contracts to lease or charter

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34. THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW*, 2 (4th ed. 2004); *see also*, *McBride v. Estis Well Serv., LLC*, 731 F.3d 505 (5th Cir. 2013), *on reh'g en banc*, 768 F.3d 382, 405 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2310 (2015) (“[T]here are two primary sources of federal maritime law: common law developed by federal courts . . . and statutory law enacted by Congress.”).

35. SCHOENBAUM, *supra* note 34, at 60.

36. *See, e.g.*, *Am. Stevedores v. Porello*, 330 U.S. 446 (1947); *see also*, *Atl. & Gulf Stevedores, Inc. v. Revell Shipping Agency, Inc.*, 750 F.2d 457 (5th Cir. 1985). Stevedore means “to work at or undertake responsibility for the loading or unloading of (a ship).” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2239 (1976).

37. *See, e.g.*, *Diesel “Repower,” Inc. v. Islander Investments Ltd.*, 271 F.3d 1318 (11th Cir. 2001). In contrast, a contract to repair a “dead” ship does not fall within admiralty. *See*, *Colonna’s Shipyard, Inc. v. U.S.A.F. Gen. Hoyt S. Vandenberg*, 584 F. Supp.2d 862, 867 (E.D. Va. 2008) (stating that a contract to repair a “dead” ship does not fall within admiralty).

38. *See, e.g.*, *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310 (1995).

39. *See, e.g.*, *Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638 (1900).

40. *See, e.g.*, *Jackson v. Marine Exploration Co., Inc.*, 614 F.2d 65 (5th Cir. 1980); *N.J. Steam Nav. Co. v. Merchant’s Bank of Boston*, 47 U.S. 344 (1848); *Ex parte McNiel*, 80 U.S. 236 (1872); *Fordham v. Munson S.S. Line*, 6 F. Supp. 435 (S.D.N.Y. 1933).

41. *See, e.g.*, *Ex parte Easton*, 95 U.S. (5 Otto) 68, 77 (1877). Wharfage is defined as “1a: the provision or the use of a wharf. b: the handling or stowing of goods on a wharf. 2a: the charge for the use of a wharf for freight handling or ship dockage. b: a charge assessed for handling incoming or outgoing cargo on a wharf. 3: the wharf accommodations of a place.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2599-600 (1976). The unloading or loading of cargo is considered within admiralty. *See* *Marubeni-Iida (America), Inc. v. Nippon Yusen Kaisha*, 207 F. Supp. 418, 419 (S.D.N.Y. 1962), *citing to*, *Am. Stevedores*, 330 U.S. at 456. However, “[i]t is clear that admiralty has no jurisdiction over an action for damage to cargo being held for storage purposes.” *Id. citing to*, *Pillsbury Flour Mill Co. v. Interlake S.S. Co.*, 40 F.2d 439 (2d Cir. 1930), *cert. denied*, 282 U.S. 845 (1930).

42. *See, e.g.*, *Lubick v. Travel Services, Inc.* 573 F. Supp. 904 (D.V.I. 1983).

vessels are in admiralty,<sup>43</sup> but contracts to sell or construct entirely new vessels are not.<sup>44</sup> Even contracts to cater or supply groceries to a movable drilling rig are in admiralty.<sup>45</sup>

Nevertheless, discerning whether a contract for work to be performed offshore or over the OCS falls within admiralty, has proven to be a most trying task. While a contract may place parties directly above water, in the Gulf of Mexico it is never safe to assume maritime law will inevitably apply to a dispute. Thus, off the Fifth Circuit coast, companies run the risk of facing OCSLA and losing protections afforded to them by maritime law.

### *B. Origins of OCSLA*

Congress enacted OCSLA to assert federal control over the natural resources located on the OCS and to encourage oil and gas exploration.<sup>46</sup> Enacted on August 7, 1953, the Act defines the OCS as encompassing “all submerged lands lying seaward and outside of the area of lands beneath navigable waters . . . and of which the subsoil and seabed appertain to the United States.”<sup>47</sup> Furthermore, for the application of certain sections of OCSLA—such as 43 U.S.C. sections 1333(a)(2) and 1333(b)—the situs

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43. *See, e.g.*, *Cooper v. Meridian Yachts*, 575 F.3d 1151 (11th Cir. 2009); *Armour & Co. v. F. Morgan S. S. Co.*, 270 U.S. 253 (1926); *Jack Neilson, Inc. v. Tug Peggy*, 428 F.2d 54 (5th Cir. 1970); *Kirno Hill Corp. v. Holt*, 618 F.2d 982 (2d Cir. 1980); *see also*, *Sword Line, Inc. v. United States*, 230 F.2d 75 (2d Cir. 1956), *aff'd*, 351 U.S. 976 (1956) (describing a quasi-contract action for the alleged overpayment of a charter for government merchant vessels; holding the case in admiralty). Preliminary agreements to charter a vessel do not fall within admiralty. *See, e.g.*, *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Co.*, 739 F.2d 798, 801 (2d Cir. 1984), *writ denied*, 470 U.S. 1031 (1985), *citing to*, *The Thames*, 10 F. 848 (S.D.N.Y. 1881).

44. *See, e.g.*, *People's Ferry Co. v. Beers*, 61 U.S. (20 How.) 393 (1858). However, the general rule has become that a vessel under construction may become the object of a contract when construction has progressed enough so that the vessel may perform its intended use. *Thames Towboat Co. v. The Francis McDonald*, 254 U.S. 242 (1920).

45. *Stoot v. Fluor Drilling Services, Inc.*, 851 F.2d 1514 (5th Cir. 1988).

46. *See* 43 U.S.C. § 1332 (2012).

47. *See* 43 U.S.C. § 1331(a) (2012).

requirement established by 43 U.S.C. section 1333(a)(1) must be met.<sup>48</sup> The Act was broadly interpreted in *Rodrigue v. Aetna Casualty & Surety Co.* to include as an OCSLA situs fixed structures such as artificial island drilling rigs located on the Outer Continental Shelf.<sup>49</sup> However, in *Offshore Logistics, Inc. v. Tallentire*, the Supreme Court restricted the application of OCSLA to accidents “actually occurring” on an artificial island.<sup>50</sup> Additionally, although federal law exclusively governs the OCS, section 1333(a)(2) provides for the laws of the adjacent state to apply as the “surrogate federal law.”<sup>51</sup> Unless state law conflicts with federal law, whether state law applies as surrogate federal law has been the center point of a great deal of complex OCSLA litigation; particularly, in litigation over jurisdiction and choice-of-law.<sup>52</sup>

### C. Litigating OCSLA in the Fifth Circuit

Of course, the Fifth Circuit is where these choice-of-law cases will moor, as nearly all OCSLA-related cases involve disputes that arise out of

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48. 43 U.S.C. § 1333(a)(1):

The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and 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 State: *Provided, however*, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(emphasis in original).

49. 395 U.S. 352, 355–58 (1969).

50. 477 U.S. 207, 217 (1986). The case involved a wrongful death action arising out of a helicopter crash into the high sea. The Court applied the Death on the High Seas Act, reasoning that “[a]lthough the decedents were killed while riding in a helicopter and not a more traditional maritime conveyance, that helicopter was engaged in a function traditionally performed by waterborne vessels: the ferrying of passengers from an ‘island,’ albeit an artificial one, to the shore.” *Id.* 477 U.S. at 218.

51. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 357 (1969). At this time, the Supreme Court was interpreting an earlier version of OCSLA, as the Act was amended in 1978.

52. SCHOENBAUM, *supra* note 34, at 51.

the Gulf of Mexico.<sup>53</sup> Although not the earliest case of this type, *Demette v. Falcon Drilling Company*<sup>54</sup> delineated important situs distinctions within section 1333(a)(1), providing an analytical launch-point. In *Demette*, which centered on an indemnity claim, the Fifth Circuit found the contractual dispute arose on an OCSLA situs purely because the relevant accident occurred on an OCSLA situs.<sup>55</sup> The court incorporated distinct locations that satisfy the OCSLA situs test as prescribed in section 1333(a)(1):

The OCSLA applies to all of the following locations:

- (1) the subsoil and seabed of the OCS;
- (2) any artificial island, installation, or other device if:
  - (a) it is permanently or temporarily attached to the seabed of the OCS, and
  - (b) it has been erected on the seabed of the OCS, and
  - (c) its presence on the OCS is to explore for, develop, or produce resources from the OCS;
- (3) any artificial island, installation, or other device if:
  - (a) it is permanently or temporarily attached to the seabed of the OCS, and
  - (b) it is not a ship or vessel, and
  - (c) its presence on the OCS is to transport resources from the OCS.<sup>56</sup>

Subsequently, *Demette* was overruled on the grounds that it improperly attributed OCSLA situs to the facts based on tort, rather than contract, principles.<sup>57</sup> Nonetheless, the situs distinctions furthered by *Demette* are still important for situs determinations, regardless of whether a court is inquiring about a tort or contractual dispute.<sup>58</sup>

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53. Prior to 1981, the Fifth Circuit encompassed all Gulf Coast states. However, it was split into two different appellate circuits: the current Fifth Circuit (Texas, Louisiana, and Mississippi) and the current Eleventh Circuit (Alabama, Georgia, and Florida). Thomas J. Coleman, Jr., *Disordered Liberty: Judicial Restrictions on the Rights to Privacy and Equality in Bowers v. Hardwick and Baker v. Wade*, 12 T. MARSHALL L. REV. 81, 92 (1986). Still, because most oil and gas production in the Gulf of Mexico stems from Texas and Louisiana, today's Fifth Circuit handles just about every OCSLA case.

54. 280 F.3d 492 (5th Cir. 2002), *reh'g denied*, 37 Fed. Appx. 93 (2002), *overruled on other grounds*, *Grand Isle III*, 589 F.3d at 786.

55. *Id.* at 498.

56. *Id.* at 497.

57. *Id.* at 492, *reh'g denied*, 37 Fed. Appx. 93 (2002), *overruled on other grounds*, *Grand Isle*, 589 F.3d at 786.

58. See, e.g., *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 213 (5th Cir. 2013); *McDowell v. C&D Prod. Specialists, Co., Inc.*, No. 14-569, 2015 WL 4564771, at \*3 (W.D. La. 2015); and *Energy XXI, GoM, LLC v. New Tech Eng'g, L.P.*, 787 F. Supp.2d 590, 601 (S.D. Tx. 2011).

*Rodrigue* dealt with consolidated wrongful death actions: one arising out of an accident involving a crane mounted to the artificial island drilling rig<sup>59</sup> and the other resulting from a fall atop the derrick above the artificial island drilling rig.<sup>60</sup> In *Rodrigue*, the Fifth Circuit explained that once the OCSLA situs has been satisfied, it must next be determined whether state law applies as “surrogate” federal law under 43 U.S.C. section 1333(a)(2).<sup>61</sup> In making this determination, the Fifth Circuit employs a test adopted in 1990, which serves as the courts’ “analytical starting point.”<sup>62</sup> In *Texas Union Petroleum v. PLT Engineering* (hereinafter *PLT*),<sup>63</sup> the Fifth Circuit articulated the three-prong “*PLT* test,” allegedly formulated in *Rodrigue*,<sup>64</sup> to determine this inquiry:

[For state law to govern:] (1) The controversy must arise on a situs covered by OCSLA (i.e., the subsoil, seabed, or artificial structure permanently or temporarily attached thereto); (2) Federal maritime law must not apply of its own force; and (3) the state law must not be inconsistent with Federal law.<sup>65</sup>

Often, inquiry into the test’s second prong—whether federal maritime law applies of its own force—dictates the result.<sup>66</sup> In *Davis & Sons, Inc. v. Gulf Oil Corp.* (hereinafter *Davis*), the Fifth Circuit prescribed a rather

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59. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 352 (1969).

60. *Id.* at 354.

61. SCHOENBAUM, *supra* note 34, at 51. See § 1333(a)(2) reading:

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction: (2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf. (B) Within one year after September 18, 1978, the President shall establish procedures for setting any outstanding international boundary dispute respecting the outer Continental Shelf.

62. Robertson, *supra* note 1, at 541.

63. 895 F.2d 1043 (5th Cir. 1990), *cert denied*, 111 S. Ct. 136 (1990).

64. See *infra* note 80 and accompanying text.

65. *Id.* at 1047.

66. See SCHOENBAUM, *supra* note 34, at 53.

particular test for determining the second prong—whether a contract for offshore drilling activity constitutes a maritime contract:

- 1) What does the specific work order in effect at the time of the injury provide?
- 2) What work did the crew assigned under the work order actually do?
- 3) Was the crew assigned to do work aboard a vessel in navigable waters?
- 4) To what extent did the work being done relate to the mission of the vessel?
- 5) What was the principal work of the injured worker? and
- 6) What work was the injured worker actually doing at the time of the injury?<sup>67</sup>

These cases form the framework for the Fifth Circuit's adjudication of OCSLA choice-of-law disputes.<sup>68</sup> Further, as nearly all OCSLA cases are decided in the Fifth Circuit, other circuits often follow the Fifth Circuit's methods in their intermittent adjudication of OCSLA disputes.<sup>69</sup>

## II. PIVOTAL CASES

The crux of Fifth Circuit jurisprudence on OCSLA choice-of-law analysis relies on two cases, separated by nearly twenty-years of litigation: *PLT* and *Grand Isle III*.

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67. 919 F.2d 313, 316 (5th Cir. 1990), *reh'g denied*, 924 F.2d 1054 (5th Cir. 1991).

68. *See, e.g.*, *ACE Am. Ins. Co. v. M-I, LLC*, 699 F.3d 826 (5th Cir. 2012) and *Armijo v. Tetra Technologies, Inc.*, 936 F. Supp.2d 675 (E.D. La. 2013), *appeal docketed*, *Tetra Technologies, Inc., et. al. v. Vertex Services, LLC*, No. 12-2667, 2015 WL 1810453 (E.D. La. April 20, 2015).

69. *See, e.g.*, *Valladolid v. Pacific Operations, LLP*, 604 F.3d 1126, 1139 (9th Cir. 2010) (“[W]e adopt the following test . . . [which] is consistent with the pre-*Mills* Fifth Circuit interpretation of [43 U.S.C.] § 1333(b), which we endorse.”); and *Curtis v. Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 811 (3d Cir. 1988) (“We agree with the Fifth Circuit position that the ‘but for’ test is appropriate in establishing whether Curtis’s injury occurred as a result of operations on the outer continental shelf.”).

A. *PLT: Grey Horses and Ubiquitous Tentacles*<sup>70</sup>

For twenty-five years, *PLT* has formed the backbone of the Fifth Circuit's choice-of-law analysis under OCSLA.<sup>71</sup> However, unlike the majority of these contractual indemnity cases, *PLT* was not an indemnity clause case, nor did it arise from the commission of a tort.<sup>72</sup> Instead, *PLT* was, as the court put it in *Grand Isle III*, a "pure contract case."<sup>73</sup> The dispute arose from Union Texas Petroleum's (UTP) invocation of a contractual provision that allowed the corporation to withhold payment to *PLT* in the event *PLT* failed to pay its subcontractors.<sup>74</sup> *PLT* sued to obtain payment for its work, and further sought to impose a statutory lien on the pipeline.<sup>75</sup> Whether *PLT* was entitled to the lien depended on whether Louisiana law applied as surrogate federal law under OCSLA.<sup>76</sup> According to the contract, *PLT* was obligated to "design, fabricate, and install a gas transportation system from a platform owned by UTP . . . to a side tap" in a different pipeline, all located on or buried under the OCS.<sup>77</sup> The Fifth Circuit instituted the three-pronged *PLT* test that guides district courts' determination of whether state law should act as surrogate to federal law under section 1333(a)(2)(A).<sup>78</sup>

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70. Title inspired by the language in Circuit Judge Brown's opinion; see, *PLT*, 895 F.2d at 1049.

71. The following cases either examined or discussed *PLT* when analyzing a dispute relating to the OCS: *Grand Isle III*, 589 F.3d 778 (5th Cir. 2009); *Demette*, 280 F.3d 492 (5th Cir. 2002); *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512 (5th Cir. 1996); *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208 (5th Cir. 2013); *ACE Am. Ins.*, 699 F.3d 826 (5th Cir. 2012); *Texaco Exploration and Prod., Inc. v. AmClyde Engineered Products Co., Inc.*, 448 F.3d 760 (5th Cir. 2006); *Diamond Offshore Co. v. A&B Builders, Inc.*, 302 F.3d 531 (5th Cir. 2002); *Dahlen v. Gulf Crews, Inc.*, 281 F.3d 487 (5th Cir. 2002); *Smith v. Penrod Drilling Corp.*, 960 F.2d 456 (5th Cir. 2014); *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083 (5th Cir. 1990); *In re Deepwater Horizon*, 745 F.3d 157 (5th Cir. 2014) (declined to extend); *Baloney v. Ensco Offshore Co.*, 570 Fed. Appx. 423 (5th Cir. 2014); *Cutting Underwater Technologies USA, Inc. v. Eni U.S. Operating Co.*, 671 F.3d 512 (5th Cir. 2012); *Hamm v. Island Operating Co.*, 450 Fed. Appx. 365 (5th Cir. 2011); *United States v. Pickett*, 598 F.3d 231 (5th Cir. 2010); *Alleman v. Omni Energy Services Corp.*, 580 F.3d 280 (5th Cir. 2009); *Stanfield v. Island Operating Co.*, 306 Fed. Appx. 175 (5th Cir. 2009).

72. *PLT*, 895 F.2d 1043, 1046.

73. *Grand Isle III*, 589 F.3d at 785.

74. *PLT*, 895 F.2d at 1046.

75. *Id.* at 1045–46.

76. *Id.* at 1049–50.

77. *Id.* at 1045.

78. *Id.* at 1047.

Courts in the Fifth Circuit have since followed the *PLT* test without hesitation.<sup>79</sup> Most peculiar is the fact that, in *Grand Isle III*, the court claimed the *PLT* test was a three-step process originally formulated by the Supreme Court in *Rodrigue*; however, it would be a fruitless endeavor to search for anything formulating these three conditions in *Rodrigue*.<sup>80</sup> Moreover, the *PLT* test itself has not been a cornerstone of clarity. Arguably, the test is flawed.<sup>81</sup> As Professor David Robertson, a leading admiralty scholar, has averred (prior to *Grand Isle III*), the *PLT* test contains three flaws:

(a) *PLT*'s first element affirmatively misrepresents [43 USC section] 1333(a)(2)(A) by putting "temporarily attached" structures within its coverage. (b) *PLT*'s second element elides the fact that [section] 1333(a)(2)(A) precludes the application of adjacent-state federal law only when it is "inconsistent with . . . other Federal laws." Federal maritime law and adjacent-state surrogate federal law might both apply in a case in which there is no inconsistency between the two. (c) *PLT*'s third element overlaps its second in a confusingly inaccurate way, implying on the one hand that federal maritime law may not have to be inconsistent with adjacent-state law in order to oust it and on the other hand that federal maritime law may not constitute "other Federal laws" for [section] 1333(a)(2)(A) purposes.<sup>82</sup>

Furthermore, after *Grand Isle III*, whether the *PLT* test's three-step process actually continues to serve its function is up for debate.<sup>83</sup> Granted, these flaws may have been real issues with the *PLT* test before *Grand Isle III*. However, because the Fifth Circuit made such a substantial shift in the *PLT* test's application, additional issues have since developed.

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79. See, e.g., The *PLT* test "is firmly supported in the Fifth Circuit jurisprudence as the proper test for deciding whether state law provides the rule of decision in an OCSLA case." *Grand Isle I*, 2007 WL 2874808, at \*3 (citing *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512, 1526 (5th Cir. 1996)); see also, *Baloney v. Ensco Offshore Co.*, 570 Fed. Appx. 423, 425–26 (5th Cir. 2014), applying the *PLT* test; and *In re Deepwater Horizon*, 745 F.3d 157 n.10 (5th Cir. 2014).

80. Reiterating Professor Robertson's sentiment; see, David W. Robertson, *OCS Indemnity Contracts: State Law or Maritime Law?—Grand Isle Shipyard v. Seacor Marine, LLC*, 35 TUL. MAR. L.J. 467, 490 (2011), citing to, *Hogden*, 87 F.3d at 1525 ("The *PLT* test was first announced in that case in 1990 without relevant citation.").

81. Robertson, *supra* note 1, at 541.

82. *Id.*

83. See Robertson, *supra* note 80, at 490.

*B. Grand Isle III: The Salt less Rodeo*

*Grand Isle III* involved a dispute over a contractual indemnity clause triggered by the injury of Grand Isle Shipyard (GIS) employee, Denny Neil, on a Seacor Marine vessel.<sup>84</sup> While en route to the residential platform after a day's work, Neil tripped trying to exit the galley of the M/V SEA HORSE IV, injuring his ankle.<sup>85</sup> He initially sued Seacor, which subsequently settled, but in turn sued GIS for indemnity pursuant to its contracts with BP American Production Company (BP).<sup>86</sup> Seacor and GIS had contracted respectively with BP to service BP's platforms on the OCS.<sup>87</sup> The contractual relationship between GIS and BP consisted of two levels: first, under a blanket agreement, the Master Maintenance and Construction Services Contract (MMCSC), and second, within specific work orders.<sup>88</sup>

Seacor and BP contracted by way of a Vessel Charter Agreement, which called for the transportation of laborers to and from the various platforms.<sup>89</sup> Although these contracts with BP were separate and distinct, it was understood that they created a relationship between all three parties.<sup>90</sup> Each contract contained an identical hold-harmless indemnity clause that stipulated all contractors and subcontractors of BP were to indemnify each other in the event liabilities were incurred.<sup>91</sup> As in *PLT*,

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84. *Grand Isle III*, 589 F.3d 778, 782 (5th Cir. 2009).

85. *Id.* at 781.

86. *Id.* at 782.

87. *Id.* at 789.

88. Master Service agreements lay out the general provisions of a contractual relationship, whereas a "work order" is more like an invoice that shows what specific work has been performed. Neil's work order on the day of the accident called for laying and welding down grating, welding a pollution rail, and clean up the work space. See Motion for Summary Judgment by Grand Isle Shipyard, Inc., Gray Ins. Co., *Grand Isle Shipyard, Inc. v. Seacor Marine LLC*, 589 F.3d 778 (5th Cir. 2009) (No. 06-01405) (Exhibit "D-Part 5" Daily Work Tickets).

89. See *id.* (Exhibit "C-Part 1" Vessel Charter Contract).

90. See the contractual language provided at *Grand Isle*, 589 F.3d at 791:

Contractor [Grand Isle] agrees to defend, indemnify, release and hold company's [BP] to other contractors [e.g., Seacor] harmless in accordance with the provisions of this Article 14 (to the extent such other Contractors execute cross indemnification provisions substantially similar to those contained in this section 14.07) from and against all claims, liabilities, damages, and expenses (including without limitation attorney's fees and other costs of defense), irrespective of insurance coverage for the following: (i) all injuries to, deaths, or illnesses or persons in contracted group CG . . . .

91. This is common practice in the industry; however, there are strong policy reasons to nullify these kinds of indemnity clauses—they too often are the result of unequal bargaining power. Some states (e.g., Louisiana (LOIA) and Texas (Texas Oilfield Anti-Indemnity Statute)) have enacted legislation to nullify these clauses.

the validity of the indemnity clauses depended on “whether the adjacent state law of Louisiana, including LOIA [Louisiana Oilfield Anti-Indemnity Act], applies to the case.”<sup>92</sup> If Louisiana law applied, the indemnity clauses would be nullified, but if Louisiana law did not apply, the clauses would be valid and enforceable.<sup>93</sup>

The court focused its analysis on the first *PLT* prong (whether the controversy arose on a situs covered by OCSLA),<sup>94</sup> ultimately establishing the “focus-of-the-contract” test as the means for determining the first *PLT* prong. The court deferred to the district court on the second and third prongs.<sup>95</sup> This became an opportunity for the court to correct a disparity in its jurisprudence. Specifically, before *Grand Isle III*, the Fifth Circuit had not analyzed the first *PLT* prong consistently; some panels had looked to where the tort occurred, while others looked to the nature of the contract.<sup>96</sup> Reasoning that it was improper to apply tort law principles while adjudicating contract law disputes, *Grand Isle III* settled the intra-circuit split and overruled a number of cases.<sup>97</sup> Accordingly, the majority assessed the first prong under the “focus-of-the-contract.”<sup>98</sup> Specifically, the test examines where a majority of work called for by the contract is performed.<sup>99</sup> The court held that “a contractual indemnity claim (or any other contractual dispute) arises on an OCSLA situs if a majority of the performance called for under the contract is to be performed on stationary platforms or other OCSLA situses enumerated in 43 U.S.C. section 1333(a)(2)(A).”<sup>100</sup>

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92. See *Grand Isle III*, 589 F.3d at 782.

93. See *id.* at 782.

94. See *id.* at 783; Robertson, *supra* note 80, at 471 (“Once *Grand Isle* had won the ‘OCSLA situs’ battle, the war was pretty much over.”).

95. *Grand Isle III*, 589 F.3d 778, 789 (5th Cir. 2009).

96. *Id.* at 786.

97. See cases cited *supra* note 10.

98. See *Grand Isle III*, 589 F.3d at 787. A significant reason why courts urge the distinction between tort and contract jurisdiction is because of the “fortuity element” involved in torts. A fortuitous event is defined as “[a] happening that, because it occurs only by chance or accident, the parties could not reasonably have foreseen.” BLACK’S LAW DICTIONARY 769 (10th ed. 2014). See also, LA. CIV. CODE ANN. art. 1875 (“A fortuitous event is one that, at the time the contract was made, could not have been reasonably foreseen.”). Tort actions are governed by the laws of the place where the tort occurred; see RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378 (1934). Because the jurisdiction where (at least negligent) torts occur is largely left up to chance, the governing law is equally fortuitous. Where a contract seeks to predetermine which laws will govern a relationship in the event of a dispute between the parties, it would be counterintuitive to subject a contracted relationship to chance.

99. See *Grand Isle III*, 589 F.3d at 787.

100. See *id.*

### III. THE PROBLEMS WITH *PLT* AFTER *GRAND ISLE III*

There are a number of problems with *Grand Isle III* and, since the opinion was released in 2009, many of these concerns have been voiced, but deserve to be revisited.

#### A. *What is Left of the First and Second Prongs*

After *Grand Isle III*, the *PLT* test can scarcely be said to still serve its purpose. By holding that the first prong's focus is aimed at where the contract calls for the work to be performed, *Grand Isle III* effectively merged the first and second prongs.<sup>101</sup> Deciding the first prong under a focus of the contract test essentially "dismantles" the test.<sup>102</sup> Professor Robertson called this a "strong move toward making the nature of the contract . . . dominant for the first *PLT* factor as well."<sup>103</sup> However, calling it a "strong move toward" underestimates the result—the move precisely made the nature of the contract the dominant consideration of the first *PLT* factor. Illustrating the result of this shift, the second prong seeks to determine the "nature and character" of the contract.<sup>104</sup> Perhaps the most indicative element of a contract's nature and character is where a majority of the work is to be performed. Judge Garza warned of this overlap in his dissent to *Grand Isle III*.<sup>105</sup> Even so, the fusion of the first and second prongs, though unintentional, should theoretically provide for a more efficient test—allowing courts to analyze the issue communally.<sup>106</sup>

#### B. *Grand Isle III's Chance to Get Salty: Kirby and Davis*

It is a mystery as to why the court limited its analysis of the second and third prong to judicial check swings, afforded only brief mentioning

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101. *Grand Isle III*, 589 F.3d 778, 799 (5th Cir. 2009).

102. See Robertson, *supra* note 80, at 490.

103. *Id.*

104. As the second prong of its analysis, the *PLT* test employs the test furthered by *Davis*. *Grand Isle I*, the district court decision, examined the second prong in full *Davis* analysis and concluded Neil's work order and GIS' MMCSC did not constitute a maritime contract. *Grand Isle Shipyard, Inc. v. Seacor Marine LLC*, No. 06-1405, 2007 WL 2874808, at \*5 (E.D. La. Sept. 26, 2007). Ultimately, the goal of *Davis* is to determine whether a contract's "nature and character" constitutes a maritime contract. *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990), *reh'g denied*, 924 F.2d 1054 (5th Cir. 1991).

105. See *Grand Isle III*, 589 F.3d at 799–800.

106. See *infra* text Part IV.

in the majority's opinion.<sup>107</sup> Notwithstanding Judge Engelhardt's agreeable analysis of the contract under *Davis*,<sup>108</sup> the Fifth Circuit skirted an opportunity to bring its maritime contract test up to date. The Supreme Court addressed maritime contract jurisdiction determination in *Norfolk Southern Railway Co. v. Kirby* five years prior to *Grand Isle III* and fourteen years after *Davis*.<sup>109</sup>

*1. The Supreme Court's Modification of Maritime Contract Jurisdiction in Kirby*

The issue presented in *Kirby* was whether bills of lading<sup>110</sup> for the shipment of goods that required both rail and vessel transportation should be considered maritime contracts.<sup>111</sup> The dispute arose out of a train derailment between Savannah, Georgia and Huntsville, Alabama.<sup>112</sup> The bills of lading governing the parties called for the transportation of goods from Sydney, Australia, to Huntsville, Alabama; requiring the goods to be transferred from ship to rail at Savanna, Georgia, in order to reach the final destination.<sup>113</sup> Critically, each bill of lading contained a "Himalaya Clause," which is intended to limit liabilities of parties in a shipping arrangement.<sup>114</sup> The Himalaya Clause is generally accepted in international shipping nations, but its "effect varies from total exculpation in some countries to invalidity in others."<sup>115</sup> Himalaya Clauses have not

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107. Only at the second to last paragraph of the majority's opinion are the second and third *PLT* prongs sparingly addressed. See *Grand Isle III*, 589 F.3d 778, 789 (5th Cir. 2009).

108. See, *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, No. 06-1405, 2007 WL 2874808, at \*4-5 (E.D. La. 2007).

109. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14 (2004).

110. A bill of lading is a detailed list of shipment of goods in the form of a receipt given by the carrier to the person consigning the goods. See NEW OXFORD AMERICAN DICTIONARY THIRD EDITION (2010). Bills of lading serve as prima facie evidence of the goods shipped. 46 U.S.C. § 30703(c). Additionally, a bill of lading can be both a contract and a receipt; see *J.K. Armsby Co. v. Actieselskabet Dampskibet Island*, 272 F. 266 (2d Cir. 1921), *cert denied*, 257 U.S. 634 (1921).

111. *Id.*

112. *Id.* at 19.

113. *Kirby*, 543 U.S. at 18.

114. Himalaya Clauses are contractual devices that provide liability limitations to other downstream parties that take part in the contract's execution. They originate from the English case, *Adler v. Dickson*, [1955] 1 Q.B. 158 (C.A.).

115. Joseph C. Sweeney, *Crossing the Himalayas: Exculpatory Clauses in Global Transport. Norfolk Southern Railway Co. v. James N. Kirby, PTY LTD.*, 125 S. Ct. 385, 2004 AMC 2705 (2004), 36 J. MAR. L. & COM. 155, 162 (April, 2005).

received seamless acceptance in the U.S. federal courts,<sup>116</sup> just as indemnity clauses are not deemed valid in all U.S. state jurisdictions.<sup>117</sup>

Initially, the parties in *Kirby* assumed that federal law, as opposed to state law, applied.<sup>118</sup> It was not until the case reached the Supreme Court that counsel for Kirby argued the matter sounded in tort—calling for the application of state law and the subsequent nullification of the Himalaya Clause.<sup>119</sup> As in *Grand Isle III*, in *Kirby*, determining the controlling law of the bills of lading—federal maritime or state—ultimately determined the applicability of the bills’ Himalaya Clauses.<sup>120</sup> If maritime law applied, the Himalaya Clauses were enforceable, affording Norfolk Southern liability protection. Conversely, if state law applied, the clauses would be nullified. The Court ultimately ruled that maritime law would apply to the bills of lading, reasoning that, “[c]onceptually, so long as the bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus is a maritime contract.”<sup>121</sup>

Prior to *Kirby*, when courts were presented with disputes arising from mixed contracts, the standard was to separate the parts of the contract when possible and to apply the appropriate law to each part, respectively.<sup>122</sup> This was known as the mixed contract doctrine. Arguably, *Kirby* did away with the mixed contract doctrine, which resulted in an expansion of the bounds of admiralty contract jurisdiction.<sup>123</sup> Relative to *Grand Isle III*, and all other Fifth Circuit cases after *Kirby*, *Kirby* proves important because of the effect it should have on the second *PLT* prong. Considering the Supreme Court’s new maritime contract jurisdiction regime, there is propensity for some of these Fifth Circuit OCSLA contract disputes to have been within federal maritime jurisdiction.

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116. *Id.*

117. *See, e.g.*, Louisiana Oilfield Anti-Indemnity Act, LA. REV. STAT. ANN. § 9:2780 (2016).

118. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 22 (2004).

119. *Id.*

120. *Id.* at 31–32.

121. *Id.* at 27.

122. Generally, mixed contracts did not fall within admiralty jurisdiction. However, a court could exercise admiralty jurisdiction over a contract with obligations for carriage over both land and sea if: (1) the claim arises from a breach of maritime obligations that are severable from the non-maritime portion obligations, or (2) the land-based portion of the contract was merely incidental. *Hartford Fire Ins. Co. v. Orient Overseas Containers (UK) Ltd.*, 230 F.3d 549, 555 (2d Cir. 2000).

123. Marva Jo Wyatt, *COGSA Comes Ashore . . . and more: The Supreme Court Makes Inroads Promoting Uniformity and Maritime Commerce in Norfolk Southern Railway v. Kirby*, 30 TUL. MAR. L.J. 101, 122 (2006).

## 2. Davis: *The Fifth Circuit's Maritime Contract Jurisdiction Test*

The Fifth Circuit's maritime contract jurisdiction test was set forth in *Davis*.<sup>124</sup> However, determining whether Fifth Circuit verdicts of the past decade in OCSLA disputes under *Davis* would have been different is not entirely necessary to prove that *Davis* is "obsolete."<sup>125</sup> Evidencing its age, *Davis* recognized the mixed contract doctrine.<sup>126</sup> *Kirby* has at least diminished, if not demolished, the mixed contract doctrine.<sup>127</sup> Aside from the issues with *PLT*, just by the mere pecking order of the judiciary system, the Fifth Circuit should have incorporated *Kirby* into the second prong of the *PLT* test. The Fifth Circuit has since recognized *Kirby* on occasion, but has largely remained idle at the chance to even revisit *Davis* in lieu of *Kirby*, much less implement *Kirby* into the second *PLT* factor.<sup>128</sup>

However, to say that *Davis* is entirely obsolete is a stretch. There are certainly some elements in *Davis* that are not inconsistent with *Kirby* and would tend to aid in the determination of the nature and character of the contract. A particularly important element furthered by *Davis* concerns contractual arrangements consisting of two parts, a blanket agreement followed by later work orders.<sup>129</sup> *Davis* held that in these circumstances, the court should interpret the two together.<sup>130</sup> In fact, some of *Davis*'s language anticipated *Kirby*:

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124. See *supra* note 67 and accompanying text.

125. See Robertson, *supra* note 1, at 542. Given the age of *Davis* (twenty-six years), the argument that it has become "obsolete" appears to have some merit, especially since *Kirby* has since been decided.

126. See *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 315–16 (5th Cir. 1990), *citing to*, *Compagnie Francaise De Navigation A Vapeur v. Bonnasse*, 19 F.2d 777, 779 (2d Cir. 1927), *quoted in* *Hale v. Co-Mar Offshore Corp.*, 588 F. Supp. 1212, 1217 (W.D. La. 1984).

127. See Wyatt, *supra* note 123; see also THOMAS J. SCHOENBAUM & JESSICA L. MCCLELLAN, *ADMIRALTY AND MARITIME LAW*, § 1-10 (4th ed., 2010 Pocket Part).

128. *Davis* is still considered to be good law by Fifth Circuit standards and is consistently applied. See *Baloney v. ENSCO, Inc.*, No. 11-2730, 2013 WL 1856039 (5th Cir. 2013), *aff'd*, *Baloney v. Ensco Offshore Co.*, 570 Fed. Appx. 423 (5th Cir. 2014); *ACE Am. Ins. v. M-I, LLC*, 699 F.3d 826 (5th Cir. 2012); *Devon La. Corp. v. Petra Consultants, Inc.*, 247 Fed. Appx. 539 (5th Cir. 2007); *Hoda v. Rowan Co.*, 419 F.3d 379, 381 (5th Cir. 2005). Additionally, research to date does not provide any substantive negative treatment of *Davis & Sons*. *Raffray v. Gulf Logistics, LLC*, No. 10-1017, 2010 WL 5055849 (E.D. La. 2010) declined to extend *Davis*. In *Alleman v. Omni Energy Services Corp.*, 580 F.3d 280, 284 (5th Cir. 2009), the sitting panel comprised of Circuit Judges Smith, Garza, and Clement, quoted *Kirby* but continued on stating, "In this circuit, we utilize the two-part inquiry laid out in *Davis*" without acknowledging the disparities between the two and *Davis*'s apparent age.

129. *Davis*, 919 F.2d at 315.

130. *Id.* However, *Grand Isle III* seems to have rejected this; see *infra* note 138.

Whether the blanket agreement and works, read together, do or do not constitute a maritime contract depends . . . on the ‘*nature and character of the contract*,’ rather than on its *place of execution or performance* . . . a contract is maritime if it has a ‘genuinely salty flavor.’<sup>131</sup>

Moreover, the six factors advanced in *Davis* to determine maritime contract jurisdiction, when the historical treatment is not readily apparent, are not inconsistent with the goals of *Kirby* and may still help courts evaluate the nature and character of the contract.<sup>132</sup> That being said, these factors serve best as complimenting elements for determining a contract’s primary objective, rather than being the steadfast rule.

Prior to *Grand Isle III*, courts within the Fifth Circuit have acknowledged the relation between *Davis* and *Kirby*.<sup>133</sup> Specifically, the district courts were of the opinion that “[*Kirby*] did not alter this circuit’s standards for determining whether a contract is maritime or non-maritime.”<sup>134</sup> Notwithstanding the numerous opportunities, the Fifth Circuit has not explicitly addressed the apparent discrepancy, but instead continues with *Davis*.<sup>135</sup>

### C. Application of the “Focus-of-the-Contract” Test

Despite establishing the focus-of-the-contract test, *Grand Isle III* did not offer guidance on how to apply the test.<sup>136</sup> It is easy to point out the difficulty in determining what constitutes the “majority” of the work called for by the contract purely by the imprecise nature of “majority.”<sup>137</sup> However, *Grand Isle III*’s application of the test to the circumstances is

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131. *Davis*, 919 F.2d at 316, citing to, *N. Pacific S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 125 (1919); *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) (emphasis added). *Kirby* echoed the language of *Davis*, using “nature and character” and “place of the contract’s formation or performance.” *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 24 (2004).

132. When the historical treatment in jurisprudence does not easily reveal a contract to be maritime, *Davis* lists six fact-specific factors to determine how the contract should be treated. *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990). See *supra* note 67 and accompanying text for factors.

133. See *Alleman*, 580 F.3d at 284.

134. See, e.g., *Alleman v. Omni Energy Services Corp.*, 434 F. Supp.2d 405, 411 (E.D. La. 2006).

135. See *supra* note 128.

136. See *Grand Isle III*, 589 F.3d 778, 801 (5th Cir. 2009) (Garza, J., dissenting).

137. To refresh, in applying the focus-of-the-contract test, a contractual dispute will arise “under an OCSLA situs if a *majority* of the work called for by the contract is on stationary platforms or other enumerated OCSLA situs.” *Grand Isle III*, 589 F.3d at 787 (italics added).

not so obvious. There are two clear issues with the majority's application of the focus-of-the-contract test.

First, it appears the majority applied the test to the work order under which Neil was operating, instead of together with the blanket agreement.<sup>138</sup> It is common practice in the industry to form contractual relationships at two levels; first, sign a blanket agreement, and then later issue work orders for specific jobs.<sup>139</sup> This begs the question of which to apply the focus-of-the-contract test to: the blanket agreement, the work order, or both. Prior to *Grand Isle III*, it was well established that courts were to interpret blanket agreements and work orders together.<sup>140</sup> In footnote six of *Grand Isle III*, the majority acknowledged the Circuit's prior interpretive method, reading both the blanket contract and work order together. However, without expressly rejecting the prior analytical framework, the court appeared to endorse a narrower inquiry into the work order only.<sup>141</sup>

Second, the majority incorrectly examined only the contract between GIS and BP to determine the focus of the contract. As courts are to interpret the blanket agreement and work order together, courts should look to the entire contractual network where multiple contractors are servicing a common party to achieve one end-goal. Furthermore, in these unique circumstances where a common party contracts with multiple parties and requires each to hold harmless the other, looking to the common party's purpose would reveal the true overall focus of the contracts.

If the court insists on applying a focus-of-the-contract test, at the very least it cannot be proper to look only at a specific work order—this will not

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138. *Grand Isle III*, 589 F.3d at 787, n.6 (citing footnote six of the majority's opinion, which is not entirely clear as to whether the majority has endorsed interpretation of the blanket contract and work order together or pursuant only to the work order):

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]*, 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.* (italics added).

139. *See Davis*, 919 F.2d at 315–17.

140. *Id.*

141. *See supra* note 138.

account for the focus-of-the contract, or in some instances, may even fail to provide enough evidence to award a judgment.<sup>142</sup> Clearly, parties operating under such contractual arrangements involving several parties are not operating solely under the work order, or solely pursuant to the blanket agreement. The contractual network creates a broad relationship that encompasses all contractors and subcontractors.<sup>143</sup> This misapplication of the adopted focus-of-the-contract test led to *Grand Isle III*'s most inequitable result—the abrogation of all reciprocity between Seacor and GIS, a result that will follow in future contractual relationships of the same structure.

#### *D. The (not so) Reciprocal Indemnity of Grand Isle III*

Section 905(b) of the Longshore Harbor and Workers' Compensation Act (LHWCA)<sup>144</sup> invalidates indemnity agreements from covered maritime employers to vessel owners,<sup>145</sup> whereas section 905(c) creates an exception to the rule. Pursuant to section 905(c), if the injured party is entitled to benefits under LHWCA “by virtue of section 1333 of Title 43” (OCSLA), then

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142. See *infra* note 169 and accompanying text.

143. See *infra* notes 148, 151 and accompanying text.

144. 33 U.S.C. §§ 901-950 (2006).

145. 33 U.S.C. § 905(b) reads: Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

“reciprocal indemnity provisions” between covered maritime employer and vessel are valid.<sup>146</sup>

Before *Grand Isle III*, it was noted that, although section 905(c) required reciprocity between vessels and covered maritime employers, the Fifth Circuit did not require contractual “privity” between the parties.<sup>147</sup> So long as a reciprocal agreement existed between the contractor and vessel owner or operator, indemnity extended to other non-signatory contractors.<sup>148</sup> Additionally, it was not required that the reciprocal agreement be identical.<sup>149</sup> Recognizing these principles, it should apply *a fortiori*<sup>150</sup> to *Grand Isle III* that the parties were entitled to indemnity. The contracts at issue in *Grand Isle III* contained “virtually identical” reciprocal indemnity clauses and the parties, GIS and Seacor, were not merely other contractors, but signatories.<sup>151</sup> Nevertheless, *Grand Isle III's* outcome proved far from reciprocal, but virtually one-sided.<sup>152</sup>

As it was, there was no doubt that the Vessel Charter between Seacor and BP would have been considered a maritime contract.<sup>153</sup> Accordingly, the indemnity clause contained in the Vessel Charter would have been

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146. 33 U.S.C. § 905(c) reads: Outer Continental Shelf

In the event that the negligence of a vessel causes injury to a person entitled to receive benefits under this Act by virtue of section 1333 of Title 43, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel in accordance with the provisions of subsection (b) of this section. Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this chapter by virtue of section 1333 of Title 43 and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

147. See Adams & Milhollin, *supra* note 6, at 73–74, citing generally to, Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115 (5th Cir. 1992).

148. See Adams & Milhollin, *supra* note 6, at 73–74.

149. *Id.* at 73.

150. “*A fortiori*” can be defined as: “Accepted Lat. Expression, short for *a fortiori causa* (or *ratione*), meaning, ‘for a more forceful reason’, or ‘even more so.’” GÉRARD CORNU, *DICTIONARY OF THE CIVIL CODE 1* (2014). See also, “argument *a fortiori*,” defined as:

[R]easoning consisting in applying the rule given in a text to a case not contemplated by that text, because a reference to the ‘reason’ behind the rule (*ratio legis*) makes it obvious that the rule offers even greater reasons to apply to the case not expressly contemplated by the text. *Id.* at 56.

151. *Grand Isle III*, 589 F.3d 778, 782 (5th Cir. 2009), citing to, Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 543 F.3d 256, 258 (5th Cir. 2008) (“*Grand Isle Panel*”).

152. See Robertson, *supra* note 80, at 485–87.

153. If there is anything that has been historically treated as traditional maritime activity, it is a vessel charter for the carriage of passengers over navigable waters. See *The Moses Taylor*, 71 U.S. 411 (1866).

enforceable against Seacor under general maritime law.<sup>154</sup> By contrast, the majority held that GIS's contract with BP fell under OCSLA, nullifying the indemnity provision owed by GIS.<sup>155</sup> Both indemnity clauses acknowledged all of BP's other contractors and agreed to hold harmless "Company Group"<sup>156</sup> and "Contractor Group,"<sup>157</sup> a clear representation of the parties' intent to make indemnity reciprocal. But—as Professor Robertson previously noted—a question arises if an employee of Seacor was injured allegedly by the negligence of a GIS employee or representative.<sup>158</sup> If a Seacor employee had sued GIS, and GIS subsequently settled with the Seacor Employee, then attempted to exercise the reciprocal indemnity provision, demanding indemnity from Seacor, would GIS be able to enforce the indemnity clause contained in Seacor's contract? Yes, under the terms of the contract between Seacor and BP. Whereas, after *Grand Isle III*, in the instance a GIS employee (i.e., Denny Neil) sued Seacor, Seacor would be unable to enforce the indemnity clause contained in GIS's contract with BP. It is doubtful Congress would have intended such an inequitable consequence of section 905(c). The result being an obvious "blemish on the new regime."<sup>159</sup> However, consider if instead the majority had looked at the entire contractual relationship—the MMCS, Vessel Charter, and work orders—as if each contract represented a portion of a larger contract. Regardless of whether the focus-of-the-contract called for, the application of OCSLA or maritime law, each party would have been subjected to the same treatment—either full indemnity or none at all.

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154. Reciprocal indemnity clauses that allocate liability to employers, regardless of who was negligent, have been consistently upheld under general maritime law. See e.g., *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 540 (5th Cir. 1986); *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1216 (5th Cir. 1986); *Blanks v. Murco Drilling Corp.*, 766 F.2d 891, 894 (5th Cir. 1985).

155. *Grand Isle III*, 589 F.3d at 789.

156. See Motion for Summary Judgment by Grand Isle Shipyard, Inc., Exhibit "B-Part 1-3" Master Maintenance and Construction Services Contract, Art. 14 Indemnity, Sec. 14.01.02, p.7, Gray Ins. Co., *Grand Isle Shipyard, Inc. v. Seacor Marine LLC*, No. 06-01405, 2007 WL 2874808, (5th Cir. Sept. 26, 2007); see also Exhibit "C-Part 1" Vessel Charter, Art. 17 Indemnity, Sec. 17.01, *et seq.* ("Company Group" means the following entities and persons individually and collectively: Company and its Affiliates, its co-venturers, co-lessees, co-working interest owners and their Affiliates, and the officers, directors, employees, agents, and representatives of all those entities.").

157. See Motion for Summary Judgment by Grand Isle Shipyard, Inc., Gray Ins. Co., Exhibit "B-Part 1-3" Master Maintenance and Construction Services Contract, Art. 14 Indemnity, Sec. 14.01.03, p.7 *Grand Isle Shipyard, Inc. v. Seacor Marine LLC*, No. 06-01405, 2007 WL 2874808, (5th Cir. Sept. 26, 2007); see also Vessel Charter, Art. 17 Indemnity, Sec. 17.01, *et seq.* ("Contractor Group" means the following entities and persons individually and collectively: Contractor and its Affiliates, its subcontractors and their Affiliates, and the officers, directors, employees, agents, and representatives of all these entities.").

158. See Robertson, *supra* note 80, at 485.

159. *Id.* at 487.

*E. Armijo and Tetra: Fresh Opportunity*

Recently, the Fifth Circuit was presented with an opportunity to revisit its holding in *Grand Isle III. Armijo v. Tetra Technologies, Inc.*,<sup>160</sup> was appealed to the Fifth Circuit in 2015 and was taken up in *Tetra Technologies, Inc. v. Continental Ins. Co.*<sup>161</sup> This case is a classic representation of the issue presented in *Grand Isle III*: a tort occurs on a certain OCSLA situs; the contractual relationship involves indemnity clauses; and the outcome depends on whether adjacent state law is surrogated via OCSLA, or federal maritime law applies of its own force. Nonetheless, it is unclear whether the contract should be considered to have arisen on an OCSLA situs. However, it is clear that both the district court and the Fifth Circuit cannot sufficiently determine OCSLA situs under *Grand Isle III* precedent.

In *Armijo*, numerous plaintiffs were injured while working to dismantle a bridge between two oil production platforms.<sup>162</sup> As directed by their Tetra supervisors, the plaintiffs made a series of cuts on the bridge's supporting structures and attached nylon straps to hoist the bridge and remove it to a barge below.<sup>163</sup> After the first attempt to hoist the bridge failed, Plaintiffs were instructed to go onto the bridge to determine what else needed to be done to free it.<sup>164</sup> While Plaintiffs were on the bridge, it collapsed and, as a result, they tumbled some seventy to eighty feet into the Gulf of Mexico.<sup>165</sup> Plaintiffs subsequently filed suit against Tetra and Maritech Resources (Maritech). One plaintiff was an employee of Vertex Services, LLC, (Vertex), against which Tetra and Maritech filed an indemnity action (along with their insurer) pursuant to the Master Service Agreement (MSA) entered into between Vertex and Tetra.<sup>166</sup>

The parties agreed to the district court's application of the *PLT* test to determine whether section 1333(a)(2)(A) applied.<sup>167</sup> It then became evident that the court was tasked with considering the problems of *Grand Isle III*; first being the application of the focus-of-the-contract test. With *Grand Isle III*'s holding that courts "should look to where the work is to be performed pursuant to the specific work order," the district court found itself in a

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160. 936 F. Supp.2d 675 (E.D. La. 2013), *appeal docketed*, Tetra Technologies, Inc., et. al. v. Vertex Services, LLC, No. 12-2667, 2015 WL 1810453 (E.D. La. April 20, 2015).

161. 814 F.3d 733 (5th Cir. 2016) [hereinafter Tetra].

162. *Armijo*, 936 F. Supp.2d at 678.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Armijo v. Tetra Technologies, Inc.*, 936 F. Supp.2d 675, 678–79 (E.D. La. 2013).

167. *Id.* at 680.

quandary as no formal work order was available for the court to examine.<sup>168</sup> In a second effort to determine the focus of the contract, the district court turned to other evidence indicating where the contract called for the work to be performed, but ultimately found it “impossible to extrapolate this over the duration of the work order.”<sup>169</sup> And as expected, the MSA (or blanket agreement) provided no guidance to the nature of the work.<sup>170</sup> As a result, the district court could not satisfy the first prong of *PLT* test.

On the second prong—because its inquiry now calls upon essentially the same information as the first prong (nature and character)—the court reached the same dead-end. Applying *Davis*, the district court stated that:

In short, there is insufficient evidence in the record here to determine enough about the nature of [the] MSA and work order even to make an informed analogy for purposes of determining whether it is the type of contract traditionally regarded as maritime. There is far from enough evidence to answer the six questions of the *Davis* fact-specific inquiry.<sup>171</sup>

The court then moved to the third prong—whether state law was inconsistent with federal law—and determined it was the only prong that could be satisfied.<sup>172</sup> The court found “no reason to depart from the numerous decisions in which the Fifth Circuit has found that LOIA is not inconsistent with federal law.”<sup>173</sup> However, this does not solve the issue of whether the indemnity clauses were enforceable. For it to be relevant whether state law is inconsistent with federal law, state law must be found applicable; therefore, since it was impossible to determine whether state law was applicable, the third prong had no bearing on the issue.

Since the matter in *Armijo* was a motion for summary judgment, the district court wisely made an analysis under an assumption that state law would apply as surrogate law under OCSLA.<sup>174</sup> This was merely to determine whether LOIA (if applicable) would even nullify the indemnity provision at all.<sup>175</sup> Defendants argued that LOIA requires the contract at issue to “pertain to a well,” and because this was a contract for the dismantling of a “fully decommissioned” platform, it did not constitute a “well” for purposes of LOIA.<sup>176</sup> Moreover, the contract must only bear a

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168. *Id.* at 681, *citing to, Grand Isle III*, 589 F.3d at 787 n. 6.

169. *Id.* at 682.

170. *Id.*

171. *Id.* at 683.

172. *Armijo v. Tetra Technologies, Inc.*, 936 F. Supp.2d 675, 683 (E.D. La. 2013).

173. *Id.*, *citing, e.g., Grand Isle III*, 589 F.3d at 789.

174. *Armijo*, 936 F. Supp.2d at 683–84.

175. *Id.*

176. *Id.* at 684–85.

“nexus to a well” for LOIA to apply.<sup>177</sup> The district court concluded that “no evidence supporting the existence of a nexus to a well” was provided and granted summary judgment against Vertex; therefore, the indemnity agreements were enforceable.<sup>178</sup>

On appeal, the Fifth Circuit reversed the district court’s summary judgment on the grounds that there was insufficient evidence to support a summary judgment in favor of either party.<sup>179</sup> For both the first and second *PLT* prongs, the Fifth Circuit agreed with the district court and found that no determination could be made with the evidence.<sup>180</sup> However, the district court was found to have incorrectly interpreted LOIA, concluding it *would not* void the indemnity agreement between Tetra and Vertex, when in fact it *would* void the agreement.<sup>181</sup> According to the district court’s incorrect interpretation of LOIA, determining the first two prongs of *PLT* was unnecessary because the result would be the same—indemnity clause upheld; judgment against Vertex. For this reason the Fifth Circuit reversed and remanded instructing the district court to determine “whether Louisiana law must be adopted as surrogate federal law.”<sup>182</sup> Essentially, the district court was ordered to come to a definite determination for both the first and second prong of *PLT*.

Critical to the determination of both the first and second *PLT* prongs are the specific work orders the injured parties were operating under at the time of the accident. Hence, the Fifth Circuit’s remand to reopen the case to allow for introduction of more evidence, preferably specific work orders.<sup>183</sup> However, such work orders—for one reason or another—were missing from the record; neither party submitted any evidence of a specific work order.<sup>184</sup> Potentially, such work orders may have been given verbally, “from time to time as needed.”<sup>185</sup> In which case, the district court would once again be left as “helpless as a sailor cast on a desert rock.”<sup>186</sup> Granted, these work orders would aid in the determination of the first and

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177. *Id.* at 684, *citing to*, *Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co.*, 953 F.2d 985, 995 (5th Cir. 1992).

178. *Armijo v. Tetra Technologies, Inc.*, 936 F. Supp.2d 675, 685 (E.D. La. 2013).

179. *Tetra Technologies, Inc. v. Cont’l Ins., Co.*, 814 F.3d 733 (5th Cir. 2016).

180. *Id.* at 738–42.

181. *Id.* at 742–46 (Part. II. B. “LOIA Would Void the Indemnity Agreement”) (emphasis added).

182. *Id.* at 742.

183. *Id.* at 742 (“[W]e remand for the district court to determine the now dispositive issue of whether Louisiana law must be adopted as surrogate federal law.”).

184. *Id.* at 739; *Armijo v. Tetra Technologies, Inc.*, 936 F. Supp.2d 675, 681 (E.D. La. 2013).

185. *Armijo*, 936 F. Supp.2d at 681.

186. William Wordsworth, *The Female Vagrant*, in *Lyrical Ballads and Other Poems* 29, 34 (Martin Scofield ed., Wordsworth Editions Ltd. 2003) (1798).

second prongs, even the Fifth Circuit panel held “the absence of a specific work order is not fatal” to the party asserting that the controversy arose on an OCSLA situs (the nullity of the indemnity clause).<sup>187</sup> At best, these work orders *could* provide evidence of where the work should be performed.<sup>188</sup>

Even if on remand the district court reopens the case to allow the introduction of work order between Tetra and Vertex under which the accident occurred, the court would still be taking into consideration the other aspects of the contractual arrangement between the parties, i.e., the MSA and Salvage Plan. This reaffirms the solution this comment presents below, that the test should be an “all-inclusive, focus-of-the-contracts test.”<sup>189</sup> Regarding the absence of one piece of evidence as “not fatal,” implies that the work order should just be another factor considered with the rest of contracts, rather than the determining element.

Finally, with brevity, notice can be taken of the court’s silence on two prevailing issues. First, that after *Tetras*, there is no mention of *Kirby* in Fifth Circuit dialogue concerning jurisdiction disputes between OCSLA and maritime.<sup>190</sup> The second concerns the court’s fleeting concurrence that LOIA is consistent with federal law.<sup>191</sup> There is potential for argument that the relationship between 33 U.S.C. section 905 and LOIA is not necessarily consistent. Consistent with LOIA, section 905(b) of LHWCA prohibits indemnity agreements between a covered maritime employer and a vessel owner.<sup>192</sup> However, section 905(c) removes the prohibition of indemnity agreements when negligence of “a vessel causes injury to a person entitled to receive benefits . . . by virtue of [OCSLA]”—seemingly inconsistent with LOIA.<sup>193</sup> The district court did not address this possible inconsistency, as it

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187. *Tetra Technologies, Inc. v. Cont’l Ins., Co.*, 814 F.3d 733, 739 (5th Cir. 2016).

188. *Id.* at 739 (citing *ACE Am. Ins. Co.*, 699 F.3d at 831 (*Tetra*, note 18) (emphasis added)).

189. *See infra* Part IV.

190. *See supra* Part III.B.1.

191. *Tetra*, 814 F.3d at 742.

192. LA. REV. STAT. ANN. § 9:2780(B):

Any provision contained in . . . or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals . . . is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

193. 33 U.S.C. § 905(c) (1984) (“Nothing contained in subsection (b) of this section shall preclude the enforcement . . . of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under [OCSLA] and the vessel agree to defend and indemnify the other for cost . . .”).

found that Vertex had not contracted with Tetra Technologies as a vessel owner, which is a requisite for section 905(c) to apply.<sup>194</sup>

The Fifth Circuit was presented with a fresh, salty opportunity and inadvertently reaffirmed the problems with *Grand Isle III*. However, the issues have been prolonged. Whether the district court will discover sufficient evidence to provide for the issue on remand is something the community will have to wait for, but even then, the case still stands to be appealed once more.

#### IV. SOLUTION: AN ALL INCLUSIVE PACKAGE DEAL, RES NOVA

The suggested solution to filter some of *Grand Isle III*'s muddy-water is three-fold: (1) abandon *PLT*, or at least recognize that the first and second prongs are redundant after *Grand Isle III*; (2) update the maritime contract jurisdiction test from *Davis* to *Kirby*; and (3) make the focus-of-the-contract test inclusive of all contracts that form the entire contractual relationship at issue, rather than examining each contract separately—a change from a mutually exclusive “focus-of-the-contract” to an all-inclusive “focus-of-the-contracts” test.

By examining only the contract between GIS and BP, the majority in *Grand Isle III* viewed the reciprocal contracts (GIS's MMCSC with BP and Seacor's Vessel Charter with BP) as wholly separate and unrelated. As a result, the reciprocity of the indemnity clauses was a nullity.<sup>195</sup> If the majority had applied the focus-of-the-contract test to all contracts relevant to BP's overall goal, then, regardless of whether the majority deemed the focus to arise on an OCSLA situs or within maritime law, the same laws would have been applied to both Seacor and GIS—affirming reciprocity, irrespective of the validity of the indemnity clauses. Furthermore, this sustains *Grand Isle III*'s efforts to correct the distinction of tort and contract issues presented in the cases it overruled.<sup>196</sup>

If it is acknowledged that after *Grand Isle III*, the first and second factors of the *PLT* test will produce the same results, there is an opportunity to create a more efficient test. Courts should then answer both: whether the controversy arises on an OCSLA situs and whether federal maritime law applies of its own force. Nevertheless, under these contracts that position work-performance at

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194. *Armijo v. Tetra Technologies*, 936 F. Supp.2d 675, 683 (E.D. La. 2013).

195. *Grand Isle III*, 589 F.3d 778, 782 (5th Cir. 2009) (holding that GIS's contract with BP fell under OCSLA, nullifying the indemnity provision owed by GIS).

196. *See supra* note 10.

a location on or above the OCS (past state submerged lands),<sup>197</sup> the choice-of-law analysis for contractual disputes will lead only to either general maritime law or whichever adjacent state law OCSLA applies.

The situation presented is rather particular, but occurs often on the OCS. It includes a common party contracting with several contractors to satisfy one need related to the exploration of oil and gas in an area with a nexus to the OCS. The adoption of a test *res nova* specific to these circumstances is reasonable. Positioning the court's analysis from the viewpoint of the common party, looking to the common party's multiple contracts (that effectuates a singular, overarching contractual relationship), will present a mixed contract. This provides a launching point for the Fifth Circuit to adopt the principles set forth by the Supreme Court in *Kirby*. It follows then that the Fifth Circuit should update its maritime contract regime. Professor Robertson has proposed the following consolidation of an older Fifth Circuit case, *Theriot v. Bay Drilling Corp.*<sup>198</sup> and *Kirby*:

So long as a contract's substantial purpose is to effectuate oil or gas drilling on navigable waters aboard a vessel, it is a maritime contract. Its character as a maritime contract is not defeated simply because it also provides for obligations that are not related to the use of the vessel.<sup>199</sup>

This test is favorable for several reasons. First, the test serves the indicia of the courts in the Fifth Circuit to treat all of these special vessels (i.e., jack-up rigs) involved in oil and gas exploration as essentially involved in a maritime activity.<sup>200</sup> This will enhance the predictability of oil and gas contracts over the OCS. Second, although the test is characterized as a maritime test, because it is broad and fundamentally seeks to determine nature and character, it serves both the first and second factors of *PLT*—even more so in lieu of *Grand Isle III*. Third, this test, as it is the brainchild of *Kirby*, does not offend *Grand Isle III*'s efforts to remove the tort-based, fortuity element

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197. Currently, state jurisdiction extends three geographical miles off the state's shores. 43 U.S.C. § 1312 (1953). However, legislation has been proposed to extend this to nine nautical miles. H.R. 1663, 114th Cong. §103(a) (2015). For general information about U.S. Maritime Limits and Boundaries, see OFFICE OF COAST SURVEY, *U.S. Maritime Limits & Boundaries* (last visited Oct. 11, 2016), [nauticalcharts.noaa.gov/csdl/mbound.htm](http://nauticalcharts.noaa.gov/csdl/mbound.htm) [<https://perma.cc/3DU5-SVMR>].

198. 783 F.2d 527 (5th Cir. 1986).

199. Robertson, *supra* note 1, at 548.

200. *Id.* at 547.

from contractual disputes.<sup>201</sup> Accordingly, it furthers the focus-of-the-contract test.

This comment's contribution comes in addition to adopting Professor Robertson's proposed test.<sup>202</sup> Applying the test in an all-inclusive manner and from the viewpoint of the common party, the test will eliminate the indemnification inequalities created by *Grand Isle III*.

Under *Grand Isle III* context, a foreseeable problem with a "focus-of-the-contracts" test is deciding the choice-of-law for an action arising from an injury suffered by a seaman on a vessel. Considering that the Vessel Charter between Seacor and BP, by itself, was undoubtedly a maritime contract, in the event a court utilizing this proposed all-inclusive method deems the entire contractual arrangement as arising under OCSLA, this could (improperly) prevent vessel crew certain rights and remedies under maritime law. Therefore, the application of this method would reasonably be restricted to claims between the subcontractors of the common party (i.e., GIS and Seacor). For any claims or disputes between a subcontractor and the common party (i.e., GIS and BP, or Seacor and BP), courts should continue to apply the focus of the particular contract between the common party and the subcontractor.

#### CONCLUSION: TAKE IT WITH A GRAIN OF SALT

District courts in the Fifth Circuit have been applying the focus-of-the-contract test as it was established in *Grand Isle III*,<sup>203</sup> but it is equally apparent that the application of the test is flawed, as seen in *Armijo* and *Tetra*. Removing the element of fortuity in a contractual dispute acutely serves the ability of entities to predict legal consequences of their contract. When *Grand Isle III* adjusted the first prong of the *PLT* test to distinguish tort from contract, the majority made an attempt to facilitate the predictability of legal consequence; however, it came at a cost. Where there are formidable policy concerns of equal bargaining power that arise from the oil and gas indemnity

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201. *Kirby* was specifically concerned with keeping the fortuity element out of contract jurisdiction analysis. The court stressed that contract jurisdiction was "conceptual rather than spatial." *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 23 (2004). The ruling sought to correct the apparent problem with the lower courts applying tort (spatial) analysis to resolve contract (conceptual) disputes. *Id.* at 15 ("Lower court cases that appear to have depended solely on geography [where the tort occurred] in fashioning a rule for identifying maritime contracts are inconsistent with the conceptual approach required by this Court's precedent.").

202. Robertson, *supra* note 1, at 548.

203. See, e.g., *Thibeaux v. Merit Energy Co., LLC*, 920 F. Supp.2d 706, 710 (W.D. La. 2013); *Patlan v. Apache Corp.*, No. 1:09-CV-926, 2010 WL 2293272, at \*4 (E.D. Tex. 2010); and *W & T Offshore, Inc. v. Apache Corp.*, 918 F. Supp.2d 601, 609 (S.D. Tex. 2013).

clauses, and states have done their best to address these issues (i.e., LOIA), *Grand Isle III* has undermined principles of equality by eradicating any reciprocity of indemnity clauses on the OCS. Granted, the all-inclusive “focus-of-the-contracts” test furthered by this comment may still afford the courts a great deal of discretion in determining whether a contract lies in maritime or under OCSLA. Admittedly, this does not necessarily lend itself to legal predictability, but at the very least, it will ensure that all parties within the same contractual network, or operating ensemble, are subject to the same laws.

Developing a new test to address the issues of *Grand Isle III* will require a coup of sorts—likely another *en banc* review. Equally plausible is the notion that the answers may lie beyond Fifth Circuit science. At the time, *Tetra* appeared to be the best chance for the Fifth Circuit to gather at the roundtable and readdress its focus-of-the-contract test, but the issue lives to see another day. Perhaps when the day comes practitioners will be served something with “a more genuinely salty flavor.”<sup>204</sup>

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204. See, e.g., *Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961).

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