LILLEHAMMER ENERGY CLAIMS CONFERENCE
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# Selected Decisions of Interest (United States)

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# OUTLINE

- *In re the Matter of the Complaint of Larry Doiron, Inc., et. al. v. Specialty Rental Tools & Supply LLP, et. al.*, 879 F. 3d 568 (5th Cir. 2018).
- *United States V. American Commercial Lines, LLC*, 2017 WL 5146110 (5th Cir. 2017)
- *Associated International Insurance Company v. Scottsdale Insurance Company* United States Court of Appeals, Fifth Circuit No. 16-20465

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# *In Re: Larry Doiron*

- MSA between Apache Corporation ("Apache") and Specialty Rental Tools & Supply, L.L.P. ("STS")
- The MSA contained an indemnity provision obligating STS to defend/indemnify Apache and its contractors
- Apache issued oral work order to STS to perform flow back services on a gas well located in navigable waters in Louisiana to remove obstructions hampering the well's flow

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- Neither Apache nor STS anticipated needing a vessel to perform the job
- STS work crew arrived on site and determined that it needed some additional heavy equipment and that a crane would be required to lift the equipment into place
- Apache contracted with Larry Doiron, Inc. ("LDI") to provide a crane barge
- LDI's crane operator struck and injured one of the STS workers while lifting a piece of equipment with the barge's crane

# Issue Presented/Procedural History

- LDI sought indemnity against personal injury claims, and narrow question presented was whether the MSA was a maritime contract
- If the contract was deemed maritime, general maritime law permitted enforcement of the indemnity provision
- If Louisiana law controlled, the Louisiana Oilfield Anti-Indemnity Act, ("the LOAIA"), voided the MSA's indemnity provision as against Louisiana public policy (*See* LA. REV. STAT § 9:2780(A))
- The District Court concluded that the contract was maritime, and STS appealed

# The Prior Test

Before *Doiron*, the test applied to determine whether a contract is maritime in nature was the six-factor test set forth in *Davis & Sons, Inc. v. Gulf Oil Corp* 919 F.2d 313 (5th Cir. 1990)

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 work aboard a vessel in navigable waters?
4. To what extent did the work being done relate to the mission of that vessel?
5. What was the principal work of the injured worker?
6. What work was the injured worker actually doing at the time of injury?

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# The Court of Appeals' New Test

- The Court determined that the first question should be whether the contract at issue is one to provide services to facilitate the drilling or production of oil and gas on navigable waters

- If the answer to the first question is "yes," then one goes on to examine whether the contract provides, (or whether the parties expect), that a vessel will play a substantial role in the completion of the contract

- If so, the contract will be deemed maritime

- The Court held that the MSA was not maritime, Louisiana law controlled, and the LOAIA barred the indemnity claims presented

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# Implications of the Decision

- New test is supposed to be simpler than the former *Davis & Sons* test, but it really is not
- Although the Court reached the correct result, the analysis is still unnecessarily complicated, and the *Davis* factors, while no longer the applicable test remain relevant under the new "simpler" test to determine whether a vessel played a "substantial" role
- Accordingly, there is still a lot of room for litigation by parties on both sides of the argument
- The issue of whether a contract is maritime or not will likely continue to be hotly contested in many situations, particularly in jurisdictions like Louisiana and Texas that have enacted anti-indemnity legislation that applies in the offshore energy exploration and production context

# Implications of the Decision

- The Court had a golden opportunity to create a truly simple test and hold that only contracts whose principal purpose has traditionally been the subject of maritime law, (i.e. maritime transportation or commerce), are maritime contracts

- Such a test would have been easy to apply, and it would exclude contracts whose principal objective is the exploration and development of oil and gas resources

- Such contracts should be excluded because they are performed on both land and offshore wells, deal with issues that are foreign to maritime law, and have traditionally been governed by a body of state law specifically developed to deal with the problems that arise under those contracts

# *U.S. v. American Commercial Lines, LLC*

- July 20, 2008 oil spill in the Mississippi River near New Orleans
- Tank barge laden with crude oil was towed into the path of an oceangoing tanker, the TINTOMARA
- American Commercial Lines ("ACL") owned the tug and the barge
- DRD Towing ("DRD") operated the tug under two charter parties with ACL

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- At the time of the collision, the captain of the tug was not on the vessel
- The steersman, who'd been left in command, had been working for 36 hours straight, with only two short naps in that timeframe, all in violation of numerous USCG regulations
- The steersman veered the tug into the path of the tanker, and the tanker collided with the tug/barge
- The barge broke away and sank spilling approximately 300,000 gallons of oil into the Mississippi River

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- As owner of the barge, ACL was deemed the responsible party under the Oil Pollution Act of 1990 ("OPA")
- ACL paid $70 million for removal costs and damages, and the US government paid the remaining $20 million
- A liability trial between the vessel interests resulted in a finding that DRD was 100% at fault for the collision (ACL and the TINTOMARA interests found free from fault)
- The U.S. government then sued DRD and ACL seeking to recover $20 million in clean up costs
- DRD filed for bankruptcy, and the government obtained a summary judgment against ACL for $20 million

ACL appealed arguing:

1. It was entitled to a complete defense to OPA liability under 33 USC Sec. 2703 (a), because DRD caused the incident and DRD was not acting "***in connection with***" its contractual relationship with ACL because the contract required compliance with all applicable laws and regulations

2. It was entitled to limit its liability under 33 USC Sec. 2704(a) because DRD's gross negligence/willful misconduct/statutory violations did not occur "***pursuant to***" the contractual relationship

# The Court of Appeals' Decision

- The court concluded that, given OPA's policy of broad liability, a very broad "but for" causation analysis should be used
- If third party's conduct that caused incident would not have occurred "but for" the contractual relationship, then the third party's conduct occurred "in connection with" the contractual relationship even if the conduct was not "in compliance with" the contract terms
- Court determined that "but for" the contractual relationship b/w ACL and DRD, DRD would not have been operating the tug/transporting ACL's barge, and the spill would not have occurred.
- ACL not entitled to exoneration from liability under OPA

- Court also rejected ACL's arguments for limitation of liability
- "Pursuant to" is narrower than "in connection with," but not so narrow as to only encompass acts authorized by the contract(s)
- "Pursuant to" language is met if the person who commits the acts does so in the course of carrying out the terms of the contractual relationship
- DRD's actions occurred while carrying out the terms of the contractual relationship, and ACL could not limit its liability for those acts

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- The Fifth Circuit is the first appellate court to address the scope of the contractual relationship language in OPA's defense/limitation provisions

- The Court's decision to apply OPA broadly and the defenses/limitations very narrowly is not necessarily surprising

- It is significant because it establishes that an innocent responsible party can be held accountable for the acts of a party with which it contracts, even though the party's acts expressly violate the terms and conditions of the contract(s) and/or are criminal

# *Associated International Insurance Company v. Scottsdale Insurance Company*

- Associated, paid to settle a lawsuit against a Defendant that was an additional insured on the Associated excess CGL policy
- The Associated policy contained a subrogation clause
- Scottsdale had also issued a commercial umbrella policy to Defendant
- Associated, as subrogee of Defendant, demanded reimbursement from Scottsdale for the amounts Associated paid to settle the claims against Defendant
- Scottsdale denied the demand on the basis that the property at issue in the underlying lawsuit was not listed on Scottsdale's schedule of covered properties

# Procedural History

- Associated filed suit in federal court in Texas arguing that it was mutual mistake for the insured and Scottsdale to have omitted the property at issue from the schedule
- The district court sided with Scottsdale holding that, as a subrogated insurer, Associated did not have standing to seek reformation of the Scottsdale umbrella policy because Associated lacked privity of contract with Scottsdale
- Associated appealed

# The Court of Appeals' Decision

- Texas law applied
- Texas courts had not addressed whether a subrogation clause allows a subrogee to assert a reformation claim on a contract between its subrogor and a third party
- Court of Appeals concluded that Associated did not need to demonstrate a specific connection to the Scottsdale policy to establish privity and standing to seek reformation
- Subrogation clause in the Associated policy established privity and standing because Associated was subrogated to all of the Defendant's/additional insured's rights once Associated paid to settle the claim on the Defendant's behalf
- As a subrogated insurer, Associated "stood in the shoes" of its insured and could seek reformation of the Scottsdale policy to recoup the amounts paid to settle the underlying lawsuit

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# The Court of Appeals' Decision

- The decision illustrates that an insurer's right to subrogation is interpreted VERY broadly in Texas

- When considering subrogation matters where Texas law applies to interpretation of the contracts involved, parties should be aware that a subrogee will truly "stand in the shoes" of the subrogor to the greatest extent possible

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