CONTRACTUAL CHOICE OF LAW ISSUES ON THE OUTER CONTINENTAL SHELF

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Gerald F. Slattery, Jr.[1]

I. INTRODUCTION

As used in this article, the term "outer continental shelf" refers to the seabed and subsoil of the Gulf of Mexico seaward of the boundaries[2] of Texas, Louisiana, Mississippi, Alabama and Florida.[3] Pursuant to the Outer Continental Shelf Lands Act ("OCSLA" or the "Act"),[4] the federal government of the United States has asserted its civil and political jurisdiction over the outer continental shelf, in order to manage the exploration for and production of minerals, primarily oil and gas.[5]

Companies that have been granted mineral leases by the federal government—which entitle the companies to explore for and produce oil and gas, and require them to pay royalties to the federal government[6]—enter into a myriad of contracts. In the exploration phase, operators of mineral leases enter into contracts with other companies for drilling platform construction and towing, the transportation of workers, the drilling of wells, wireline services, drilling mud,

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[2] Not more than three marine leagues from the coastline of the state, 43 U.S.C. §1301(b).

[3] This is the Gulf of Mexico OCS Region (which is managed together with the Atlantic Region), administered by the Bureau of Ocean Energy Management ("BOEM") within the United States Department of the Interior. BOEM also administers the Pacific OCS Region. The Gulf of Mexico Region is by far the most actively leased of the three regions: There are no active leases in the Atlantic Region; only 43 in the Pacific Region; and 4,168 in the Gulf of Mexico Region. Of these, 3,266 leases, or 78% of the total in the Gulf of Mexico Region, are in the Western Planning Area and Central Planning Area, primarily offshore Texas and Louisiana. BOEM Gulf of Mexico OCS Region, http://www.boem.gov/Gulf-of-Mexico-Region/; BOEM Pacific OCS Region, http://www.boem.gov/Pacific-Region/.

[4] 43 U.S.C. §1331 et seq.

[5] Id. §1333(a)(1); see id. §1331(k), (l), (m) & (q).

[6] Id. §1337.

downhole cementing, well logging, and well completion. In the production phase the operators enter into contracts for the construction or use of production platforms, and the construction and maintenance of pipelines to bring the oil and gas ashore.

What law governs these contracts? According to OCSLA, federal law governs "the subsoil and seabed of the outer Continental Shelf and . . . all artificial islands, and all installations and other devices permanently attached or temporarily attached to the seabed"[7] in order to explore for and produce minerals. If this federal law does apply, most often it will be the law of the state adjacent to the platform or other installation where the contract was to be performed, which pursuant to the Act is to be adopted as surrogate federal law.[8] Conversely, if the controversy does not relate to "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon,"[9] maritime law, not the law of the adjacent state, will govern. The decisions about what law applies have great importance for the parties: They can determine whether a suit has been timely filed, what remedies are available, the limits on a party's recovery, and whether indemnity provisions in the parties' contracts will be enforceable. How the United States Fifth Circuit Court of Appeals makes these decisions is the subject of this article.

The article begins by discussing the controversies between coastal states and the federal government about jurisdiction over and control of the outer continental shelf before 1953, when OCSLA and its sister statute, the Submerged Lands Act,[10] were enacted. It then analyzes the text of OCSLA in light of its purpose, and describes the contractual controversies that can give rise to cases where the choice between state law/surrogate federal law, on the one hand, and maritime law, on the other, must be made. The article next reviews the history of Fifth Circuit jurisprudence

[7] Id. §1333(a)(1).
[8] Id. §1333(a)(2)(A).
[9] Id.
[10] 43 U.S.C. §1301 et seq.

addressing these choice of law issues, with particular attention to the three most important decisions in this history: Rodrigue v. Aetna Cas. & Sur. Co.,[11] decided by the United States Supreme Court in 1969, which corrected a bias in favor of admiralty law that had been developing at the Fifth Circuit; Union Texas Petroleum Corp. v. PLT Eng'g, Inc.,[12] decided by the Fifth Circuit in 1990, which articulated a three-step process for making choice of law determinations; and Grand Isle Shipyard, Inc. v. Seacor Marine, LLC,[13] decided by the Fifth Circuit en banc in 2009, which introduced a new analysis for determining the situs of contractual disputes arising from operations on the outer continental shelf. The article concludes by considering how the Fifth Circuit has progressed toward its goal of "grant[ing] contracting parties a far greater measure of predictability and stability in allocating risk."[14]

II. THE OUTER CONTINENTAL SHELF LANDS ACT

A. History and Purpose of the Act

Principles of federalism of course require that the sovereignties of the federal government and the states coexist, with separate domains for each. In the years before OCSLA was enacted, a controversy between the federal government and certain coastal states played out before the United States Supreme Court. Exercising its original jurisdiction[15] in three cases where the United States sued California, Louisiana and Texas, respectively, the Supreme Court adjudicated the competing claims of the federal government and the state governments about jurisdiction over and control of the seabed and subsoil of the ocean adjacent to those states.

[11] 395 U.S. 932 (1969).
[12] 895 F.2d 1043 (5th Cir. 1990).
[13] 589 F.3d 778 (5th Cir. 2009) (en banc).
[14] Id. at 787.
[15] Pursuant to article III, section 2 of the United States Constitution: "In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction."

In the first of these three cases, United States v. California,[16] the United States complained that California had granted several mineral leases on lands underlying the Pacific Ocean, extending seaward from the coast for three nautical miles. In its complaint the federal government asserted that it, not California, was "the owner in fee simple of, or possessed of paramount rights in and powers over," the disputed lands, and prayed for a declaratory judgment in its favor and an injunction against continued acts of trespass.[17]

California in its answer admitted that it had granted the mineral leases complained of, and asserted its ownership of the disputed lands based upon (i) the inclusion of such lands within its original boundaries,[18] (ii) the acquisition by the original 13 states from the Crown of England of a similar three-mile belt of land underlying adjacent seas, and (iii) California's admission to the Union on an "equal footing" with those original states.[19] According to California, these premises yielded a conclusion that it owned the seabed up to three nautical miles from its coastline.

On the merits, the Supreme Court avoided the issue of legal title to the disputed lands, instead focusing on the rights asserted by the United States "in two capacities transcending those of a mere property owner": national defense and international relations.[20] And concerning California's argument that the original 13 states (with which California asserted it was entitled to parity) had acquired ownership of a three-mile belt of land underlying adjacent seas, the Supreme Court dismissively stated: "[W]hen this nation was formed, the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion."[21] Ultimately for the Supreme Court, the national defense and international relations concerns supported the

[16] 332 U.S. 19 (1947).
[17] Id. at 22-23.
[18] Cal. Const. 1849, art. XII.
[19] 332 U.S. at 23.
[20] Id. at 29.
[21] Id. at 32 & n.12.

federal government's "paramount rights in and power over this area,"[22] and the Court ruled in favor of the United States, granting it all the relief it had sought in its complaint.

After winning the California case, the United States next sued Louisiana,[23] which claimed that its boundary extended seaward 27 marine miles from its coast,[24] and Texas,[25] which claimed that its boundary extended all the way to the outer edge of the continental shelf.[26] In its complaint in Louisiana, the federal government sought the same declaratory and injunctive relief it had sought in California as to the primacy of its rights over the continental shelf, and additionally sought an accounting for all moneys Louisiana had received attributable to the disputed area after June 23, 1947, when California had been decided.[27]

In its answer, Louisiana asserted a defense that California had not asserted, and that portended the enactment of OCSLA: that because Congress had not adopted any law asserting federal authority over the seabed of the Gulf of Mexico, there were no conflicting claims of federal and state government powers, hence no justiciable controversy.[28] But the Supreme Court rejected this defense, and ultimately Louisiana fared no better than California had. The Supreme Court "found no reason why Louisiana stands on a better footing than California so far as the three-mile belt is concerned," or regarding the additional 24 miles seaward: "If, as we held in California's case, the three-mile belt is in the domain of the nation rather than that of the separate states, it follows a fortiori that the ocean beyond that limit also is."[29]

In its lawsuit, Texas raised a unique defense, which neither California nor Louisiana could have raised. Unlike those two states, Texas prior to its admission to the Union had been an

[22] Id. at 36.
[23] United States v. Louisiana, 339 U.S. 699 (1950).
[24] Id. at 701.
[25] United States v. Texas, 339 U.S. 707 (1950).
[26] Id. at 720 & n.11.
[27] Id. at 701.
[28] Id. at 702.
[29] Id. at 705.

independent republic, formally recognized by the United States and other nations.[30] According to Texas, this distinguished its case from California's and Louisiana's, as to the three leagues extending into the Gulf of Mexico which the Congress of Texas had defined as the seaward boundary of the republic in 1836.[31]

But the result in Texas ultimately was the same as in California and Louisiana, and followed from those decisions, as the "equal footing" clause in the Joint Resolution admitting Texas to the Union meant that Texas should not be treated differently from California or Louisiana. The federal government's rights over the continental shelf, extending from the coastline seaward, were paramount over the rights of all three states.[32]

Congress had been following the three cases, and in 1953 it responded by enacting the Submerged Lands Act[33] and OCSLA.[34] The Submerged Lands Act legislatively overruled the Supreme Court's decision in California and its award of money damages in Louisiana and Texas. The statute recognized the states' title to and ownership of the "lands beneath navigable waters within the boundaries of the respective States,"[35] defining the term "boundaries" to include the seaward boundaries as they had existed when the states entered the Union, not to exceed "three geographical miles into the Atlantic Ocean or the Pacific Ocean or . . . three marine leagues into the Gulf of Mexico. . . ."[36] The statute further released all claims by the federal government for money damages arising out of "any operations" by the states or persons acting pursuant to their

[30] Id. at 713 & nn.1, 2 & 3.
[31] Id. at 713 & n.5.
[32] Id. at 715-20.
[33] 43 U.S.C. §1301 et seq. (enacted May 22, 1953).
[34] 43 U.S.C. §1331 et seq. (enacted August 7, 1953).
[35] 43 U.S.C. §1311(a).
[36] Id. §1301(b).

authority within those boundaries,[37] and it recognized the mineral leases granted by the states which were in effect on June 5, 1950,[38] the date when Louisiana and Texas were decided.

OCSLA, enacted two and one-half months after the Submerged Lands Act, asserted the federal government's jurisdiction and control over the "outer Continental Shelf," defined to mean all submerged lands beyond the states' boundaries that the Submerged Lands Act had recognized.[39] The Supreme Court in California, Louisiana and Texas had based its recognition of the federal government's paramount interest in these lands on concerns of national defense and foreign relations. OCSLA, asserting the same paramount federal interest, instead emphasized the need to exploit the mineral resources underlying the outer continental shelf, referring to it as "a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development. . . ."[40]

OCSLA uses forceful language to assert the federal government's interest in the outer continental shelf. It states as a matter of national policy that the outer continental shelf "appertain[s] to the United States and [is] subject to its jurisdiction, control, and power of disposition. . . ."[41] The Act extends (i) the Constitution and laws and (ii) the civil and political jurisdiction of the United States to the subsoil and seabed of the shelf, and to every structure permanently or temporarily attached to the seabed for the purpose of exploiting the shelf's natural resources.[42] And recognizing that federal law cannot reach every issue in every case arising from

[37] Id. §1311(b)(2).
[38] Id. §1311(c).
[39] 43 U.S.C. §§1331(a), 1332(1).
[40] Id. §1332(3).
[41] Id. §1332(1). Section 1332 uses the odd phrase "appertain to," and does not use the words "are owned by." But as to the natural resources in the seabed and subsoil, the federal government, by declaring that the shelf is subject to its jurisdiction, control and power of disposition, is clearly asserting the rights of an owner. These include all of the incidents of ownership: usus, fructus and abusus. Cf. La. Civ. Code art. 477A: "The owner of a thing may use, enjoy and dispose of it within the limits and under the conditions established by law."
[42] 43 U.S.C. §1333(a)(1).

collisions, allisions, property damage, personal injuries, deaths, accidents and contract disputes,[43] the Act conscripts the laws of the state adjacent to the seabed or island or structure that is the focus of the controversy, to serve as surrogate federal law in order to adjudicate the issues.[44]

The strong language of OCSLA asserting the paramount interest of the United States comports with the statute's principal purpose: "to resolve the 'interminable litigation' arising over the controversy of the ownership of the lands underlying the marginal sea."[45] And the carefully chosen, even curious language used to describe what those interests actually are ("appertain to" instead of "are owned by") portended language in the 1958 Geneva Convention on the Continental Shelf (the "Convention"), which became effective as law in the United States in 1964, eleven years after OCSLA was enacted.[46] The text of the Convention, which would supercede any incompatible language in OCSLA,[47] makes clear that for the 43 signatory nations, the exercise of their sovereignties over the continental shelf is allowed only for the limited purpose of exploiting the shelf's natural resources: "The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources."[48]

Prior to the enactment of OCSLA, the assertions of sovereignty by California, Louisiana and Texas—particularly aggressively by Louisiana (claiming 27 miles out) and Texas (claiming all the way to the edge of the continental shelf)—over the shelf lands extending from their states provoked the federal government to assert the primacy of its rights, to the exclusion of the rights

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[43] "There is no federal general common law." Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
[44] 43 U.S.C. §1333(a)(2)(A).
[45] United States v. Maine, 420 U.S. 515, 527 (1975), quoting H.R. Rep. No. 215, 83d Cong., 1st Sess., 2 (1953), U.S. Code Cong. & Admin. News, at 1385.
[46] Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 340 (5th Cir.1978).
[47] Id. The author has not found any incompatibility between the texts of OCSLA and the Convention.
[48] Convention, art. 2(1), quoted in United States v. Ray, 423 F.2d 16, 21 (5th Cir. 1970). One of the Comments on the Convention issued by the International Law Commission reinforces this point: "[S]uch control and jurisdiction [by the coastal State] shall be exercised solely for the purpose of exploiting its resources; and [the Commission] rejected any claim to sovereignty or jurisdiction over the superjacent waters." 11 U.S. GAOR, Supp. 9 at 40, U.N. Doc. A/3159 (1956), quoted in Treasure Salvors, note 46 above, 569 F.2d at 340 n.23.

of those littoral states, over all of the seabed and subsoil beyond the states' coastlines. The United States Supreme Court accepted the arguments of the federal government, which were based on concerns of national defense and international relations, and recognized the outer continental shelf as exclusively its demesne.

The Submerged Lands Act and OCSLA, promulgated by Congress a few years after California, Louisiana and Texas were decided, substituted for the decisions in those cases a statutory scheme that recognized the primacy of the states' interests as far as three marine leagues from their coastlines, and the primacy of the federal government's interest beyond. And unlike the Supreme Court's decisions, OCSLA identified the interest of the United States in the outer continental shelf as the orderly exploitation of its natural resources, not national defense or international commerce. A close examination of the text of the statute reveals what it requires and how it works.

B. What the Act Requires, and When it Applies

Section 1331 of OCSLA is the statute's definitional section. For choice of law purposes, the definitions of particular importance are "affected State" (which among other things means a state whose law as surrogate federal law will provide the rule of decision in a case pursuant to section 1332(a) of the Act), and "exploration," "development," and "production" (which mean, respectively, searching for minerals, the activities that take place after the discovery of minerals in paying quantities, and the activities that take place after the successful completion of a well).[49] Section 1332 is entitled "Congressional declaration of policy," and in this section Congress declares that the outer continental shelf is subject to the United States' jurisdiction, control, and

[49] 43 U.S.C. §1331(f), (k), (l) & (m).

power of disposition, and that it is a vital national resource reserve that should be developed deliberately and expeditiously by the federal government for the benefit of the public.[50]

Section 1333 is a densely worded section of the statute, and for choice of law purposes it is the most important section, because it identifies the locations on the outer continental shelf where the law of the adjacent state will be applied as surrogate federal law. Subsection (a)(1) asserts the jurisdiction of the federal government. It states that the Constitution and laws of the United States, and its civil and political jurisdiction, extend to the seabed and the subsoil of the shelf, and to three categories of structures: (i) "artificial islands"; (ii) "installations and other devices permanently or temporarily attached to the seabed" in order to explore for, develop or produce minerals; and (iii) "any such installation or other device" which is not a ship or a vessel and which is used to transport minerals.[51]

Subsection (a)(2)(A) of section 1333 adopts as surrogate federal law "the civil and criminal laws of each adjacent State," to the extent such laws are applicable to the dispute and are not inconsistent with OCSLA or other federal law and regulations promulgated by the Secretary of the Interior. The adjacent state's laws apply to the subsoil and the seabed, and to "artificial islands and fixed structures erected thereon." A state is considered to be "adjacent" if such areas, islands and structures "would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf. . . ."[52]

Section 1349 of the Act, in subsection (b)(1), addresses subject matter jurisdiction and venue. Federal district courts are given jurisdiction over cases "arising out of, or in connection with" operations for the exploration, development or production of minerals, or cases involving

[50] Id. §1332(1), (3).
[51] Id. §1333(a)(1).
[52] Id. §1333(a)(2)(A).

rights to such minerals. Venue lies in the judicial district where any defendant resides or may be found, or in the judicial district closest to where the cause of action arose.[53]

Sections 1331, 1332, 1333 and 1349 are the sections of OCSLA most implicated in breach of contract actions where choice of law decisions must be made. The choice is between the law of the adjacent state, as defined in section 1333(a)(2)(A), or maritime law. If the focus of the contract[54] is one of the situses identified in section 1333(a)(1) and (2)(A), and if maritime law does not apply of its own force, the law of the adjacent state will apply. [55] Otherwise, maritime law will apply. In breach of contract actions this choice of law analysis, which sounds straightforward but has vexed the Fifth Circuit for many years, often occurs in the context of indemnity provisions, which frequently will be unenforceable under the adjacent state's law, but enforceable under maritime law.

C. Contracts for Exploration and Production on the Outer Continental Shelf

Operations on drilling and production platforms on the outer continental shelf proceed 24 hours a day and, depending on the phase of operations, the employees of the operator, the drilling contractor and several other contractors may be working simultaneously on their aspects of the operations. The work is dangerous, and injuries and deaths sometimes occur. The contracts between the operator and its several contractors frequently employ a simple, common-sense method of allocating liability for accidents, which is evenhanded and can have the salutary effect of decreasing litigation. Essentially, the contracts provide that regardless of whose negligence causes an accident, each contracting party will be responsible for its own employees.

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[53] Id. §1349(b)(1).

[54] See Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 589 F.3d 778, 787 (5th Cir. 2009) (en banc) ("Grand Isle IV"). The citations for Grand Isle I, Grand Isle II and Grand Isle III, which are, respectively, the district court decision, the Fifth Circuit panel's opinion, and the Fifth Circuit's order granting the petition for rehearing en banc, appear in notes 348, 349 and 350 below.

[55] See Union Texas Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043, 1047 (5th Cir. 1990), citing Rodrigue v. Aetna Cas. and Sur. Co., 395 U.S. 352, 355-56, 359 (1969). This assumes that the laws of the adjacent state do not conflict with federal law, and according to Fifth Circuit caselaw they almost never do.

If the parties have agreed to allocate responsibility in this way, their contract will contain reciprocal indemnity provisions: The operator indemnifies the contractor for injury, death or property damage claims brought on behalf of the operator's employees, and the contractor indemnifies the operator for such claims brought on behalf of the contractor's employees. Such indemnity provisions can be worded substantially as follows:

> Contractor agrees to protect, defend, indemnify and save Operator and its joint owners harmless from and against all claims, demands, and causes of action of every kind and character, without limit and without regard to the cause or causes thereof or the negligence of any party, arising in connection herewith in favor of Contractor's employees, Contractor's subcontractors or their employees, on account of bodily injury, death or damage to property.
>
> Operator agrees to protect, defend, indemnify and save Contractor harmless from and against all claims, demands and causes of action of every kind and character, without limit and without regard to the cause or causes thereof or the negligence of any party, arising in connection herewith in favor of Operator's employees, Operator's contractors or their employees (other than those identified in the paragraph above) on account of bodily injury, death or damage to property.[56]

Provisions such as these, because they include the phrase "without regard to . . . the negligence of any party," can require the indemnitor to indemnify the indemnitee for the indemnitee's own negligence. If the platform or other focus of the contract is offshore Texas or Louisiana[57] such that the law of one of those states will apply as surrogate federal law pursuant to OCSLA,[58] a provision requiring indemnity for the indemnitee's own negligence in personal injury and death cases will be enforceable only under limited circumstances (Texas), or will be

[56] See Theriot v. Bay Drilling Corp., 783 F.2d 527, 539-40 (5th Cir. 1986).
[57] The great majority of drilling and production on the outer continental shelf takes place offshore Texas and Louisiana. See note 3 above.
[58] 43 U.S.C. §1333(a)(2)(A).

unenforceable altogether (Louisiana). This is so because statutes in those two states enforce their strong policies disfavoring such indemnities in the context of oil and gas operations.

III. CONSEQUENCES OF CHOICE OF LAW DECISIONS

A. If State Law Applies Pursuant to OCSLA

1. Texas

The Texas statute addressing the indemnity provisions in oil and gas contracts was enacted in 1985.[59] In the statute, the Texas legislature expresses its finding that "an inequity is fostered [sic] on certain contractors by the indemnity provisions in certain agreements" pertaining to oil and gas operations, and states that "[c]ertain agreements that provide for indemnification of a negligent indemnitee are against the public policy of this state."[60] The statute therefore declares that, subject to certain exceptions, an agreement relating to oil and gas operations "is void if it purports to indemnify a person against loss or liability for damage that . . . is caused by or results from the sole or concurrent negligence of the indemnitee" or persons associated with the indemnitee, and relates to personal injury, death or property damage.[61]

Under certain circumstances, "mutual indemnity obligations"[62] and "unilateral indemnity obligations"[63] are not prohibited. A mutual indemnity obligation, notwithstanding that it requires indemnity for the indemnitee's negligence, is not prohibited if, and to the extent that, it is supported by insurance or qualified self-insurance obtained by the indemnitor for the benefit of the

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[59] This statute is known as the Texas Oilfield Anti-Indemnity Act, and is codified at Tex. Civ. Prac. & Rem. Code §§127.001-.007.

[60] Id. §127.002(a), (b).

[61] Id. §127.003(a)(1), (2). Liability resulting from radioactivity, pollution, reservoir damage, and wild well control is excluded from the statute. Id. §127.004(1)-(5).

[62] Defined as "an indemnity obligation . . . in which the parties agree to indemnify each other and each other's contractors and their employees" against personal injury, wrongful death and property damage claims. Id. §127.001 (3).

[63] Defined as "an indemnity obligation . . . in which one of the parties as indemnitor agrees to indemnify the other party as indemnitee" for personal injury, death or property damage claims, "but in which the indemnitee does not make a reciprocal indemnity to the indemnitor." Id. §127.001(6).

indemnitee.[64] A unilateral indemnity provision imposing a similar obligation is likewise not prohibited if it is supported by insurance or qualified self-insurance, but is allowed only to a limit of $500,000.[65]

2. Louisiana

Louisiana also has a statute, enacted in 1981, which addresses indemnity provisions in oil and gas contracts.[66] In the context of personal injury and death claims, the statute takes a straightforward approach to provisions that would require indemnity for an indemnitee's negligence: They are prohibited. As the Texas legislature does in its statute, the Louisiana legislature in the statute it has enacted makes a finding that "an inequity is foisted on certain contractors . . . by the defense or indemnity provisions . . . contained in some agreements pertaining to wells for oil, gas or water or drilling for minerals . . . to the extent those provisions apply to death or bodily injury to persons."[67] The statute accordingly makes any agreement relating to an oil, gas or water well, or drilling for minerals, "void and unenforceable to the extent that it purports to . . . provide for defense or indemnity . . . 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. . . . "[68]

Louisiana's statute expressly does not affect the validity of such indemnity provisions in operating agreements and farmout agreements and, like Texas's statute, does not apply to radioactivity, oil spills and clean-up operations following the blowout of a well.[69] But where Texas allows indemnity for an indemnitee's negligence under certain circumstances if the obligation is

[64] Id. §127.006(a), (b).
[65] Id. §127.006(a), (c).
[66] This statute is known as the Louisiana Oilfield Indemnity Act, and is codified at La. R.S. 9:§2780.
[67] Id. §2780A.
[68] Id. §2780B.
[69] Id. §2780D(2), F(1), (2) & (3).

supported by insurance, Louisiana flatly proscribes such insurance, referring to "waivers of subrogation, additional named insured endorsements, or any other form of insurance protection" as methods "which would frustrate or circumvent the prohibitions of this section," and making such measures "null and void and of no force and effect."[70]

3. Parties' Choice of Law

Parties to offshore oil and gas contracts sometimes include choice of law provisions, pursuant to which they agree that maritime law, or the law of a particular state, will govern the interpretation and enforceability of their contract. But if OCSLA governs the contract,[71] the Fifth Circuit applies the law of the adjacent state pursuant to the statute[72] and ignores the parties' choice of maritime law or the law of another state. It does so because "OCSLA is itself a congressionally mandated choice of law provision requiring that the substantive law of the adjacent state is to apply even in the presence of a choice of law provision in the contract to the contrary."[73]

If OCSLA does not apply, such that the law of the adjacent state will not provide the rule of decision, the interpretation and enforceability of a contract, including its indemnity provisions, will be governed by general maritime law. That body of law takes a different approach to the enforceability of an obligation to indemnify an indemnitee for its own negligence than does Texas or Louisiana.

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[70] Id. §2780G.

[71] OCSLA will govern if three conditions are met: "(1) The controversy must arise on a situs covered by OCSLA. . . . (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law." Union Texas Petroleum Corp. v. PLT Eng'g, Inc. ("PLT"), 895 F.2d 1043, 1047 (5th Cir. 1990).

[72] 43 U.S.C. §1333(a)(2)(A).

[73] PLT, note 71 above, 895 F.2d at 1050, citing Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 482 n.8 (1981) ("OCSLA does supercede the normal choice-of-law rules that the forum would apply.").

B. If Maritime Law Applies

1. Indemnity Obligations Under General Maritime Law

Texas law limits, and Louisiana law prohibits, the enforcement of a provision requiring indemnity for the indemnitee's own negligence. By contrast maritime law, although it regards such provisions warily, will enforce them provided that the language leaves no doubt that that was the intent of the parties. In a case where it applied maritime law, the Fifth Circuit approvingly described the evenhandedness and efficiency of reciprocal indemnity clauses containing such provisions:

> The purpose of these reciprocal indemnity agreements . . . is to divide the responsibility for personal injury/death among the many employers and contractors according to the identity of the injured employee rather than according to which party's fault or negligence caused the injury. In effect, each party assumes the risk of the other's negligence and agrees to be responsible for injuries to its own employees no matter how, or by whom, caused. The purpose of describing the classes of persons in the indemnification provisions is to define those employees for whom each party assumes the risk of injury.[74]

The Fifth Circuit has stated that indemnity clauses governed by maritime law should be construed to cover all losses which reasonably appear to have been within the parties' contemplation.[75] If the parties intend an indemnity obligation to cover a party's own negligence, that intent must be "expressly and specifically manifested"[76] in "language couched in unmistakable terms."[77] The Fifth Circuit has found that language indemnifying against "any and all claims" does not reach the negligence of the indemnitee,[78] but that the language "without limit and without

[74] Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1216 (5th Cir. 1986).
[75] Weathersby v. Conoco Oil Co., 752 F.2d 953, 956 (5th Cir. 1984).
[76] Ordunasa v. Zen-Noh Grain Corp., 913 F.2d 1149, 1153 (5th Cir. 1990), quoting Branch v. Fidelity & Cas. Co., 783 F.2d 1289, 1294 (5th Cir. 1986).
[77] Randall v. Chevron U.S.A., Inc., 13 F.3d 888, 905 (5th Cir. 1994), overruled on other grounds by Bienvenu v. Texaco, Inc., 164 F.3d 901 (5th Cir. 1999), quoting Lanasse v. Travelers Ins. Co., 450 F.2d 580, 583-84 (5th Cir. 1971), cert. denied, 406 U.S. 921 (1972).
[78] Seal Offshore, Inc. v. American Standard, Inc., 736 F.2d 1078, 1081 (5th Cir. 1984).

regard to the cause or causes thereof or the negligence of any party" does indemnify a party for its own negligence.[79]

2. Parties' Choice of Law

If OCSLA applies, the Fifth Circuit will apply the law of the adjacent state as the statute requires, regardless of the law the parties have chosen in their contract. But if maritime law applies, absent compelling reasons the Fifth Circuit will honor the parties' choice of law: "[U]nder admiralty law, where the parties have included a choice of law clause, that state's law will govern unless the state has no substantial relationship to the parties or the transaction, or the state's law conflicts with the fundamental purposes of maritime law."[80]

In the cited case, Stoot v. Fluor Drilling Services., Inc., honoring the parties' choice of law provision in a maritime contract[81] led to a paradoxical result. The owner of a drilling rig was sued by an employee of its catering company, which pursuant to contract was obligated to indemnify the rig owner against claims including those arising from the rig owner's own negligence. The rig owner therefore filed a third party demand against the catering company, and succeeded at the district court. But the Fifth Circuit noted that the contract provided that Louisiana law would govern, and held that the caterer's indemnity obligation was unenforceable pursuant to Louisiana's oilfield indemnity statute.[82]

The rig owner and the catering company in Stoot presumably intended that all of the provisions in their contract, including the indemnity provision, would be enforceable. If they had said nothing about choice of law, or if they had specified general maritime law to govern the

[79] Theriot v. Bay Drilling Corp., 783 F.2d 527, 540 (5th Cir. 1986).
[80] Stoot v. Fluor Drilling Services, Inc., 851 F.2d 1514, 1517 (5th Cir. 1988), citing Hale v. Co-Mar Offshore Corp., 588 F.Supp. 1212, 1215 (W.D. La. 1984).
[81] 851 F.2d at 1517 ("[T]he contract was correctly construed [by the district court] as one involving maritime obligations.").
[82] La. R.S. 9:§2780.

interpretation and enforceability of their maritime contract, the Fifth Circuit would have enforced the indemnity provision. But they specified Louisiana law as the governing law, and the Fifth Circuit, duly honoring the choice they had made as maritime law directs, held that the indemnity provision was unenforceable—the opposite of what the parties had agreed to. This worked to the particular disadvantage of the rig owner, who clearly had bargaining leverage in negotiating the contract, as it was the sole indemnitee pursuant to the unilateral indemnity provision, which extended to claims arising from its own negligence. Too clever by half in specifying Louisiana law as the governing law, the rig owner forfeited the one-sided indemnity protection it had achieved in the contract.

IV. EVOLUTION OF THE FIFTH CIRCUIT'S APPROACH TO CHOICE OF LAW ISSUES

Indemnity provisions are very important parts of the contracts governing exploration, production and transportation of minerals on the outer continental shelf. By means of these provisions the lease operators, platform owners, contractors and subcontractors allocate the risks incident to their expensive and dangerous operations. The parties assume that the indemnity provisions in their contracts are enforceable, and based on that assumption they calculate the costs of the obligations they undertake and the benefits of the obligations their counterparties undertake. They think they know how responsibility for property damage, personal injury and death claims will be allocated, because they have agreed on how those responsibilities will be allocated.

The choice of law principles applied by the Fifth Circuit in breach of contract cases thus are vitally important to the contracting parties. By way of OCSLA, will Texas law or Louisiana law, which can limit or abrogate the parties' agreements about indemnity in personal injury and death cases, apply to the parties' contracts? Or will maritime law, which usually will enforce the indemnity provisions in those agreements, instead apply? The Fifth Circuit knows that it should

have a consistent approach to answering these questions. Otherwise, parties to offshore contracts will not be able to predict what law will govern their indemnity arrangements, which will prevent them from reliably allocating risk in their contracts.[83] But for some decades after OCSLA was enacted, and frustratingly for the court, the Fifth Circuit did not have a consistent approach to deciding contractual choice of law issues in cases arising from operations on the outer continental shelf.[84]

In the long line of cases addressing this issue, three stand out as particularly important. The first is Rodrigue v. Aetna Cas. & Sur. Co.,[85] decided by the United States Supreme Court in 1969. In Rodrigue the Supreme Court reversed two decisions by the Fifth Circuit,[86] in which the court of appeals had held that admiralty law,[87] not state law made applicable through OCSLA, provided the rule of law in wrongful death cases arising from operations on fixed platforms on the outer continental shelf. The Supreme Court examined the text and legislative history of OCSLA to conclude that it required the application of state law to cases arising from such operations, and unanimously reversed the Fifth Circuit. The Fifth Circuit heeded Rodrigue's clear mandate, and changed course.

The second of the three especially important cases is Union Texas Petroleum Corp. v. PLT Eng'g, Inc. ("PLT"),[88] decided in 1990, which articulated for the first time a three-part test to determine whether state law as surrogate federal law under OCSLA, or maritime law, will provide

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[83] See Grand Isle IV, 589 F.3d 778, 787 (5th Cir. 2009) ("The tort-situs approach prevents commercial parties from reliably allocating risk in their contractual arrangements because they have no way of predicting where 'controversies' might arise and thus no way of knowing which law will govern.").

[84] Hodgen v. Forest Oil Corp., 87 F.3d 1512, 1523 & n.8 (5th Cir. 1996) ("[W]e again confront a series of arguably inconsistent cases. . . . We have on previous occasions expressed our frustration with the inconsistency of our case law in this general area."), overruled in part by Grand Isle IV, note 83 above, 589 F.3d at 778 & n.8.

[85] 395 U.S. 252 (1969).

[86] Rodrigue v. Aetna Cas. & Sur. Co., 395 F.2d 671 (5th Cir. 1968), rev'd, 395 U.S. 352 (1969), and Dore v. Link Belt Co., 391 F.2d 671 (5th Cir. 1968), rev'd, 395 U.S. 352 (1969).

[87] As codified in the Death On The High Seas Act, 46 U.S.C. §761.

[88] 895 F.2d 1043 (5th Cir. 1990).

the rule of decision in a case arising from operations on the outer continental shelf. In nearly every case decided since PLT, the Fifth Circuit has used its three-part test in order to determine choice of law issues.

The third case of particular importance to contractual choice of law issues is Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, ("Grand Isle IV"),[89] decided by the Fifth Circuit en banc in 2009. In that case, the en banc court adopted a different approach for determining the situs of a controversy in breach of contract cases than had been used previously. The court directed that, instead of examining where the accident occurred as in tort cases, district courts thereafter deciding contract cases, and panels reviewing their decisions, should determine the "focus of the contract."[90] If this focus—where "a majority of the performance called for under the contract is to be performed"[91]—is on a stationary platform or another of the OCSLA situses enumerated in the statute, that situs, not where the underlying accident occurred, is the situs to be used in the PLT analysis.[92]

So there is some continuity developing in the case law after all. One can trace the evolution of a sound, consistent approach to deciding contractual choice of law issues on the outer continental shelf by examining Fifth Circuit case law as it has evolved in four phases: before Rodrigue was decided; after Rodrigue, and before PLT; PLT and afterwards, prior to Grand Isle IV; and Grand Isle IV and the few cases decided since then.

A. Before Rodrigue

In the years following the enactment of OCSLA, the Fifth Circuit viewed cases arising from oil and gas operations in the Gulf of Mexico through a maritime lens. Offshore Co. v.

[89] Grand Isle IV, note 83 above, 589 F.3d 778 (5th Cir. 2009).
[90] Id. at 787.
[91] Id.
[92] Id.

Robison,[93] a tort case decided in 1959, exemplifies this approach, even though it does not mention OCSLA. In that case, an accident occurred on a jack-up drilling platform while it was on location in the Gulf of Mexico offshore Texas.[94] The opinion accurately describes how such platforms work:

> Retractable legs are the distinctive feature of Offshore No. 55. These are eight legs or towers, caissons, twelve feet in diameter, running through the hull, two located on each of the four corners of the barge. When the drilling barge is in position, the legs are dropped down to the ocean floor, then hydraulic jacks lift the barge above the water level so that the main deck of the barge may serve as a drilling platform. When the drilling barge is in a floating position, the spuds are recessed so that the barge will have a flat bottom.[95]

Offshore No. 55 could be towed from location to location. Mentioning this and other features,[96] the court treated the platform as a vessel, notwithstanding that at the time of the incident the platform, attached to columns resting on the ocean floor, could have been viewed as an "artificial island[ ] . . . temporarily attached to the seabed"[97] as contemplated by OCSLA. Without discussion the court referred to maritime law to decide the case, which presented issues under the Jones Act[98] and the warranty of seaworthiness owed to seamen. The importance of the case in a choice of law context is that it is based on a premise, accepted and expounded upon in later decisions, that the law governing cases arising from operations on the outer continental shelf, whether sounding in tort or contract, would be maritime law.

The implicit premise of Robison became explicit in Pure Oil Co. v. Snipes,[99] decided by the Fifth Circuit two years later, in 1961. An employee of a drilling contractor fell from the top of

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[93] 266 F.2d 769 (5th Cir. 1959).
[94] The accident occurred "about three miles from the Texas coast." Id. at 772.
[95] Id.
[96] "Offshore No. 55 has a raked bow and carries navigation lights, bitts, anchors, bilge pumps, and cranes. It has only a top deck and a lower hull." Id.
[97] 43 U.S.C. §1333(a)(1).
[98] Now 46 U.S.C. §30104 et seq.
[99] 293 F.2d 60 (5th Cir. 1961).

a tank, 15 feet above the deck of the drilling platform, which was itself 50 feet above the water. As he descended he first struck the deck, then fell through an open space and hit at least two structural members undergirding the deck, before he dropped into the ocean. This occurred on a fixed platform, "not . . . the floating-submersible type dealt with in Offshore Co. v. Robison,"[100] in the Gulf of Mexico 65 miles off the coast of Louisiana. The Fifth Circuit squarely acknowledged that the fixed platform "was in the area defined in [OCSLA]."[101]

The precise issue before the court was the timeliness of the plaintiff's lawsuit, which was filed 22 months after the accident happened. If Louisiana law governed, the suit would be untimely, as tort actions in Louisiana must be filed within a year of the occurrence.[102] Conversely, if maritime law governed, the equitable doctrine of laches would apply, pursuant to which the Fifth Circuit could conclude that the suit was timely, as the district court had concluded. Acknowledging that "on traditional lines an event taking place on a structure fixed permanently to the bed of the water might be regarded as non-maritime,"[103] but making no reference to the Act's directive that "the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States for . . . the outer Continental Shelf, and artificial islands and fixed structures erected thereon,"[104] the Snipes court concluded that maritime law governed the case.

The court articulated two reasons as support for its surprising conclusion. First, Congress had assigned to the United States Coast Guard, "the agency traditionally charged with regulation and enforcement of maritime matters,"[105] the task of promulgating and enforcing safety regulations for drilling platforms on the outer continental shelf. According to the Court, the Coast Guard's

[100] Id. at 62.
[101] Id.
[102] La. Civ. Code art. 3492 (formerly art. 3536).
[103] 293 F.2d at 64-65.
[104] 43 U.S.C. §1333(a)(2)(A).
[105] 293 F.2d at 66.

regulations "reflect a view that . . . these oil well drilling structures located in the midst of the high seas present substantially all of the perils of the seas and are therefore to be regulated as such."[106] One of those perils, said the Snipes court, "is the likelihood of falling onto the deck or into the ocean"[107]—precisely the fact pattern in the case before it. The Fifth Circuit's second reason for concluding that maritime law governed was the express adoption by OCSLA of the Longshoremen's and Harbor Workers' Compensation Act,[108] not the workers' compensation acts of adjacent states, as the basis for an employer's mandatory compensation for death or disability of its employee.[109] The court therefore applied the equitable maritime doctrine of laches, and concluded that the injured rig worker's suit was timely.

After Snipes was decided, Fifth Circuit panels deciding cases arising from offshore oil and gas operations followed its holding that maritime law provides the rules of decision. It was inevitable that this would happen, because the court has a rule that "one panel of the Fifth Circuit cannot overrule a prior Fifth Circuit panel decision—right or wrong—unless and until that decision is overruled, either explicitly or implicitly, by the Supreme Court or the en banc Fifth Circuit."[110] So Snipes was duly followed, and maritime law, not the law of the adjacent state, was applied in three cases arising from injuries sustained by workers on fixed platforms on the outer continental shelf offshore Louisiana: Movible Offshore Co. v. Ousley,[111] Ocean Drilling & Expl. Co. v. Berry Bros. Oilfield Serv., Inc. ("ODECO"),[112] and Loffland Bros. Co. v. Roberts.[113]

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[106] Id.
[107] Id. at 66-67 & n.11, citing 33 C.F.R. §143.15-1 & .15-5.
[108] 33 U.S.C. §901 et seq.
[109] 293 F.2d at 67, citing 43 U.S.C. §1333(c).
[110] Horan, The Rules That Govern the Rules That Govern in the Federal Courts of the Fifth Circuit, Tex. B.J. 622, 624 (September 2004). See Central Pines Land Co. v. United States, 274 F.3d 881, 893 (5th Cir. 2001), cert. denied, 537 U.S. 822 (2002) (Although easily confused with traditional stare decisis, "our rule that one panel cannot overturn another serves a somewhat different purpose of institutional orderliness."), quoting Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 425-26 (5th Cir. 1987).
[111] 346 F.2d 870 (5th Cir. 1965).
[112] 377 F.2d 511 (5th Cir. 1967).
[113] 386 F.2d 540 (5th Cir. 1967), cert. denied, 389 U.S. 1040 (1968).

Ousley was decided in 1965. On a fixed oil well platform in the Gulf of Mexico 40 miles off the coast of Louisiana, the employee of a rig building contractor had injured his knee while he was trying to align two member pieces of a derrick so they could be bolted together. The Fifth Circuit panel held that maritime law governed the action, citing Snipes and referring to it as a "carefully considered opinion."[114] The issue before the panel was whether under maritime law the defense of assumption of the risk could be raised in an action brought by a non-seaman; the panel concluded that it could not.

In ODECO, decided in 1967, two employees of a rig service contractor were injured when a tank on a fixed, unmanned platform in the Gulf of Mexico, 30 miles off the coast of Louisiana, exploded. The plaintiffs sued the platform owner, alleging negligence, and the platform owner filed a third-party demand against their employer, the rig service contractor. In the third-party demand, the platform owner asserted contract and tort theories of indemnity. The district court held that under maritime law neither theory could be asserted, and dismissed the third-party demand. The Fifth Circuit panel affirmed the dismissal of the third-party demand,[115] citing Ousley and Snipes, and stated that "it is clear that federal maritime law, not that of Louisiana or any other state, controls this controversy."[116]

In Roberts, also decided in 1967, the decision by the Fifth Circuit panel whether to apply Louisiana law or maritime law would determine whether the plaintiff would recover anything, as had been the case in Snipes. The plaintiff in Roberts, an employee of a casing contractor, was injured when he fell 40 feet from the derrick to the deck of a drilling platform, which was "a fixed structure embedded in the Outer Continental Shelf some fifteen to twenty miles off the Louisiana

[114] 346 F.2d at 873.
[115] The dismissal of the third-party demand was the only issue on appeal. The opinion does not indicate whether the plaintiffs had settled their claims or prevailed at trial.
[116] 377 F.2d at 514 n.4.

coast."[117] He filed suit against the drilling contractor and the platform owner. The drilling contractor filed a cross-claim[118] against the platform owner for contribution or indemnity in tort, and a third-party demand against the casing contractor (the plaintiff's employer) asserting tort theories of indemnity and contribution, and a contract theory of breach of the implied warranty of workmanlike performance owed by the casing contractor pursuant to its contract with the platform owner, as to which the drilling contractor alleged it was a third-party beneficiary. The platform owner also filed a third-party demand against the casing contractor, asserting a contractual claim for indemnity and defense costs.

The plaintiff's claims, the cross-claim, and the third-party demands were sorted out by the district court as follows. The jury had found that the plaintiff had been 10 percent contributorily negligent, and the district court, applying the maritime law rule of comparative negligence, had reduced his award by that percentage. The district court dismissed the drilling contractor's cross-claim and third party demand, as the jury had determined that neither the platform owner nor the casing contractor were negligent. By supplemental judgment, the district court also awarded the platform owner attorney's fees and costs pursuant to its contract with the casing contractor.[119]

On appeal, the drilling contractor argued for the first time that under OCSLA the law of Louisiana should have been applied, and that it was entitled to judgment since the jury had found that the plaintiff had been contributorily negligent.[120] The Fifth Circuit rejected this argument, holding that the comparative negligence regime of maritime law, not the contributory negligence

[117] 386 F.2d at 543.
[118] Incorrectly described by the court as a third-party claim, id. at 542.
[119] Id. at 543 & 544. Presumably the district court had awarded the platform owner indemnity. The casing contractor appealed only from the portion of the judgment awarding the platform owner its attorney's fees and costs. Id. at 543. The Fifth Circuit, with no discussion of OCSLA, affirmed the district court on this issue. Id. at 551.
[120] Louisiana at that time still applied the harsh doctrine of contributory negligence, pursuant to which any negligence by the plaintiff would defeat his claim for recovery. Since 1979, Louisiana has applied the doctrine of comparative negligence, which only reduces a plaintiff's recovery by his percentage of causative negligence. See La. Civ. Code art. 2323.

regime of Louisiana law, governed the case. The panel said that the Snipes holding, that "under the Act federal maritime law was to apply to torts occurring on these offshore platforms," had been "consistently followed by this Court,"[121] citing Ousley and ODECO, and concluded that "the decisions of this court require the application of maritime law to this case."[122]

In 1968, the Fifth Circuit decided two cases, Dore v. Link Belt Co.[123] and Rodrigue v. Aetna Cas. & Sur. Co.,[124] where workers had been killed in accidents on fixed platforms on the outer continental shelf. In these two cases, the decision whether to apply admiralty law or state law as surrogate federal law under OCSLA would significantly affect the recovery allowed to the decedents' survivors. If admiralty law governed, then the Death on the High Seas Act ("DOHSA")[125] would apply, and the survivors' recovery would be limited to pecuniary loss. But if state law, made applicable through OCSLA, applied,[126] the survivors could additionally recover nonpecuniary damages for wrongful death, such as loss of love and affection.[127]

Wrongful death cases arising from offshore platform accidents were res nova for the court of appeals,[128] but the court saw no reason why the rationale of the personal injury cases it had decided—Snipes,[129] ODECO[130] and Roberts[131]—would not also apply to death cases: "While it is true that [these cases] relate to injuries sustained by workmen and not their death, we do not regard this distinction as decisive. The rationale of these opinions is equally and logically applicable to

[121] 386 F.2d. at 545.
[122] Id.
[123] 391 F.2d 671 (5th Cir. 1968).
[124] 395 F.2d 216 (5th Cir. 1968).
[125] 46 U.S.C. §761 et seq.
[126] In both cases the plaintiff survivors pleaded that the remedies under state law were available to them in addition to, not in lieu of, the remedies under DOHSA. Dore, 391 F.2d at 673; Rodrigue, 395 F.2d at 217.
[127] 391 F.2d at 674.
[128] "Determination of which law is to apply to cases involving death of a maritime worker on the outer Continental Shelf presents a question of first impression for this Court." Dore, note 122 above, 391 F.2d at 674.
[129] Snipes v. Pure Oil Co., 293 F.2d 60 (5th Cir. 1961).
[130] Ocean Drilling & Expl. Co. v. Berry Bros. Oilfield Serv., Inc., 377 F.2d 511 (5th Cir. 1967).
[131] Loffland Bros. Co. v. Roberts, 386 F.2d 540 (5th Cir. 1967), cert. denied, 389 U.S. 1040 (1968).

torts which result in death of a worker."[132] The Fifth Circuit accordingly held in both Dore and Rodrigue that DOHSA was the exclusive remedy for the decedents' survivors.[133] But the United States Supreme Court granted the survivors' petitions for writs of certiorari in both cases,[134] and the Snipes line of cases was about to come to an end.

In a single opinion written for both cases,[135] the Supreme Court unanimously reversed the Fifth Circuit, and remanded Dore and Rodrigue so that judgment could be entered that OCSLA (the "Lands Act"), hence Louisiana law as surrogate federal law, not DOHSA (the "Seas Act"), was the decedents' survivors' sole remedy. Using the parlance of the Act,[136] the Supreme Court repeatedly referred to the offshore drilling platforms as "artificial islands,"[137] and said that the text of the Act made it clear that "federal law, supplemented by state law of the adjacent State, is to be applied to these artificial islands as though they were federal enclaves in an upland State."[138]

According to the Supreme Court, "since the Lands Act deliberately eschewed the application of admiralty principles to these novel structures, Louisiana law is not ousted by the Seas Act, and under the Lands Act it is made applicable."[139] Admiralty jurisdiction did not extend to fixed platforms on the outer continental shelf: "The accidents in question here involved no collision with a vessel, and the structures were not navigational aids. They were islands, albeit artificial ones, . . . and the accidents had no more connection with the ordinary stuff of admiralty than do accidents on piers. Indeed, the Court has specifically held that drilling platforms are not within admiralty jurisdiction."[140] Ultimately, the text of the Act, its legislative history, and the

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[132] Dore, note 123 above, 391 F.2d at 675.
[133] Id. at 677; Rodrigue, note 124 above, 395 F.2d at 217.
[134] Rodrigue v. Aetna Cas. & Sur. Co., 393 U.S. 932 (1968).
[135] Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969).
[136] 43 U.S.C. §1333(a)(1)(2).
[137] E.g., 395 U.S. at 352-55, 359, 363-65.
[138] Id. at 355.
[139] Id.
[140] Id. at 360, citing Phoenix Constr. Co. v. The Steamer Poughkeepsie, 212 U.S. 558, aff'g 162 F. 494 (D.C. Cir. 1908).

facts of Dore and Rodrigue led the Supreme Court to reverse the Fifth Circuit and remand for further proceedings applying Louisiana law, by way of OCSLA, as the governing law.[141]

B. After Rodrigue, and Before PLT

In the cases it decided after Rodrigue, the Fifth Circuit of course followed the mandate of the Supreme Court, and altogether ceased treating fixed offshore platforms as inherently subject to maritime law. Its decision-making about whether maritime law applied to tort and contract cases involving such platforms became reflective rather than reflexive: Where maritime law was applied, it was because there was an independent reason, apart from the location of the platform at sea, for its application. Kimble v. Noble Drilling Co.,[142] decided by the Fifth Circuit three months after Rodrigue, is a good example of this. In that case an employee of a drilling contractor was injured in two accidents that occurred on a drilling platform, which was a "permanent, immobile artificial island[ ] affixed to the ocean floor. . . ."[143] But the employee slept, ate his meals, and performed significant duties on a vessel, which was kept alongside the platform for transportation to a neighboring platform. On the basis of this evidence the jury found that he was a Jones Act seaman, and the district court entered judgment in accordance with its verdict.

On appeal, the jury's determination that the employee in Kimble was a seaman was upheld by the Fifth Circuit, as there was sufficient evidence that he was assigned permanently to the vessel and that the duties he performed contributed to its function and mission.[144] About the Supreme Court's recent decision in Rodrigue, the Fifth Circuit stated: "The case at bar is distinguishable in that the Jones Act and the general maritime law do not apply of their own force. . . . Here,

[141] 395 U.S. at 366.
[142] 416 F.2d 847 (5th Cir. 1969), cert. denied, 397 U.S. 918 (1970).
[143] 416 F.2d at 848.
[144] Id. at 849.

Kimble's status as a seaman depended not on the location of the platforms at sea but upon his assignment to, and responsibilities on, the tender, which was unquestionably a vessel."[145]

Later cases also evidence the difference in the Fifth Circuit's approach to choice of law issues after Rodrigue. In Dickerson v. Continental Oil Co.,[146] the owner of an "offshore stationary (fixed) drilling platform located in the Gulf of Mexico, on the Outer Continental Shelf,"[147] had entered into contracts with a drilling company, a well service company, and a welding contractor, all of whom worked under the direction of the platform owner's representative. The representative had ordered that produced condensate, a highly volatile and unstable liquid, be stored in a tank on the platform that was meant only for diesel fuel, which is not highly volatile. According to the Fifth Circuit, "[t]he tank itself was not plugged and Continental's representative told no one that it contained condensate."[148]

The representative then carelessly ordered two of the welding contractor's employees to commence welding operations above the unplugged tank, and the fire and explosion that followed ultimately resulted in several lawsuits for wrongful deaths, personal injuries, and property damage. In these several lawsuits, observed the Fifth Circuit, "theories of initial, contingent and secondary liabilities abound. . . ."[149] Before commencing its analysis of these theories the court cited Rodrigue and stated that "[i]n determining liability and the amount of damages to be awarded in this case the law of Louisiana thus applies."[150]

In another tort case, Wallace v. Texaco, Inc.,[151] decided 11 years after Dickerson, the Fifth Circuit faced the same issue it had faced two decades before in Snipes:[152] whether a suit filed more

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[145] Id. at 850.
[146] 449 F.2d 1209 (5th Cir. 1971).
[147] Id. at 1212.
[148] Id.
[149] Id.
[150] Id at 1213.
[151] 681 F.2d 1088 (5th Cir. 1982).
[152] Pure Oil Co. v. Snipes, 293 F.2d 60 (5th Cir. 1961). See text at notes 99-109 above.

than one year[153] after an accident on an offshore platform could proceed. The plaintiff in Wallace filed his lawsuit more than 13 months after he was injured in an accident. The Fifth Circuit stated that "[b]ecause Wallace was injured on a fixed platform on the outer continental shelf, his cause of action is governed by [OCSLA]. The law of the adjacent state, including the law of prescription, governs actions under the Act. . . . In this case, the adjacent state is Louisiana."[154] Applying Louisiana law, the Fifth Circuit held that the injured worker's tort claims had prescribed, and that he could not assert a breach of contract claim[155] because he was not a third-party beneficiary of his employer's contract with the platform owner.[156]

Choice of law decisions in cases arising from operations in the outer continental shelf can be more complicated in breach of contract cases than in tort cases. Three cases decided by the Fifth Circuit in the post-Rodrigue,[157] pre-PLT[158] era—Leffler v. Atlantic Richfield Co.,[159] Laredo Offshore Constr., Inc. v. Hunt Oil Co.,[160] and Thurmond v. Delta Well Surveyors[161]—demonstrate this.

In Leffler, the Fifth Circuit addressed "whether it is federal maritime law or Louisiana law that governs a cross-claim for indemnification arising out of injuries sustained by a seaman employed on the Outer Continental Shelf of Louisiana."[162] The issue came to the court in the context of a personal injury claim brought by the injured employee of a catering company, which had entered into a contract with the operator of a fixed platform on the outer continental shelf

[153] The prescriptive period (statute of limitations) for tort actions under Louisiana law is one year. La. Civ. Code art. 3492 (formerly art. 3536).
[154] 681 F.2d at 1089.
[155] Which has a ten-year prescriptive period, La. Civ. Code art. 3499 (formerly art. 3544).
[156] 681 F.2d at 1090.
[157] Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969).
[158] Union Texas Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043 (5th Cir. 1990).
[159] 785 F.2d 1341 (5th Cir. 1986).
[160] 754 F.2d 1223 (5th Cir. 1985).
[161] 836 F.2d 952 (5th Cir. 1988).
[162] 785 F.2d at 1342.

offshore Louisiana. The employee, a galley hand, performed duties primarily on the platform, but also on a barge moored alongside. Following an injury, he filed suit against his employer and the operator of the platform under the Jones Act[163] and general maritime law. The jury found that he was a seaman, and that both the platform operator and the catering company had been negligent, and accordingly assigned percentages of fault.[164]

The platform operator asserted a right to indemnity pursuant to its contract with the catering company by filing a cross-claim, which was bifurcated for trial and decided by the district court. That court held that the contract was not maritime, and so had to be construed under Louisiana law as required by OCSLA. The court ruled that under the Louisiana Oilfield Indemnity Act[165] the indemnity provision was not enforceable, and dismissed the cross-claim.

On the appeal of the dismissal of the cross-claim, the Fifth Circuit stated that "as between employer and employee, the determination of seaman status, supported by the evidence, is by itself a sufficient and independent basis for the application of maritime law to their relationship. . . . It does not necessarily follow, however, that the contractual relationship between [the platform operator] and [the catering company] is governed by such considerations."[166] Having thus warned that the injured plaintiff's status as a seaman did not a fortiori lead to a conclusion that the contract between his employer and the platform operator was necessarily maritime, the Fifth Circuit proceeded to determine that maritime law nonetheless did apply. The court found that an agreement for the employ of the plaintiff as a "borrowed-servant seaman," separate from the written contract and based on the parties' course of dealing, had "developed by implication and consent of the parties as an extension of an express agreement to provide services on a

[163] Now 46 U.S.C. §30104 et seq.
[164] 785 F.2d at 1342.
[165] La. R.S. 9:§2780.
[166] 785 F.2d at 1343 (emphasis added), citing Laredo, note 160 above, 754 F.2d at 1231, and Kimble, note 142 above, 416 F.2d at 850.

platform. . . ."[167] This implied agreement was governed by maritime law, and there being no impediment to the enforcement of the indemnity obligation under that legal regime, the district court's dismissal of the breach of contract claim was reversed, and the case was remanded.[168]

Laredo[169] and Thurmond,[170] two other offshore contract cases decided by the Fifth Circuit after Rodrigue[171] and before PLT,[172] demonstrate that the characterization of a contract as governed by admiralty law or state law by way of OCSLA is not always an either/or analysis. Laredo was an action arising from a contract between the owner of well and an offshore construction company for the transportation and installation of a platform to be permanently affixed over a wellhead on the outer continental shelf 25 miles offshore Louisiana. A year and a half after executing the contract and commencing work, the construction company sued for non-payment, and the well owner defended on the grounds that the construction company had improperly installed the pilings for the platform and had caused other damage.[173]

In its complaint, the construction company had pleaded that the court had admiralty jurisdiction, which the well owner challenged in a motion to dismiss. In their argument about whether the district court had jurisdiction, the parties focused entirely on admiralty,[174] missing the OCSLA point[175] entirely. The district court, addressing only the arguments the parties had made, held that the litigation related to platform construction, not a maritime activity, and granted the well owner's motion to dismiss.[176]

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[167] 785 F.2d at 1343.
[168] Id.
[169] Laredo Offshore Constr., Inc. v. Hunt Oil Co., 754 F.2d 1223 (5th Cir. 1985).
[170] Thurmond v. Delta Well Surveyors, 836 F.2d 952 (5th Cir. 1988).
[171] Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969).
[172] Union Texas Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043 (5th Cir. 1990).
[173] 754 F.2d at 1225.
[174] Id. at 1226.
[175] 43 U.S.C. §1333(a)(1): "The . . . civil and political jurisdiction of the United States are extended to . . . 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. . . ."
[176] 754 F.2d at 1226.

When the parties arrived at the Fifth Circuit, the court directed them to brief whether the district court had jurisdiction under OCSLA.[177] The appellee well owner argued that jurisdiction did exist under OCSLA; the appellant construction company argued that OCSLA did not apply, but that even if it did, maritime law should nonetheless control.[178] Addressing both of the appellant's arguments, the Fifth Circuit first held that OCSLA did apply, focusing on the sections of the Act that grant district courts jurisdiction[179] and that define the term "development" as including "platform construction."[180] According to the Fifth Circuit, the litigation involved only the actual building of a platform on the outer continental shelf, and "[u]nder the Act, such construction is explicitly included within the range of activities constituting 'development' of the subsurface. It seems clear, therefore, that OCSLA's jurisdiction . . . squarely encompasses the present litigation."[181]

The appellant construction company's second argument—that even if OCSLA did apply, it overlapped with maritime law, and maritime law should control[182]—was also rejected by the Fifth Circuit. The court acknowledged that in order to perform its contract, the construction company did have to transport workers and supplies to the well site,[183] but pointed out that that the "principal obligation under the contract was the construction of a stationary platform, and . . . it is the alleged breach of this obligation that gave rise to the instant action."[184] The Fifth Circuit concluded:

> While the contract no doubt contemplated the hiring of the vessels and the seamen to build the structure, the subject matter of this case has no direct relationship with these traditional subjects of

[177] Id.
[178] Id.
[179] 43 U.S.C. §1349(b).
[180] Id. §1331(l).
[181] 754 F.2d at 1226-27.
[182] Id. at 1229.
[183] Id. at 1231, citing Smith v. Pan Air Corp., 684 F.2d 1102, 1111 (5th Cir. 1982) ("transporting persons over the seas is a maritime-type function").
[184] 754 F.2d at 1231.

> maritime law. It is fundamental that the mere inclusion of maritime obligations in a mixed contract does not, without more, bring non-maritime obligations within the pale of admiralty law. That the contract contemplated in part the use of instruments of admiralty, therefore, is not sufficient to oust OCSLA-adopted state law in this case.[185]

As a result, said the Fifth Circuit, although the district court had been correct that it did not have admiralty jurisdiction, it did have jurisdiction under OCSLA. So the Fifth Circuit remanded the case "to give the district court an opportunity to invite Laredo to amend its pleadings to assert the correct jurisdictional basis for its action."[186]

In Thurmond,[187] as it had three years earlier in Laredo,[188] the Fifth Circuit had to parse the maritime and nonmaritime obligations in a well service contract in order to make its choice of law determination—"another close question,"[189] according to the court. If maritime law governed the contract its indemnity provision, which was the basis of a lawsuit by a well owner against two service companies,[190] would be enforceable. Conversely, if Louisiana law applied,[191] the indemnity provision would be unenforceable under the Louisiana Oilfield Indemnity Act.[192]

The service contract required the use of a self-propelled barge with a crew consisting of two men, who operated the barge and performed wireline services on the wells, and one of whom had been injured while opening a valve on a wellhead.[193] In the consolidated actions that followed, the well owner and the service companies filed duelling motions for summary judgment

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[185] Id. at 1231-32.
[186] Id. at 1233, citing 28 U.S.C. §1653 ("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate court.").
[187] Thurmond v. Delta Well Surveyors, 836 F.2d 952 (5th Cir. 1988).
[188] Laredo Offshore Constr., Inc. v. Hunt Oil Co., 754 F.2d 1223 (5th Cir. 1985).
[189] 836 F.2d at 952.
[190] One of the companies' employees had prompted the indemnity lawsuit by filing a personal injury lawsuit against the well owner. The district court consolidated the actions. Id. at 953.
[191] The well service contract pertained to wells in Louisiana's territorial waters, so OCSLA was not implicated in the state law/maritime law analysis. Id.
[192] La. R.S. 9:§2780.
[193] 836 F.2d at 953.

concerning the enforceability of the indemnity provision. The district court first granted the service companies' motion, applying Louisiana law and holding that the indemnity provision was unenforceable, but on reconsideration vacated that ruling and held that maritime law governed, making the indemnity provision enforceable. The district court accordingly denied the service companies' motion and granted the well owner's motion, whereupon the parties headed to the Fifth Circuit.

The Fifth Circuit acknowledged that "the contract . . . is mixed with maritime and non-maritime obligations. . . ."[194] The court noted that the principal obligation under the contract was the performance of wireline services, "clearly a nonmaritime obligation in the sense that it does not concern the operation of the vessel," and that the suit had arisen out of the performance of that principal, nonmaritime obligation.[195] Employing the same analysis it had used in Laredo,[196] the court held that since the indemnity controversy arose from the performance of a nonmaritime obligation, state law, not maritime law, governed, and it remanded the case with instructions to the district court to grant summary judgment in favor of the service companies.

The course correction introduced by the Supreme Court in Rodrigue[197] pointed the Fifth Circuit toward a different heading from the one that had been set by Robison[198] and Snipes.[199] Departing from that line of cases, whose reasoning tended almost always toward the application of admiralty law in cases arising from operations on the outer continental shelf, the Fifth Circuit after Rodrigue analyzed choice of law questions in a way more consonant with the purpose and

[194] Id. at 955.
[195] Id.
[196] 754 F.2d 1223 (5th Cir. 1985).
[197] Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969).
[198] Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959).
[199] Pure Oil Co. v. Snipes, 293 F.2d 60 (5th Cir. 1961).

text of OCSLA. PLT,[200] a breach of contract case decided in 1990, furthered this trend by introducing a three-part test to provide more structure for the analysis.

C. PLT and Afterwards

In PLT, an engineering company had contracted with a platform owner to design, fabricate and install a gas gathering line on the outer continental shelf offshore Louisiana, which would extend from a platform to an existing pipeline. The engineering company had also entered into three subcontracts, and one of these subcontractors in turn had entered into its own subcontracts, all in order to accomplish the construction of the pipeline, its connections to the platform and to the other pipeline, and testing as required by the principal contract. When the platform owner learned that the engineering company had not paid its subcontractors, it suspended payments under the principal contract and sued the engineering company and the subcontractors in an interpleader action[201] in the district court.[202]

After the subcontractors answered the interpleader complaint and filed counterclaims, all parties filed motions for summary judgment. The platform owner, trying to avoid the liens the subcontractors had filed pursuant to Louisiana law[203] against its platform, well and other property, asserted among other arguments that maritime law governed the subcontracts. The subcontractors, on the other hand, argued that Louisiana law applied by way of OCSLA, such that they could pursue payment of their unpaid claims against the platform owner and secure their rights to payment by filing the liens. The district court ruled in favor of the subcontractors, holding that pursuant to OCSLA, Louisiana law applied, and that the subcontractors' liens were valid and had

[200] Union Texas Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043 (5th Cir. 1990).
[201] Pursuant to Fed. R. Civ. P. 22.
[202] 895 F.2d at 1045-46.
[203] As codified in the Louisiana Oil Well Lien Act, La. R.S. 9:§4861 et seq. It seems clear that the remaining moneys due the engineering company under the principal contract, which the platform owner had withheld, were not sufficient to pay the subcontractors' claims.

been validly recorded. It dismissed the interpleader action but retained jurisdiction,[204] and eventually entered final judgments in favor of each of the subcontractors.[205]

On appeal, the Fifth Circuit cited OCSLA[206] and Rodrigue,[207] and then stated:

> [F]or adjacent state law to apply as surrogate federal law under OCSLA, three conditions are significant. (1) The controversy must arise on a situs covered by OCSLA (i.e., the subsoil, seabed, or artificial structures permanently or temporarily thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law.[208]

The Fifth Circuit pronounced that "[a]ll of these conditions are met in this case,"[209] and explained in detail why that was so. The first condition, that the controversy arise on an OCSLA situs, was clearly met, as "the gathering line exactly fits the statutory definition of an 'other device[ ] permanently or temporarily attached to the seabed . . . erected thereon for the purpose of . . . developing, or producing resources therefrom.' "[210] The second condition, reframed as requiring that "the activity be non-maritime,"[211] required some further discussion, but was also met. The court looked to Rodrigue,[212] Kimble,[213] and especially Laredo,[214] which the court called a "grey horse case"[215] and about which it stated:

> [O]ur case is much the same. While some maritime operations were undoubtedly contemplated, the principal obligation of PLT and the subcontractors was to build the gathering line and connect it to the platform and the transmission line. These activities are not traditionally maritime. Rather, they are the subjects of oil and gas exploration and production.[216]

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[204] Pursuant to §1349(b)(1) of OCSLA and 25 U.S.C. §1331 (federal question jurisdiction).
[205] 895 F.2d at 1046.
[206] 43 U.S.C. §1333(a)(1) & (2)(A).
[207] Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 355-56 (1969).
[208] 895 F.2d at 1047.
[209] Id.
[210] Id., quoting 43 U.S.C. §1333(a)(1).
[211] 895 F.2d at 1048.
[212] Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 361 (1969).
[213] Kimble v. Noble Drilling Co., 416 F.2d 847 (5th Cir. 1969), cert. denied, 397 U.S. 918 (1970).
[214] Laredo Offshore Constr., Inc. v. Hunt Oil Co., 754 F.2d 1223, 1231 (5th Cir. 1985).
[215] 895 F.2d at 1049.
[216] Id.

The third factor in the new three-part test, that the state law to be applied pursuant to OCSLA not be inconsistent with federal law, was also clearly, but only implicitly, met, as the court did not say so directly. The court went on to reject the platform owner's argument that it should apply admiralty law, as chosen by the parties in their contracts, because OCSLA requires the application of the adjacent state's law "even in the presence of a choice of law provision in the contract to the contrary."[217] The subcontractors were found to be entitled to assert liens under the Louisiana Oil Well Lien Act,[218] and to have properly recorded their liens as that statute requires.[219] The Fifth Circuit duly concluded: "Thus [the platform owner] fails on all its contentions. The District Judge was correct."[220]

Even when viewed 26 years after it was handed down, PLT seems a remarkable decision. It introduced a new, concise, three-part test to determine when state law by way of OCSLA would or would not apply in cases arising from operations on the outer continental shelf, and it is not clear from the decision exactly where the test came from. It appears following the court's quotation of (i) a single paragraph in a single section of OCSLA,[221] and (ii) three sentences from Rodrigue, in which the Supreme Court discusses, in the most general terms, the purpose and language of the Act.[222] But these brief excerpts from the statute and Rodrigue do not directly support the three-part test that the PLT court devised, or discerned, or deduced, and the decision does not analyze or discuss them before announcing the new test. It is fair to say, as a later Fifth

[217] Id. at 1050. See 43 U.S.C. §1333(a)(2)(A), and text at notes 71-73 above.
[218] La. R.S. 9:§4861 et seq.; see 895 F.2d at 1050-51.
[219] 895 F.2d at 1051.
[220] Id. at 1053.
[221] 42 U.S.C. §1333(a)(1), (2)(a), quoted in part in PLT, 895 F.2d at 1047.
[222] "The purpose of [OCSLA] was to define a body of law applicable to the seabed, the subsoil, and the fixed structures . . . on the outer Continental Shelf. That this law was to be federal law of the United States, applying state law only as federal law and then only when not inconsistent with local federal law, is made clear by the language of the Act. . . . [F]or federal law to oust adopted state law, federal law must first apply." Rodrigue v. Aetna Cas. & Sur. Co., 335 U.S. 352, 355-56, 359 (1969), quoted in PLT, 895 F.2d at 1047 (emphasis added by PLT court).

Circuit panel has said, that the PLT test was introduced "without relevant citation."[223] Regardless, it has proven to be durable, because the Fifth Circuit has used it ever since.

Smith v. Penrod Drilling Co.[224] seems to be the first contractual choice of law case using the new PLT test. In Smith, the owner of a well contracted with a drilling company to perform a workover on the well, which required the drilling contractor to position a jack-up drilling barge next to and over the well owner's platform. The contract identified a specific jack-up drilling vessel that would be used to perform the workover.[225] The contract also contained reciprocal indemnity provisions[226] which, although the decision does not say so explicitly, must have extended to the indemnitee's own negligence, as the issue before the court was whether Louisiana law, which prohibits such indemnities,[227] or maritime law, which permits them, would apply.

In response to a personal injury lawsuit brought by the drilling contractor's employee, the well owner tendered defense and indemnity to the drilling contractor. The district court, holding that the indemnity provision was enforceable because the contract was governed by maritime law, granted the well owner's motion for summary judgment. On appeal, the Fifth Circuit cited the PLT test, noted the parties' agreement that Louisiana law was not inconsistent with federal law, and so concentrated only on the first two factors—situs and the applicability of maritime law.[228] Because the accident had occurred on the drilling platform, the panel concluded that the

[223] Hodgen v. Forest Oil Corp., 87 F.3d 1512, 1525 (5th Cir. 1996), overruled in part by Grand Isle IV, 589 F.3d 778 (5th Cir. 2009).
[224] 960 F.2d 456 (5th Cir. 1992), overruled in part by Grand Isle IV, 589 F.3d 778 (5th Cir. 2009).
[225] 960 F.2d at 458.
[226] Id.
[227] La. R.S. 9:§2780.
[228] 960 F.2d at 459.

controversy had arisen on an OCSLA situs.[229] In order to determine whether the contract was maritime, the panel utilized a six-factor test developed in Davis & Sons, Inc. v. Gulf Oil Corp.:[230]

> We consider six factors in characterizing the 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 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? and (6) what work was the injured worker actually doing at the time of the injury?[231]

The Smith court said this six-factor test was "unenlightening, as each factor simply turns on the question of whether workover operations are maritime."[232] Nonetheless, the court duly went through the litany. It relied on Robison[233] in its analysis of the third factor, to conclude that the jack-up barge was a vessel, and Corbitt v. Diamond M. Drilling Co.[234] in its analysis of the fifth factor, to determine that the injured employee's work was maritime. The court accordingly concluded that maritime law controlled the contract, making the indemnity provision enforceable, and affirmed the district court's award of summary judgment to the well owner. But the court was dissatisfied with both its result and its analysis, based on its perception that the Fifth Circuit's view of maritime contracts probably was too expansive, and definitely was inconsistent.[235]

The Smith court's expression of dissatisfaction is worth some consideration. The court identified eight cases as examples of the supposedly inconsistent approach to whether an oil and

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[229] Id.
[230] 919 F.2d 313, 316 (5th Cir. 1990). The Davis court also said that the determination "depends in part on historical treatment in the jurisprudence. . . ." Id. The case arose from operations in Louisiana state waters, not on the outer continental shelf.
[231] 960 F.2d at 460, quoting Davis, 919 F.2d at 316.
[232] 960 F.2d at 460.
[233] Offshore Co. Robison, 266 F.2d 769 (5th Cir. 1959).
[234] 654 F.2d 329 (5th Cir. 1981). Like Davis, note 230 above, Corbitt arose from operations in Louisiana state waters, not on the outer continental shelf.
[235] "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." 960 F.2d at 461.

gas contract is maritime.[236] But the cases dealt with a variety of contracts, such as drilling contracts, Lewis v. Glendel Drilling Co.[237] and Theriot v. Bay Drilling Co.;[238] construction of drilling platforms, Laredo Offshore Constr., Inc. v. Hunt Oil Co.;[239] construction of gathering lines, PLT;[240] wireline services, Domingue v. Ocean Drilling & Expl. Co.[241] and Thurmond v. Delta Well Surveyors;[242] well maintenance using a jack-up barge, Davis & Sons, Inc., v. Gulf Oil Corp.;[243] and drilling and workover operations, Corbitt v, Diamond M. Drilling Co.[244] At least to this reader, it does not seem especially surprising, or regrettable, that cases featuring different contracts and presenting different facts would yield different results on whether maritime law governs. And although the appellant drilling company took the panel's hint[245] and suggested rehearing by the Fifth Circuit en banc, the suggestion was denied.[246]

The Smith court observed that with regard to the third factor in the PLT test—whether the applicable state law is inconsistent with federal law—the parties before it had agreed that Louisiana's anti-indemnity statute[247] is not inconsistent with any federal laws.[248] A line of cases decided after Smith also addressed whether indemnity obligations in offshore oil and gas contracts were enforceable, and the Fifth Circuit in these cases, as it had in Smith, simply stated or assumed that the third factor in the PLT test was met. This collapsed the PLT inquiry in these cases into

[236] Id. n.3.
[237] 898 F.2d 1083 (5th Cir. 1990).
[238] 783 F.2d 527 (5th Cir. 1986).
[239] 754 F.2d 1223, 1232 (5th Cir. 1985).
[240] 895 F.2d 1043, 1050 (5th Cir. 1990).
[241] 923 F.2d 393, 398 (5th Cir. 1991).
[242] 836 F.2d 952 (5th Cir. 1988).
[243] 919 F.2d 313, 317 (5th Cir. 1990).
[244] 654 F. 2d 329 (5th Cir. 1981).
[245] "Only our en banc court . . . can consider whether our expansive view of maritime contracts . . . should be narrowed." 960 F.2d at 460 (emphasis deleted).
[246] Id at 461.
[247] Louisiana Oilfield Indemnity Act, La. R.S. 9:§2780.
[248] 960 F.2d at 459.

two questions: Did the controversy occur on an OCSLA situs? And, does maritime law apply to the contract of its own force?

Three cases decided in 1992, the same year Smith was decided, demonstrate this: Dupont v. Sandefer Oil & Gas, Inc.,[249] Hollier v. Union Texas Petroleum Corp.,[250] and Campbell v. Sonat Offshore, Inc.[251] In Dupont, the operator of a well contracted with a drilling contractor, and the drilling contractor in turn subcontracted with the owner of a jack-up drilling rig, to drill and complete a well on the outer continental shelf offshore Louisiana. After the well was drilled but before it was completed, the drilling contractor left the site, and by means of a letter agreement the well operator assumed all of the drilling contractor's obligations, including its indemnity obligations,[252] to the rig owner for the completion phase of the subcontract.[253] The well operator then hired a completion contractor to assist in the completion of the well.[254]

When an employee of the completion contractor filed a personal injury action, the predictable dispute about whether the well operator owed indemnity to the rig owner ensued, with the well operator arguing that Louisiana law controlled the subcontract and letter agreement, such that the indemnity obligation was not enforceable, and the rig owner arguing that maritime law controlled, such that the obligation was enforceable.[255] For the Fifth Circuit, the question was an easy one:

> In [Smith] we held that a contract for the supply and use of a vessel for drilling, completion, and workover services was maritime. We therefore hold that the instant contract, requiring [the rig owner] to

[249] 963 F.2d 60 (5th Cir. 1992).
[250] 972 F.2d 662 (5th Cir. 1992), overruled in part by Grand Isle IV, 589 F.3d 778 (5th Cir. 2000).
[251] 979 F.2d 1115 (5th Cir. 1992).
[252] The subcontract "contained reciprocal indemnity provisions requiring each party to indemnify the other for personal injury claims brought by its respective employees." 963 F.2d at 61.
[253] Id.
[254] Id.
[255] Id.

> supply a vessel and use it for drilling and workover services, is maritime.[256]

The court accordingly affirmed the district court's award of summary judgment in favor of the rig owner, ordering that the well operator provide defense and indemnity as required by the subcontract and letter agreement.

Hollier[257] was a wrongful death action brought by the widow and children of an employee of a well testing contractor, who had died after being crushed between a crew boat and a fixed platform on the outer continental shelf offshore Louisiana. The defendant platform owner filed a third-party demand against the decedent's employer, seeking indemnity pursuant to a mutual indemnity provision in their contract, "valid under maritime law but prohibited by Louisiana law."[258] The district court correctly found that maritime law did not apply, but blundered by applying Texas law pursuant to a choice of law provision in the parties' contract, and held that the platform owner was entitled to indemnity.[259]

On appeal, the Fifth Circuit quoted OCSLA[260] and the PLT test,[261] and stated that "[o]nly the first two factors are in dispute in this case."[262] The court held that the controversy had arisen on an OCSLA situs, since it was an "artificial island" within the meaning of the Act,[263] and, quoting the Davis six-factor test, observed that "[t]he specific work order in this case was for well testing, a non-maritime service," and concluded that the Davis factors "indicate that the contract is non-maritime."[264] The court then held that Louisiana law should apply pursuant to OCSLA

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[256] Id. at 62, citing Smith, note 224 above, 960 F.2d 456 (5th Cir. 1992), overruled in part by Grand Isle IV, 589 F.3d 778 (5th Cir. 2009).
[257] Note 250 above.
[258] 972 F.2d at 662, citing La. R.S. 9:§2780.
[259] 972 F.2d at 662.
[260] 43 U.S.C. §1333(a)(1), (2)(A); see Hollier, 972 F.2d at 664.
[261] PLT, note 200 above, 895 F.2d at 1047; see Hollier, 972 F.2d at 664.
[262] 972 F.2d at 664.
[263] Id.
[264] Id. at 665, quoting Davis, note 230 above, 919 F.2d at 316.

notwithstanding the parties' choice of Texas law, and reversed the district court and rendered judgment in favor of the well testing contractor, denying the platform owner's indemnity demand.

In Campbell,[265] the owner of a jack-up drilling platform on location on the outer continental shelf offshore Louisiana had contracted with a drilling company, and had issued a purchase order to a casing contractor. An employee of the casing contractor was injured while transferring from a vessel to the drilling platform, and he sued the platform owner and the drilling contractor. Based on indemnity provisions in the purchase order, the platform owner sought defense and indemnity, for itself and the drilling contractor, from the casing contractor.[266] The district court awarded this relief to the platform owner by means of a partial summary judgment.[267]

On appeal, the Fifth Circuit, as the district court had done, went straight to the question whether the purchase order was a maritime contract. The court approvingly recounted the analysis the district court had performed: Historically, the Fifth Circuit had found that casing service contracts and drilling contracts were governed by maritime law,[268] and all six of the Davis factors indicated that the purchase order with its indemnity provisions was a maritime contract.[269] The Fifth Circuit observed that "the maritime/non-maritime line running through our jurisprudence concerning the nature of contracts linked to offshore gas and oil production is somewhat difficult to discern,"[270] but specifically noted that the drilling platform was "a jack-up drilling rig, which is one of the special-purpose watercraft that this court has explicitly characterized as vessels."[271]

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[265] Note 251 above.
[266] 979 F.2d at 1117.
[267] Id.
[268] Id at 1121, citing Corbitt v. Diamond M. Drilling Co., 654 F.2d 329, 332 & n.1 (5th Cir. 1981); Transcontinental Gas Pipeline Corp. v. Mobile Drilling Barge, 424 F.2d 684, 691 (5th Cir.), cert. denied, 400 U.S. 832 (1970); and Halliburton Co. v. Norton Drilling Co., 302 F.2d 431, 437 (5th Cir. 1962), cert. denied, 374 U.S. 829 (1963).
[269] 979 F.2d at 1121, citing Davis, note 229 above, 919 F.2d at 316.
[270] 979 F.2d at 1121.
[271] Id. at 1122-23, citing Domingue v. Ocean Drilling & Expl. Co., 923 F.2d 393, 394 n.1 (5th Cir. 1991), cert. denied, 502 U.S. 1033 (1992); Lewis v. Glendel Drilling Co., 898 F.2d 1083, 1088 (5th Cir. 1990); Theriot v. Bay Drilling Corp., 783 F.2d 527, 538-39 (5th Cir. 1986).

Ultimately the Fifth Circuit was persuaded that the district court's analysis and conclusion were correct, and it affirmed the award of partial summary judgment in favor of the platform owner.

The all-important question of contractual indemnity in offshore personal injury cases continued to come before the Fifth Circuit in the following years. The panels deciding these cases, applying what essentially had become a two-factor PLT test—OCSLA situs and maritime or nonmaritime character of the contract—performed their analyses in different ways and reached different results. For example, in Dupre v. Penrod Drilling Corp.,[272] the court believed that the contract was maritime, and so analyzed only that issue, which yielded a conclusion that the indemnity obligation was enforceable. In another case, Hodgen v. Forest Oil Corp.,[273] the court employed a different analysis, looking at both the situs (OCSLA) and the character of the contract (nonmaritime), which caused it to conclude that the indemnity provisions were not enforceable under Louisiana law made applicable by the Act. And in two other cases, Demette v. Falcon Drilling Co.[274] and Diamond Offshore Co. v. A&B Builders, Inc.,[275] the court analyzed both questions, finding that the occurrence of a controversy on an OCSLA situs would not preclude the enforcement of an indemnity provision if the parties' contract was maritime.

In Dupre, the owner of four wells on the outer continental shelf offshore Louisiana had entered into a contract for labor and services, which required the contractor to "equip and operate . . . a special purpose offshore jack-up drilling vessel" to drill, complete, and tie-back the wells to the owner's fixed offshore platform.[276] The parties had elected Texas law to govern the contract and its indemnity provision. If the contract was maritime, their choice of law would be honored

[272] 993 F.2d 474 (5th Cir. 1993).
[273] 87 F.3d 1512 (5th Cir. 1996).
[274] 280 F.3d 492 (5th Cir. 2002).
[275] 302 F.3d 531 (5th Cir. 2002).
[276] 993 F.2d at 475.

and indemnity would be owed;[277] conversely, if the contract was not maritime, Louisiana law through OCSLA would govern as the law of the adjoining state,[278] and the indemnity provision would not be enforceable.[279]

An employee of the well owner slipped on mud discharged from the drilling vessel and fell onto scaffolding erected on the well owner's platform. He subsequently filed a personal injury action against the contractor, which in turn filed a third party demand against the well owner for indemnity. Ruling on cross-motions for summary judgment on the indemnification issue, the district court held that the contract was maritime and that the indemnity provision was enforceable under Texas law, and so granted the contractor's motion and denied the well owner's. On appeal, the Fifth Circuit first recited the PLT test,[280] and then, giving away the result in discussing its analysis, announced that "[s]ince we conclude that maritime law applies of its own force to this maritime contract, our discussion is limited to this issue."[281]

The Fifth Circuit then dutifully ran through the six Davis[282] factors. It is clear from the opinion that the first factor, what the work order or contract provided, and the fourth factor, the relationship of the work to the mission of the vessel, were of particular importance.[283] As to the first factor, said the court, "we find that the contract specifically required [the contractor] to provide . . . a special purpose offshore drilling vessel" to drill, complete and tie-back the wells.[284] And regarding the fourth factor, the contractor "could not have performed its obligations under the

[277] "[U]nder admiralty law, where the parties have included a choice of law clause, that state's law will govern unless the state has no substantial relationship to the parties or the transaction or the state's law conflicts with the fundamental purposes of maritime law." Stoot v. Fluor Drilling Serv., Inc., 851 F.2d 1514, 1517 (5th Cir. 1988) (citations omitted), quoted in Dupre, 993 F.2d at 476 n.4.
[278] 43 U.S.C. §1333(a)(2)(A).
[279] La. R.S. 9:§2780.
[280] 993 F.2d at 476.
[281] Id. at 476-77.
[282] Davis & Sons, Inc. v. Gulf Oil Corp., note 229 above, 919 F.2d at 316.
[283] 993 F.2d at 477.
[284] Id.

contract without the vessel. . . . [W]e have previously held that contracts for the supply and use of a vessel for drilling and completing wells, and for general services connected therewith, are maritime in nature."[285] All of this convinced the court that the contract was maritime, and, concluding that the indemnity was enforceable under Texas law, it affirmed the district court in all respects.

Hodgen,[286] decided by the Fifth Circuit in 1996, was the lead case among 13 separate lawsuits that arose out of a terrible accident caused by extraordinary negligence. The owner of a cluster of four platforms on the outer continental shelf offshore Louisiana had entered into a contract with an operating company, and a time charter with the owner of a vessel, which carried the contractor's workers back and forth between the platforms. The contract contained an indemnity provision requiring the operating company to indemnify the platform owner from any claims brought by the operating company's employees, even if they were caused by the platform owner's negligence.

One morning some workers were scheduled to travel from the platform where they ate and slept to another platform. The seas were seven to nine feet high, so the men did not want to travel in the vessel, which would require them to transfer to and from the platform by means of a swing rope. They requested a helicopter, but the platform owner's representative refused. They therefore traveled in the vessel, and successfully completed the swing rope transfer onto the platform. But when they finished their work and attempted to transfer off the platform, one of the workers slammed onto the deck of the vessel, which damaged his spinal cord and left him partially paralyzed. He sued and eventually settled his claims, which left issues among the defendants for

[285] Id., citing Dupont v. Sandefer Oil & Gas, Inc., 963 F.2d 60, 62 (5th Cir. 1992); Smith v. Penrod Drilling Corp., 960 F.2d 456, 459-60 (5th Cir. 1992); Lewis v. Glendel Drilling Co., 898 F.2d 1083, 1086 (5th Cir. 1990); Theriot v. Bay Drilling Corp., 783 F.2d 527, 438 (5th Cir. 1986).
[286] 87 F.3d 1512 (1996).

the court to resolve. These included the contract's indemnity provision in favor of the platform owner, which the district court refused to enforce, reasoning that the Louisiana Oilfield Indemnity Act,[287] made applicable by OCSLA,[288] barred enforcement.

On appeal, the Fifth Circuit observed that the injured worker's lawsuit had given rise to a "web of litigation," in which the platform owner, the operating company, the vessel owner and their insurers "each attempted to pin responsibility for paying . . . damages upon someone else."[289] The outcome of most of the lawsuits depended upon whether the indemnity provision in the platform owner/operating company contract was enforceable, and on this issue the Fifth Circuit endorsed the district court's reasoning and affirmed its holding.

As to the first factor in the PLT test, the appellants argued that in Hollier, the OCSLA situs requirement was met because the injured worker in that case "was in physical contact with the platform at the time of his injury."[290] By contrast in the current case, they argued, the worker had been injured on a vessel, which was not an OCSLA situs. The Hodgen court could not decline this invitation to split hairs, and found that the injured worker had been "in physical contact with the rope, a portion of the platform, at the time of his unfortunate landing" on the vessel.[291] But the court did not believe that the OCSLA situs issue depended on the strength of the injured worker's grip—whether he was holding onto or had let go of the platform's rope when he slammed onto the deck of the pitching vessel. According to the court, Hollier actually showed that "this circuit does not apply any physical contact rule with the rigidity that appellants would impose."[292] So it held that the Hodgen controversy had arisen on an OCSLA situs.[293]

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[287] La. R.S. 9:§2780.
[288] 43 U.S.C. §1333(a)(2)(A).
[289] 87 F.3d at 1522.
[290] Id. at 1527, quoting Hollier, note 250 above, 972 F.2d at 664.
[291] 87 F.3d at 1527.
[292] Id.
[293] Id. The en banc Fifth Circuit would later disapprove of this focus on the location of the accident in OCSLA situs determinations in breach of contract cases. Grand Isle IV, 589 F.3d 778 (5th Cir. 2009).

About the second factor the Fifth Circuit stated, "We agree with the district court that the contract between [the platform owner and the operating company] was non-maritime."[294] Whether the contract was maritime was merely a different way of asking whether maritime law applied of its own force (as the PLT court had put it), because "[t]hese two inquiries are identical . . . in oilfield indemnity disputes in the OCSLA context, and both belong as a single factor in the three part PLT test."[295] The district court had found that the answers to all six questions posed by the Davis case[296] indicated that the contract was not maritime, and the Fifth Circuit agreed: All of the work by the platform company's employees related exclusively to, and was performed only on, the fixed platforms; the operating company did not have to provide or use a vessel to perform the contract (often the trips between platforms were by helicopter); the injured employee's work was the operation and maintenance of the fixed platforms; and the employee was doing this work when he was hurt.[297] Lastly, regarding the third factor, the Fifth Circuit found nothing in the Louisiana Oilfield Indemnity Act[298] that was inconsistent with federal law.[299] All of this led the Fifth Circuit to affirm the district court's holding that the indemnity provision in the platform owner/operating company contract was not enforceable under Louisiana law made applicable by OCSLA.

Demette[300] and Diamond Offshore,[301] decided in 2002, show a maturing of the Fifth Circuit's analysis of the OCSLA situs issue where a fixed platform was not involved. In Demette, instead of reflexively holding that a jack-up drilling rig was necessarily not an OCSLA situs because it was movable and hence a vessel, the court thoroughly parsed section 1333(a)(1) of the

[294] 87 F.3d at 1527.
[295] Id. at 1525.
[296] Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313, 316 (5th Cir. 1990).
[297] 87 F.3d at 1528.
[298] La. R.S. 9:§2780.
[299] 87 F.3d at 1528.
[300] Demette v. Falcon Drilling Co., 280 F.3d 492 (5th Cir. 2002), overruled in part by Grand Isle IV, 589 F.3d 778 (5th Cir. 2009).
[301] Diamond Offshore Co. v. A&B Builders, Inc., 302 F.3d 531 (5th Cir. 2002), overruled in part by Grand Isle IV, 589 F.3d 778 (5th Cir. 2009).

Act. The court was convinced by its review of the statute that the drilling rig was an OCSLA situs, because at the time of the incident "it was a device temporarily attached to the seabed, which was erected on the OCS for the purpose of drilling for oil."[302] In Diamond, likewise, the Fifth Circuit eschewed a simplistic movable rig = vessel = not an OCSLA situs analysis. The court stated that "the Demette situs test is binding,"[303] and closely examined the evidence concerning whether a semi-submersible drilling rig was physically attached to the seabed when the accident occurred.

The background of the indemnity controversy in Demette was a contract between a well owner and a drilling contractor for casing services at the well owner's offshore sites. The contract had reciprocal indemnity provisions, one of which required the drilling contractor to indemnify the well owner and its other contractors against claims brought by the drilling contractor's employees, including claims arising from the well owner's negligence. One of the other contractors, hence an indemnified party pursuant to the drilling contract, was the owner of a jack-up drilling rig that had been engaged by the well owner.[304] The Fifth Circuit unequivocally treated the drilling rig as a vessel, and described it much the same as the Robison[305] court had more than 40 years earlier:

> A jack-up drilling rig is a floating rig with legs that can be lowered into the seabed. Once the legs are secured in the seabed, the rig can be "jacked-up" out of the water to create a drilling platform. The process can be reversed, and a jack-up rig can be towed to new sites.[306]

An employee of the drilling contractor was injured while working on the drilling rig. He sued the rig owner, which in turn filed a third-party demand against the well owner for defense and indemnity. And the well owner impleaded the drilling contractor, also seeking defense and

[302] 280 F.3d at 498, citing 43 U.S.C. §1333(a)(1).
[303] 302 F.3d at 543.
[304] 280 F.3d at 494-95.
[305] Offshore Co. v. Robison, 266 F.2d 769, 772 (5th Cir. 1959). See text at notes 93-98 above.
[306] 280 F.3d at 495.

indemnity, pursuant to the drilling contract. The district court awarded summary judgment to the rig owner on its defense and indemnity claim, and the drilling contractor thereupon funded a settlement with the injured worker, reimbursed the rig owner its costs of defense, and, pursuant to an agreed reservation of rights, appealed the indemnity issue to the Fifth Circuit.[307]

The Fifth Circuit began its analysis of the situs issue with "a close inspection of section 1333(a)(1)"[308] of OCSLA—a lucid and more searching analysis than in any prior opinion.[309] The court described the categories and subcategories within that section of the Act as follows:

> [Section 1333(a)(1)] applies to two primary sets of subjects: "to the subsoil and seabed of the [OCS]"; and "to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed." This latter category is further divided into two categories: those artificial islands, installations, or devices "erected" on the OCS "for the purpose of exploring for, developing, or producing resources" from the OCS, and those "other than a ship or a vessel" whose purpose is "transporting such resources."[310]

The analysis yielded three types of locations to which OCSLA applied: first, the subsoil and seabed of the outer continental shelf; second, artificial islands, installations and other devices which are (i) permanently or temporarily attached to the seabed and (ii) erected on the seabed (iii) in order to explore for, develop or produce minerals; and third, artificial islands, installations and other devices which are (i) permanently or temporarily attached to the seabed, (ii) are not ships or vessels, and (iii) are used to transport minerals from the Outer Continental Shelf. So a vessel cannot be an OCSLA situs if it is used to transport minerals, but may be an OCSLA situs if it is used to explore for, develop or produce minerals. The jack-up drilling barge, although a vessel,

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[307] Id.

[308] Id. at 496.

[309] "Neither the Supreme Court nor this court has parsed the precise language of the statute to specify the exact contours of the situs test it establishes. We are called upon to do so today." Id.

[310] Id., quoting 43 U.S.C. §1333(a)(1). The court's thorough analysis included its consideration whether "installation or other device" has a meaning distinct from "artificial islands." Looking at other subsections of the Act, such as §1333(c), (d)(1) and (2), (e) and (f), and considering both text and context, the court concluded that "artificial islands, and all installations and other devices" form a single category. 280 F.3d at 496 n.11.

"falls into the second category of OCSLA situses: it was a device temporarily attached to the seabed, which was erected on the OCS for the purpose of drilling for oil."[311]

What about the second part of the PLT test—whether maritime law applies of its own force? The court of course referred to the Davis test[312] to answer this question, which turned out to be easy, because "[f]or some categories of contracts, the historical treatment is sufficiently clear that the fact-specific inquiry becomes unimportant. This is such a case."[313] The court noted that in prior cases it had held that indemnity provisions in contracts to provide offshore casing services are maritime, and stated that "circuit precedent virtually compels the conclusion that this is a maritime contract."[314] Lastly, pursuant to section 1333(b) of the Act and section 905(c) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"),[315] the injured worker's receipt of LHWCA benefits did not invalidate the indemnity provision in the drilling contract. So the court affirmed the district court's award of summary judgment against the drilling contractor.

Diamond Offshore[316] followed quickly upon Demette—eight months later. The familiar sequence of events leading to a contractual indemnity dispute began with a "master service contract" between an offshore well operator and a repair and maintenance contractor. The contract imposed reciprocal indemnity obligations, pursuant to which each party indemnified the other for claims brought by its employees, including claims arising from the indemnified party's negligence.[317] Pursuant to the contract, the operator engaged the contractor to perform repairs on the operator's semi-submersible drilling rig. As the Fifth Circuit explained,

> [a] semi-submersible drilling rig is a movable rig that is typically towed to a particular location where it is submerged about fifty feet

[311] Id. at 498.
[312] Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313, 316 (5th Cir. 1990).
[313] 280 F.3d at 500.
[314] Id. at 500-501, citing PLT, 895 F.2d at 1948; Lewis v. Glendel Drilling Co., 898 F.2d 1082, 1086 (5th Cir. 1990); Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1120-21 (5th Cir. 1992).
[315] 33 U.S.C. §905(c).
[316] Diamond Offshore Co. v. A&B Builders, Inc., 302 F.3d 531 (5th Cir. 2002).
[317] Id. at 536.

> and then anchored and placed to complete the mooring of the rig. The rig's platform deck is supported on columns which are attached to large underwater displacement hulls, large vertical caissons, or some combination of both. The columns, displacement hulls, or caissons are flooded on location.[318]

A welder employed by the contractor was injured while working aboard the rig, on location on the outer continental shelf more than 100 miles offshore. He sued the operator and the owner of the well in Texas state court, and the operator made demand on the contractor—the injured worker's employer—for defense and indemnity pursuant to the master service contract. The operator received no response to its demand, and thereupon sued the contractor in federal court, seeking among other relief a declaratory judgment on the defense and indemnity issue, and damages. The operator and the contractor then filed duelling motions for partial summary judgment. The district court denied the contractor's motion and granted the operator's motion, ruling with regard to the indemnity issue that the provision in the master service contract was valid and that the contractor owed the well owner defense and indemnity, and entered final judgment dismissing the case.

On appeal the contractor argued that the indemnity provision was invalid because indemnity was prohibited both by LHWCA section 905(b)[319] and by the law of the adjacent state—either Texas or Louisiana[320]—made applicable by OCSLA section 1333(a)(2). The first of these arguments would fail if the injured welder was entitled to receive LHWCA benefits pursuant to OCSLA section 1333(b), because if so, the reciprocal indemnity provisions in the master service contract would then be permissible pursuant to the exception set forth in LHWCA section

[318] Id.
[319] 33 U.S.C. §905(b).
[320] "A&B also maintains . . . that the reciprocal indemnity provision is invalid under either Louisiana or Texas anti-indemnity statutes. . . . Presumably, A&B is relying upon §1333(a)(2) of OCSLA to argue that either Louisiana or Texas law applies as a surrogate to federal law." 302 F.3d at 549 (citations omitted).

905(c).[321] And the welder's entitlement to LHWCA benefits under OCSLA section 1333(b) in turn depended upon whether the indemnity controversy had arisen on an OCSLA situs. In order to answer this question the Fifth Circuit turned to its recent Demette decision.[322]

Was the semi-submersible rig "temporarily attached to the seabed"[323] of the Gulf of Mexico when the welder was injured? If so, the rig was an OCSLA situs at the time of the welder's injury, and OCSLA section 1333(b) was applicable, and the exception of LHWCA section 905(c) was applicable, and the indemnity provision was enforceable. But the Fifth Circuit could not tell from the summary judgment evidence whether the rig was attached to the ocean floor, by means of its anchors, its drilling mechanisms, or any other method, at the time of the welder's injury. The district court's award of partial summary judgment in favor of the operator on the indemnity issue was not supported by the record.[324]

The operator asked that the case be remanded so it could supplement the summary judgment record with evidence that the rig had been attached to the seabed at the time of the accident. Considering the newness of the Demette situs test (the decision had been handed down after the district court had decided the cross-motions for summary judgment), the Fifth Circuit agreed. It remanded with instructions to the district court to "allow [the operator] to put forth additional summary judgment proof and reconsider its ruling that this case arises out of an injury on an OCSLA situs."[325] According to the Fifth Circuit,

> [t]his should require only a brief supplement to the record detailing the contact, if any, that the [semi-submersible rig] had with the ocean floor at the time of [the] alleged injury, such as its anchors,

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[321] 33 U.S.C. §905(c).
[322] Demette v. Falcon Drilling Co., 280 F.3d 492 (5th Cir. 2002).
[323] 43 U.S.C. §1333(a)(1).
[324] 302 F.3d at 545.
[325] Id. at 546. In two other respects the Fifth Circuit affirmed the district court: It agreed that the injured welder qualified for LHWCA benefits under OCSLA §1333(b) because "the injury would not have occurred but for extractive mineral operations over the OCS," and it also agreed that the indemnity provision in the master service contract between the operator and the contractor was sufficiently reciprocal to satisfy the exception in 43 U.S.C. §905(c). Id. at 546-47.

> drilling mechanisms, and flooded columns, displacement hulls, or caissons, that connected the rig to the seabed and supported the drilling platform.[326]

The second of the contractor's arguments against enforcement of the indemnity provision was that the provision was invalid under the anti-indemnity statutes of either Texas or Louisiana. But state law would not be applicable under OCSLA section 1333(a)(2) if the master service contract was maritime, and it was. The Fifth Circuit found that "[c]ontracts for vessel repair services are traditionally treated as maritime," and further found that "[t]he six Davis factors also point to the conclusion that this is a maritime contract."[327] So the court concluded that maritime law, which does not prohibit the enforcement of such indemnity provisions, applied of its own force.

D. Inconsistency and Dissatisfaction

Reading the cases from Robison[328] through Rodrigue[329] through PLT[330] to Diamond Offshore,[331] one can trace the zig-zag course traversed by the Fifth Circuit over that 43-year span. The first leg of the course, beginning with Robison, was a series of cases treating platforms on the outer continental shelf, whether fixed or movable, as little islands governed only by maritime law, notwithstanding OCSLA's mandate that the adjacent states' laws should provide the rules of decision where required by section 1333(a)(2) of the Act.[332]

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[326] Id.
[327] Id. at 549, citing New Bedford Dry Dock Co. v. Purdy, 258 U.S. 96, 99-100 (1922); Southwest Marine of San Francisco, Inc. v. United States, 896 F.2d 532, 533 (Fed. Cir. 1990).
[328] Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959).
[329] Rodrigue v. Aetna Cas. & Sur. Co., 395 F.2d 216 (5th Cir. 1968), rev'd, 395 U.S. 352 (1969).
[330] Union Texas Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043 (5th Cir. 1990).
[331] Diamond Offshore Co. v. A&B Builders, Inc., 302 F.3d 531 (5th Cir. 2002), overruled in part by Grand Isle IV, 589 F.3d 778 (5th Cir. 2009).
[332] These are the cases from Robison through Rodrigue. See text at notes 93-141 above.

The second leg, on a different tack as directed by the Supreme Court in Rodrigue,[333] extended from Kimble v. Noble Drilling Co.,[334] a tort case decided right after Rodrigue in 1969, through Thurmond v. Delta Well Surveyors, Inc.,[335] decided 19 years later. Cases decided in this interval show that the Fifth Circuit heeded the Supreme Court's directive and carefully analyzed the facts of each case in light of the language of OCSLA and traditional maritime principles. Depending on the circumstances, contractual indemnity disputes could be governed by the adjacent state's law made applicable by OCSLA section 1333(a)(2), or maritime law, or even both.[336]

The third leg of the course was steered in the direction set by PLT,[337] decided in 1990, and was guided by the lodestar three-part test—situs; maritime law or not; and consistency with federal law—devised by the panel that decided that case. Cases after PLT, extending through Diamond Offshore,[338] tended to cite the PLT test early in the analysis and then would discuss the situs of the controversy before moving to whether maritime law applied of its own force, using the Davis[339] test to answer that question. Or, if the facts strongly indicated that maritime law would apply, the court would sometimes skip the situs test and explain why maritime law applied and not state law by way of OCSLA.[340]

Along the course from Robison to Diamond Offshore one also sees two cross-currents, where judges expressed their dissatisfaction with the inconsistencies they perceived in Fifth Circuit case law on contractual choice of law issues on the outer continental shelf. One of these relates to

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[333] Note 329 above.
[334] 416 F.2d 847 (5th Cir. 1969), cert. denied, 397 U.S. 918 (1970).
[335] 836 F.2d 952 (5th Cir. 1988).
[336] As occurred in Thurmond, 836 F.2d at 956 ("[T]his contract contained severable maritime and nonmaritime obligations, and the principal obligation of this contract was nonmaritime. . . . [T]his suit arose out of the performance of a nonmaritime obligation. . . ."). See text at notes 141-199 above.
[337] Note 330 above.
[338] Note 331 above.
[339] Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313, 316 (5th Cir. 1990).
[340] As in Dupre v. Penrod Drilling Corp., 993 F.2d 474, 476-77 (5th Cir. 1993) ("Since we conclude that maritime law applies of its own force to this maritime contract, our discussion is limited to this issue.").

how the court determines whether maritime law applies to a contract. Judge Garwood, in his concurring opinion in Thurmond, was "troubled by the tension, or perhaps outright inconsistency, between many of our opinions in this area," because he saw from his research that "each of these separate lines of cases seems to proceed without considering the other."[341] Similarly, the panel in Lewis v. Glendel Drilling Co. stated that "[t]he result here is foreordained by precedent, but because of an apparently contradictory line of cases in our circuit and the uncertain policy underpinning our result, the appellant would justly ask "why?".[342] And the panel in Smith v. Penrod Drilling Corp. uneasily concluded that "[a]lthough we have been able to resolve the case at hand by relying on explicit precedent, we note that our caselaw arguably conflicts with OCSLA."[343]

The other cross-current of dissatisfaction appears in the Hodgen decision,[344] where the panel, "again confront[ing] a series of arguably inconsistent cases," and noting prior expressions of "our frustration with the inconsistency of our case law in this general area,"[345] discerned confusion in Fifth Circuit case law additionally on how to determine when the OCSLA situs requirement is met.[346] This issue—how to determine whether the controversy in a contractual choice of law case has arisen on an OCSLA situs—is the one that eventually was taken up by the Fifth Circuit en banc, in Grand Isle IV.[347]

[341] 836 F.2d at 957 (Garwood, J. concurring).
[342] 898 F.2d 1083, 1084 (5th Cir. 1990) (addressing contract for drilling operations in state territorial waters).
[343] 960 F.2d 456, 460 (5th Cir. 1992).
[344] Hodgen v. Forest Oil Corp., 87 F.3d 1512 (5th Cir. 1996).
[345] Id. at 1523 & n.8.
[346] Id. at 1524.
[347] Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 589 F.3d 778 (5th Cir. 2009).

V. THE FIFTH CIRCUIT'S CURRENT APPROACH

A. The Grand Isle Decision

The Fifth Circuit's current approach to solving contractual choice of law conundrums began with a remarkable case, filed in federal district court in 2007.[348] The district court disposed of the case on cross-motions for summary judgment, and on appeal a Fifth Circuit panel reversed.[349] But a petition for rehearing en banc was granted,[350] and the en banc Fifth Circuit[351] then reversed the panel's decision, and additionally overruled five other decisions,[352] on the issue of the situs of the controversy in a contract case implicating OCSLA. The decision mandated an analysis different from the one used in tort cases: The OCSLA situs of a contractual indemnity dispute would not be where the accident that gave rise to the lawsuit occurred, but instead would be the location that was the focus of the contract, "where a majority of the performance called for under the contract is to be performed. . . ."[353]

1. At the District Court

In Grand Isle I, a platform owner had entered into a contract with one company for the repair and maintenance of its platforms on the outer continental shelf offshore Louisiana, and had chartered a vessel from another company to transport the contractor's workers between platforms. The repair and maintenance contract contained a provision pursuant to which the contractor agreed to indemnify the platform owner and its other contractors, which included the vessel owner, from

[348] Grand Isle I, 2007 WL 2874808 (E.D. La. 2007) (unpublished opinion).
[349] Grand Isle II, 543 F.3d 256 (5th Cir. 2008).
[350] Grand Isle III, 569 F.3d 523 (5th Cir. 2009).
[351] Grand Isle IV, 589 F.3d 778 (5th Cir. 2009) (en banc).
[352] Diamond Offshore Co. v. A&B Builders, Inc., 302 F.3d 531 (5th Cir. 2002); Demette v. Falcon Drilling Co., 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); Smith v. Penrod Drilling Corp., 960 F.2d 456 (5th Cir. 1992). These cases are discussed in the text above at notes 224-327.
[353] Grand Isle IV, 589 F.3d at 787.

claims brought by the contractor's employees, including claims arising from the negligence of the platform owner or the other contractors.[354]

An employee of the contractor was injured on the vessel while preparing to board a platform. He sued the vessel owner, which settled his claim and then tendered defense and indemnity to the contractor. The contractor refused the tender and filed suit, seeking a declaratory judgment that it was not obligated by the contract to defend and indemnify the vessel owner.[355] The contractor then filed a motion for summary judgment, contending that the Louisiana Oilfield Indemnity Act,[356] made applicable by OCSLA, barred enforcement of the indemnity provision in the contract. The vessel owner filed a cross-motion for summary judgment, seeking a determination that maritime law governed the contract, and that the indemnity obligations were therefore enforceable.

According to the district court, "[b]oth parties agreed that the determinative inquiry in this contractual . . . dispute is whether Louisiana law applies, and that resolution of this issue will resolve the cross-motions for summary judgment."[357] Beginning at the beginning, the district court invoked the PLT test[358] and addressed whether the controversy had arisen on an OCSLA situs. There was no dispute that the contractor's employee had been injured on the deck of the vessel, but for the district court the vessel was not where the contractual indemnity controversy had arisen. That location was the platform:

> [The employee's] work, which consisted mainly of platform repairs and grating repairs, was performed on platforms, not vessels. [The employee's] sole relationship to the vessel was as a passenger; he did not contribute to the mission of the vessel in any manner. Further, the work tickets . . . demonstrate that the work performed

[354] 2007 WL 2874808, at *1.
[355] The contractor's insurer was also a plaintiff, and it and the contractor also sought declaratory relief regarding insurance coverage. Id.
[356] La. R.S. 9:§2780.
[357] 2007 WL 2874808, at *1.
[358] Id. at *3.

> pursuant to the [contract] was performed on platforms, not on vessels. . . . [U]nder PLT, the situs requirement has been met in this case because "the locations where substantial work pursuant to the contract was done were covered situses. . . ."[359]

So the district court in Grand Isle I went to the PLT decision itself, and not the several Fifth Circuit cases that followed it, in order to determine where the OCSLA situs was. According to PLT as the district court read it, the contract answers the question: The OCSLA situs is where most of the work under the contract is to be performed, regardless where the accident giving rise to the lawsuit occurred. This analysis was markedly different from that used by several Fifth Circuit cases, which instead had identified where the accident had occurred as the OCSLA situs.[360]

Following its situs determination, the district court in due course proceeded next to decide whether the repair and maintenance contract was governed by maritime law. The answer was portended somewhat by the court's holding that the focus of the contract—where most of the work was to be performed—was a fixed platform, because the six-factor Davis test[361] likewise is concerned with the work performed pursuant to the contract.[362] One would not expect that maritime law would govern a contract performed mostly on a fixed platform.

The district court dutifully and thoroughly went through all six factors, and, predictably, concluded that the contract was not maritime. That meant that Louisiana law, including the proscription against indemnity in the Louisiana Oilfield Indemnity Act,[363] would apply, provided it did not conflict with applicable federal law. The Fifth Circuit earlier having held that "nothing in the [Louisiana Oilfield Indemnity Act] is inconsistent with federal law,"[364] Louisiana law did

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[359] Id., quoting PLT, 895 F.2d at 1047, and citing Wagner v. McDermott, Inc., 899 F.Supp. 1551, 1556 (W.D. La. 1994), aff'd, 79 F.3d 20 (5th Cir. 1996), cert. denied, 519 U.S. 945 (1997).
[360] See note 352 above.
[361] Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313, 316 (5th Cir. 1990).
[362] The first Davis factor asks what are the terms of the contract or work order, but the other five factors are all concerned with performance. Id.
[363] La. R.S. 9:§2780.
[364] Hodgen, note 352 above, 87 F.3d at 1529.

apply, the indemnity provision in the repair and maintenance contract was not enforceable, and the contractor's motion for summary judgment was granted and the vessel owner's cross-motion was denied.[365]

2. Before the Fifth Circuit Panel

The vessel owner appealed to the Fifth Circuit, and early in its opinion the panel announced that the decisive and only issue in the appeal was the situs requirement of the PLT test: "We conclude that the OCSLA situs requirement is not met in this case, and it is accordingly unnecessary to consider whether the remaining two PLT Engineering conditions are met."[366] For the panel, the situs was not where most of the work under the contract was to be performed, but rather where the accident giving rise to the lawsuit had occurred—the vessel, not the platform. The panel harped on this point: "[I]t is undisputed that neither [the employee] nor [the vessel] were in physical contact with the platform when the accident occurred."[367] "[T]here is no suggestion that [the employee] was in actual physical contact with the platform at the time of his accident."[368] "In contrast to Hollier and Hodgen, . . . [the employee] was not in physical contact with an offshore platform at the time of his accident. . . ."[369] "[I]t is likewise apparent that [the vessel] does not qualify as an OCSLA situs under §1333(a)(1), as interpreted in Demette."[370]

So it was a simple case for the Grand Isle II panel: The accident had occurred on a vessel; a vessel is not one of the situses referenced in OCSLA section 1333(a)(1); therefore maritime law applied. The panel's tort-oriented approach is reflected in the case law it relied on most heavily in its opinion, including Offshore Logistics, Inc. v. Tallentire,[371] a tort action arising from the crash

[365] 2007 WL 2874808, at *6.
[366] Grand Isle II, 543 F.3d 256, 259 (5th Cir. 2008).
[367] Id. at 256.
[368] Id. at 262.
[369] Id.
[370] Id. at 263.
[371] 477 U.S. 207 (1986).

on the high seas of a helicopter ferrying workers from an offshore platform, "which we deem to be controlling in this case";[372] Hollier, in which the platform worker, though injured on a vessel, "was in physical contact with the platform at the time of his injury";[373] and Hodgen, where a platform worker injured on a vessel nonetheless "was, at the time of his accident, in physical contact with a rope connected to an offshore platform."[374]

All of this led the panel to the conclusion that the district court had erred. It vacated the district court's opinion and remanded the case so the district court could deny the contractor's motion for summary judgment and grant the vessel owner's cross-motion, and resolve any remaining issues. But the case was not headed back to the district court, because the contractor filed a petition for rehearing en banc, which the court granted.[375]

3. Before the Fifth Circuit En Banc

It is extraordinarily rare for the Fifth Circuit to grant a petition for rehearing en banc. Federal Rule of Appellate Procedure 35(a) states that such petitions "are not favored and ordinarily will not be ordered" unless the uniformity of the court's decisions is threatened or the case presents a question of exceptional importance.[376] Fifth Circuit Rule 35.1, entitled "Caution," refers to these standards as "rigid," states that one of the reasons such petitions are disfavored is that "each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources," and mentions the court's power to impose sanctions for an abuse of the procedure.[377] The Fifth Circuit's statistics show the rarity of petitions for rehearing en banc and the rarity of their being granted. For the 12-month period ending June 30, 2015, 236 petitions

[372] 543 F.3d at 260.
[373] Id. at 262, citing Hollier v. Union Texas Petroleum Corp., 972 F.2d 662, 664-65 (5th Cir. 1992) (internal quotation marks omitted).
[374] 543 F.3d at 262, citing Hodgen v. Forest Oil Corp., 87 F.3d 1512, 1527 (5th Cir. 1996).
[375] Grand Isle III, 569 F.3d 523 (5th Cir. 2009).
[376] Fed. R. App. P. 35(a).
[377] 5th Cir. R. 35.1.

for rehearing en banc were filed out of 7,423 cases commenced, which is 3.2% of the cases commenced. Of the 236 petitions for rehearing en banc, five were granted, which is 2.1% of the petitions filed.[378]

The Grand Isle IV en banc court of course would address the situs issue pursuant to the PLT test, as that was the only issue on which the panel had opined. Both of the reasons in Federal Rule of Appellate Procedure 35(a) for granting en banc review were implicated: The Fifth Circuit's decisions on the situs of contractual indemnity disputes were not uniform, as "[s]ome of our cases have applied this [tort] rule to a contractual indemnity dispute and looked to the site of the tort to determine the situs of the controversy," while "other cases have applied what amounts to a focus-of-the-contract test which looks to where the contract contemplates that most of the work will be performed. . . ."[379] Additionally the issue was exceptionally important, because the "tort-situs approach" that the panel had employed "prevents commercial parties from reliably allocating risk in their contractual arrangements because they have no way of predicting where 'controversies' might arise and thus no way of knowing which law will govern."[380]

The en banc court began its analysis by considering two Supreme Court cases: Rodrigue v. Aetna Cas. & Sur. Co.[381] and Offshore Logistics, Inc. v. Tallentire.[382] Rodrigue was the case that corrected the Fifth Circuit's application of maritime law to tort claims arising from accidents on fixed offshore platforms.[383] "[I]n a tort action," said the Grand Isle IV court, "Rodrigue illustrates that the OCSLA situs requirement is met if the tort occurs on a platform or other OCSLA

[378] "Statistical Snapshot," July 2014-June 2015, http://www.ca5.uscourts.gov/about-the-court/court-statistics.
[379] Grand Isle IV, 589 F.3d 778, 781 (5th Cir. 2009); see Fed. R. App. P. 35(a)(1) (En banc rehearing ordinarily will not be ordered unless "en banc consideration is necessary to secure or maintain uniformity of the court's decisions . . . .").
[380] 589 F.3d at 787; see Fed. R. App. P. 35(a)(2) (Another reason for granting en banc rehearing is where "the proceeding involves a question of exceptional importance.").
[381] 395 U.S. 352 (1969).
[382] 477 U.S. 207 (1986).
[383] See text at notes 135-41 above.

covered situs as provided in §1333(a)(2)(A)."[384] Tallentire was the case that the Grand Isle III panel had "deem[ed] to be controlling."[385] It was significant for the en banc court because the Supreme Court there had concluded that "OCSLA did not call for application of state law when the incident did not occur on an OCSLA situs. . . ."[386] For the Grand Isle IV court the two Supreme Court cases, both tort actions, set up an important distinction which the court used to segue into a discussion of PLT: "Although it is clear that Rodrigue and Tallentire provide the situs rule for tort cases, it does not follow that contract cases triggered by an underlying tort depend on the situs of that tort, i.e., the location of that occurrence."[387]

PLT was a "pure contract case,"[388] and the court there had focused on the contract in its situs determination, not on where the incident that gave rise to the case had occurred: "To determine situs, the PLT panel did not focus on where the underlying incident that gave rise to the contract claim occurred (i.e., the nonpayment of the subcontractor) but looked instead to where the work under the contract was performed."[389] But this lesson had been forgotten, because "[l]ater cases ostensibly applying PLT to contractual indemnity claims have ignored the situs of the contract and looked instead to the situs of the underlying tort."[390] These errant cases included Hollier,[391] where the panel had not considered or even discussed where most of the work under the contract was to be performed;[392] Smith,[393] which had done the same thing in its situs determination;[394] Hodgen,[395] likewise treating the location of the accident as the OCSLA situs in

[384] 589 F.3d at 784.
[385] 543 F.3d at 260.
[386] 589 F.3d at 785.
[387] Id.
[388] Id.
[389] Id.
[390] Id.
[391] Hollier v. Union Texas Petroleum Corp., 972 F.2d 662 (5th Cir. 1992).
[392] 589 F.3d at 786, citing Hollier, 972 F.2d at 664-65.
[393] Smith v. Penrod Drilling Corp., 960 F.2d 456 (5th Cir. 1992).
[394] 589 F.3d at 786, citing Smith, 960 F.2d at 459.
[395] Hodgen v. Forest Oil Corp., 87 F.3d 1512 (5th Cir. 1996).

a contract case, although with misgivings;[396] Demette,[397] which had treated the location of the accident as the OCSLA situs for both a tort claim and a contract claim, without distinguishing between the two;[398] and Diamond Offshore,[399] where the panel had remanded to the district court for a situs determination based on where the accident had occurred.[400]

All of these cases were wrong on the situs issue, notwithstanding that some had reached the right result for other reasons. The Grand Isle IV court therefore overruled them, "with respect to the extent (and only to that extent) the 'tort' analysis was used in those cases to determine situs. . . ."[401] Henceforward the focus-of-the-contract test would be used to determine the OCSLA situs in breach of contract cases:

> [W]e hold that, in determining the first condition of the PLT test, 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. §1333(a)(2)(A). It is immaterial whether the underlying incident that triggers the indemnity obligation occurs on navigable waters or on a platform or other OCSLA situs.[402]

So the panel's decision was reversed, and the district court's decision was affirmed. Louisiana law, including the proscription against indemnity in the Louisiana Oilfield Indemnity Act,[403] applied, and the contractor's motion for summary judgment was granted and the vessel owner's cross-motion was denied.

B. Subsequent Decisions

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[396] " 'Assuming without deciding that Hollier and Smith state a rule . . . providing that the situs of the controversy in an OCSLA indemnity clause case is the location of the accident, we agree . . . that the situs requirement is met in this case' because the underlying incident occurred on an OCSLA situs." 589 F.3d at 786, quoting Hodgen, 87 F.3d at 1527.
[397] Demette v. Falcon Drilling Co., 280 F.3d 492 (5th Cir. 2002).
[398] 589 F.3d at 786, citing Demette, 280 F.3d at 498.
[399] Diamond Offshore Co. v. A&B Builders, Inc., 302 F.3d 531 (5th Cir. 2002).
[400] 589 F.3d at 788 n.8, citing Diamond Offshore, 302 F.3d at 546.
[401] 589 F.3d at 788.
[402] Id. at 787.
[403] La. R.S. 9:§2780.

Fifth Circuit cases decided after Grand Isle IV show the panels falling into line and applying the new focus-of-the-contract test in their OCSLA situs determinations in contract actions. For example, in Ace American Ins. Co. v. M-I L.L.C.,[404] a contractor provided "performance fluid management services"[405] pursuant to a master service agreement it had entered into with a platform operator. The agreement contained reciprocal indemnity provisions, which extended to claims arising from the negligence of the indemnified party, and also required the parties to support their indemnity obligations with insurance. The agreement provided that work thereunder would be performed pursuant to written work orders, but the parties had relaxed this protocol, and the contractor frequently performed work pursuant to oral assignments from the operator.

An employee of the contractor was injured while working on one of the operator's fixed platforms. He sued the operator in state court; the operator in turn tendered indemnity to the contractor; and the contractor accepted the tender and settled all of the injured employee's claims. The contractor's insurer then filed an action in federal court, seeking a declaratory judgment that it did not owe reimbursement to the contractor for its settlement payments, on the grounds that the indemnity provision was governed by Louisiana law and hence unenforceable.[406] The contractor counterclaimed against the insurer; both parties filed motions for summary judgment; and the district court granted the insurer's motion.[407]

On appeal, the Fifth Circuit quoted OCSLA section 1333(a)(1) and (2)(A), and the PLT test.[408] As to the first PLT factor the court, citing Grand Isle IV, stated that "[t]he situs of the

[404] 699 F.3d 826 (5th Cir. 2012).
[405] Id. at 828.
[406] Pursuant to La. R.S. 9:§2780.
[407] 699 F.3d at 829.
[408] Id.

controversy in a contractual dispute depends on the focus of the contract."[409] The court held that where work orders (whether oral or written) are issued pursuant to a master service agreement, both the work order and the agreement must be read together. In the case before the court, this meant that the focus of the contract was the platform—also where the accident had occurred, about which the court was somewhat defensive: "Focusing on the location of the specific work order is not a return to the 'fortuitous' location of the injury approach. There is nothing fortuitous about determining the applicable law by looking to the location of the specific work order."[410]

The second PLT factor of course called for an application of the Davis test[411] to determine whether maritime law governed the work order. As the assignment called for work on a stationary platform, maritime law did not apply.[412] Neither of the parties contended that Louisiana law was inconsistent with federal law, so the third PLT factor was also satisfied.[413] The district court's award of summary judgment to the insurer was affirmed: The contractor had made a mistake by accepting the platform operator's tender of indemnity, and was not entitled to be reimbursed by its insurer.

Another case decided after Grand Isle IV shows that the focus of the contract may not always be apparent on the face of the contract. In Tetra Technologies, Inc. v. Continental Ins. Co.,[414] a contractor had entered into a contract with a platform owner to salvage a decommissioned oil production platform on the outer continental shelf offshore Louisiana. The contractor in turn had subcontracted part of the salvage operation, by entering into a master service agreement with a subcontractor. Pursuant to the master service agreement, the subcontractor was required to

[409] Id. at 830.
[410] Id. at 831.
[411] Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313, 316 (5th Cir. 1990).
[412] 699 F.3d at 831-32.
[413] Id. at 832.
[414] 814 F.3d 733 (5th Cir. 2016).

indemnify the contractor against any claims brought by the subcontractor's employees, and to provide insurance to support the indemnity obligation.[415]

One of the subcontractor's employees was injured when a bridge between two sections of the platform collapsed, causing him to fall 70 – 80 feet into the sea. He sued the contractor, which in turn sued the subcontractor and its insurer. As to the indemnity issue, on cross-motions for summary judgment the district court ultimately decided that Louisiana law, which prohibited indemnification for the indemnitee's negligence, did not apply, and entered final judgment in favor of the contractor.

On the ensuing appeal the Fifth Circuit framed its analysis around the three-part PLT test,[416] and pronounced early in its opinion that the summary judgment record was inadequate.[417] The court noted that the situs—the focus of the contract—of a master service agreement is determined by the specific work order, not the master document: "[I]n 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."[418] But the record did not include the work order in effect when the employee was injured. So the court looked elsewhere in the record, but nothing really helped: The employee's deposition testimony revealed that he had worked extensively on the fixed platform, but the court could not extrapolate the scope of the work order from the testimony.[419] The master service agreement was in the record, but it also did not show whether the subcontractor's work was to be performed on the platform.[420] And a "Salvage Plan" was similarly unhelpful, because it described the work to be performed

[415] Id. at 737.
[416] Id. at 738, quoting PLT, 895 F.2d 1043, 1047 (5th Cir. 1990).
[417] 814 F.3d at 738.
[418] Id. at 739, quoting Grand Isle IV, 589 F.3d at 787 n.6 (internal quotation marks omitted).
[419] 814 F.3d at 739.
[420] Id. at 739-40.

under the principal contract, not the subcontract containing the indemnity provisions. About the situs of the subcontract, the panel therefore concluded that "[t]he record does not definitively answer that question."[421]

Whether maritime law applied to the subcontract also could not be determined from the record. The court needed the work order to answer the first of the six questions posed by the Davis test[422]—"what does the specific work order in effect at the time of the injury provide?"[423]—but the work order was not in the record. The Salvage Plan, the employee's deposition testimony, and the complaints filed in the underlying lawsuit did not describe the nature of the entire work order or the total scope of the injured employee's duties.[424] Therefore the evidence was insufficient to justify summary judgment for either party on the second PLT factor also, and the case had to be remanded.[425]

Tetra Technologies seems a fitting end to a discussion of the Fifth Circuit's decisions on contractual choice of law issues in OCSLA cases. The Fifth Circuit remanded the case to allow the district court to admit evidence on the focus of the contract and to decide whether maritime law or state law would apply, which would determine the winner and the loser in the indemnity battle. Just so will other district courts consider to continue these questions, relying on Grand Isle IV and the Davis test.

VI. CONCLUSION

Looking back, one can see fitful but steady progress toward more certainty in the law governing contracts for offshore oil and gas operations. OCSLA's pre-history is reflected in the

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[421] Id. at 740.
[422] See note 229 above and accompanying text.
[423] Davis, 919 F.2d at 316.
[424] 814 F.2d at 741-42.
[425] Id. at 742. In order to assist the district court on remand, the Fifth Circuit decided two other issues: It concluded that the Louisiana Oilfield Indemnity Act, La. R.S. 9:§2780, would void the indemnity agreement, and it also concluded that the insurance policy covered the indemnity obligation. Whether Louisiana law would apply as surrogate federal law would be the only issue for the district court to resolve on remand. 814 F.3d at 742-48.

California, Louisiana and Texas cases decided by the United States Supreme Court before the statute was enacted. For the Supreme Court in those cases, the question was sovereignty—the United States' or the littoral states'—over the outer continental shelf, and the paramount interests that drove its decisions in favor of the United States were national defense and international relations.[426] Conversely, the paramount interest that drove Congress's decision to enact OCSLA in 1953 was different: not national defense or international relations, but "expeditious and orderly development"[427] of the shelf's mineral resources. It could not have been otherwise, because the Geneva Convention on the Continental Shelf, to which the United States became a party in 1964 and which would have superceded any incompatible language in OCSLA,[428] limits the exercise of the sovereignty of signatory nations over their outer continental shelf regions to the sole purpose of exploiting natural resources.[429]

Expeditious and orderly development of mineral resources requires that parties know which legal regime, maritime law or state law as surrogate federal law, will govern their contracts. Over the decades, the Fifth Circuit has tried to decide contractual choice of law issues in OCSLA cases in a way that serves the statute's purpose. It will continue to do this by using Grand Isle IV's focus-of-the-contract test to determine the situs of the controversy, and the Davis test to determine whether maritime law governs the contract. The focus-of-the-contract test seems a sound way for the Fifth Circuit to achieve its goal of more certainty, as it is far easier to know where the majority of the performance under a contract will occur than it is to predict where an accident will happen. Looking ahead, one expects that contracting parties will know, or be more confident, whether their

[426] See text at note 20 above.
[427] 43 U.S.C. §1332(3).
[428] See text at notes 45-48 above.
[429] Note 48 above.

indemnity provisions will be enforced, which in turn should make litigation on contractual choice of law issues less frequent.