



In the Wake of Doiron: The New Fifth Circuit Test for Maritime Contracts

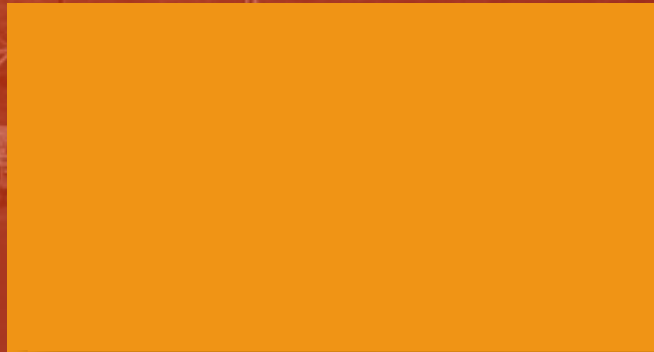
AIMU Lunch and
Learn
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Why is the determination of whether a contract is a maritime contract significant?



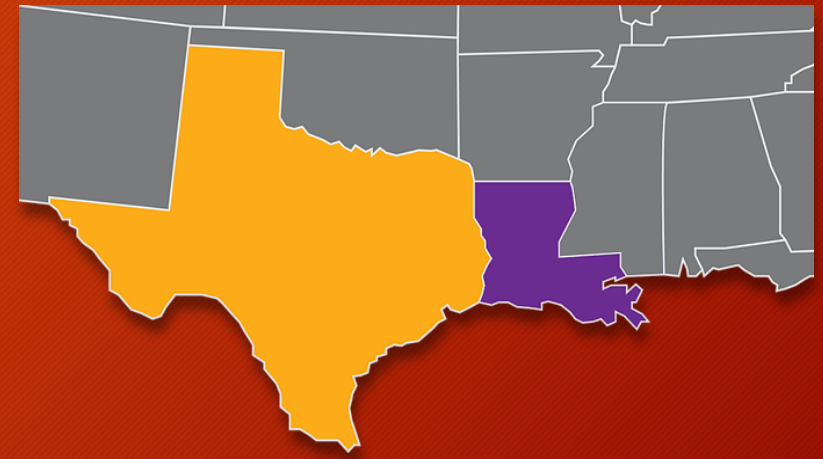
The significance is...

- 1) The establishment of federal jurisdiction
 - Some parties/attorneys generally prefer to be in federal court while others do not
 - Prevailing thought is that federal courts are quicker and more efficient
 - Dispositive motion may be more likely to be granted



The significance is...

- 2) It often determines the enforceability of an indemnity agreement
 - A true knock for knock is common in the oilfield
 - The purpose is to avoid litigation concerning comparative fault and to provide predictability in risk management
 - Both Texas and Louisiana have anti-indemnity statutes that prohibit the indemnification of a party for its own negligence
 - But, general maritime law does not prohibit such indemnity





What was a maritime contract?



The Old Fifth Circuit Test - *Davis & Sons, Inc. v. Gulf Oil Corporation* (1990)

- Davis entered into an msa with Gulf, which was subject to periodic work orders
- Indemnity in favor of Gulf for all claims arising out of contractual relationship
- Davis employee mysteriously drowns on the job, and his representatives sue Davis and Gulf
- Both Davis and Gulf brought cross motions for summary judgment to determine if maritime law or state law applied - If state law, indemnity barred by the LOIA

The Old Fifth Circuit Test - *Davis & Sons, Inc. v. Gulf Oil Corporation* (1990)

- Court fashioned a new six factor test to determine if maritime law applied:
 1. What does the work order provide?
 2. What work did the crew do pursuant to the order?
 3. Was the crew assigned to work aboard a vessel in navigable waters?
 4. To what extent did the work relate to the mission of the vessel?
 5. What was the principal work of the injured worker?
 6. What work was the injured worker doing at the time of the injury?



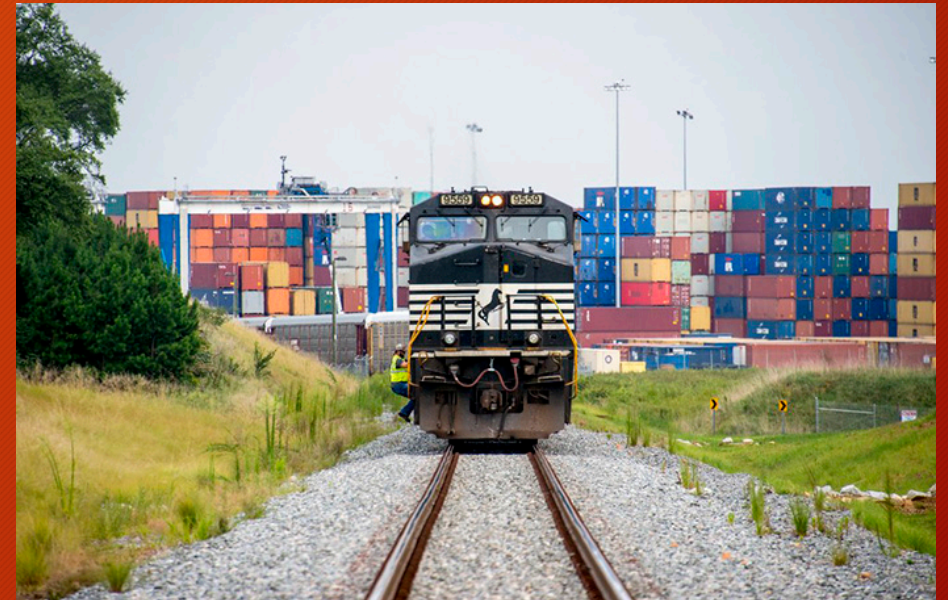
In 2004, The United States Supreme Court gets involved!

Norfolk Southern Railway Co. v. Kirby (2004)

- Kirby, an Australian company, sold machinery to a General Motors plant in Alabama
- Machinery was to be loaded in Sydney, discharged in Savannah, and ultimately taken by rail to Huntsville
- Shipment was covered by two bills of lading and Norfolk Southern Railway was hired to take the shipment by rail from Savannah to Huntsville

Norfolk Southern Railway Co. v. Kirby (2004)

- Guess what? Train derails causing \$1.5 million in damages
- Kirby sued Norfolk who won summary judgment limiting liability to \$500 per container, but the Eleventh Circuit reversed and found that Norfolk was not entitled to the benefit of the bills' limitation of liability
- U.S. Supreme Court finds that the bills of lading are maritime contracts



Norfolk Southern Railway Co. v. Kirby (2004)

- Court reasoned that you cannot rely on the involvement of a ship or vessel like in a maritime tort case
- Must look to the nature and character of the contract and test is whether the contract has a “reference to maritime service or maritime transactions”
- Bills were maritime contracts because the primary objective was to accomplish the transportation of goods by sea from Australia to the U.S.
- Analysis is conceptual rather than spatial



In Re Larry Doiron, Inc. (2018)

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- Apache and Specialty Rental Tools & Supply entered in an msa that included an indemnity provision in favor of Apache
- Apache issued a work order to Specialty for flow back services on a gas well in Louisiana waters that did not require a vessel and neither party anticipated the need for a vessel
- The parties later agree that a crane barge is needed and Apache hires Larry Doiron, Inc. to provide the barge



In Re Larry Doiron, Inc. (2018)

- LDI crane operator struck and injured a Specialty crewmember
- LDI files a limitation action, and as Apache's contractor, a third party complaint against Specialty seeking indemnity under the msa
- LDI eventually files a motion for summary judgment to establish its right to indemnity, and Specialty files a cross motion to establish that it owes no indemnity
- LDI's right to indemnity turns solely on the issue of whether the msa is a maritime contract

In Re Larry Doiron, Inc. (2018)

- The district court concluded that maritime law applied and a Fifth Circuit panel affirmed; But, Judge Davis concurs and urges an en banc re-hearing
- Concurrence highlights past criticisms that the *Davis & Sons* test requires a highly technical and discrete analysis that leads to inconsistency and spawns additional litigation
- Courts should take guidance from *Kirby* and apply contract principles - look to the contract's nature and character

In Re Larry Doiron, Inc. (2018)

- Fifth Circuit takes the case en banc
- Looks to the Supreme Court's decision in *Kirby* and its analysis focusing on the nature and character of the contract, the interest in protecting maritime commerce and how the analysis protects the interest by focusing on whether the object of the contract is maritime commerce
- Adopts the Supreme Court's rejection of the mixed contract theory that had been the foundation of the *Davis & Sons Test*

Fifth Circuit fashions a new test!

- 1) Is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters?
- 2) If yes, does the contract provide, or do the parties expect that a vessel will play a substantial role in the completion of the contract?

IF SO, THE CONTRACT IS MARITIME!

- The contract at issue was non-maritime because the use of the vessel was insubstantial and unexpected

Consequences of *Doiron*

- *Substantial* subjectivity in the second prong -what is substantial and what if expectations do not meet reality as in *Doiron*
- Does the new test truly supplant the old test?
- Choice of law provisions are meaningless
- Potential shift towards the “maritime but local” strategy by litigants
- Impact on *Marcel v. Placid Oil Company*

The first test for the new test

In Re Crescent Energy Services, LLC

In Re Crescent Energy Services, LLC (2018)

- Crescent and Carizzo Oil & Gas entered into a contract, which included an msa and a turnkey bid for plug and abandonment work, and the contract contained an indemnity provision in favor of Carizzo
- Crescent employee is injured on the job
- Crescent files a limitation action, and Carizzo responds claiming the benefit of Crescent's insurance and emphasizing its contractual right to indemnity
- Crescent's insurers deny that indemnity is owed under the LOIA because the contract is non-maritime and state law applies

In Re Crescent Energy Services, LLC (2018)

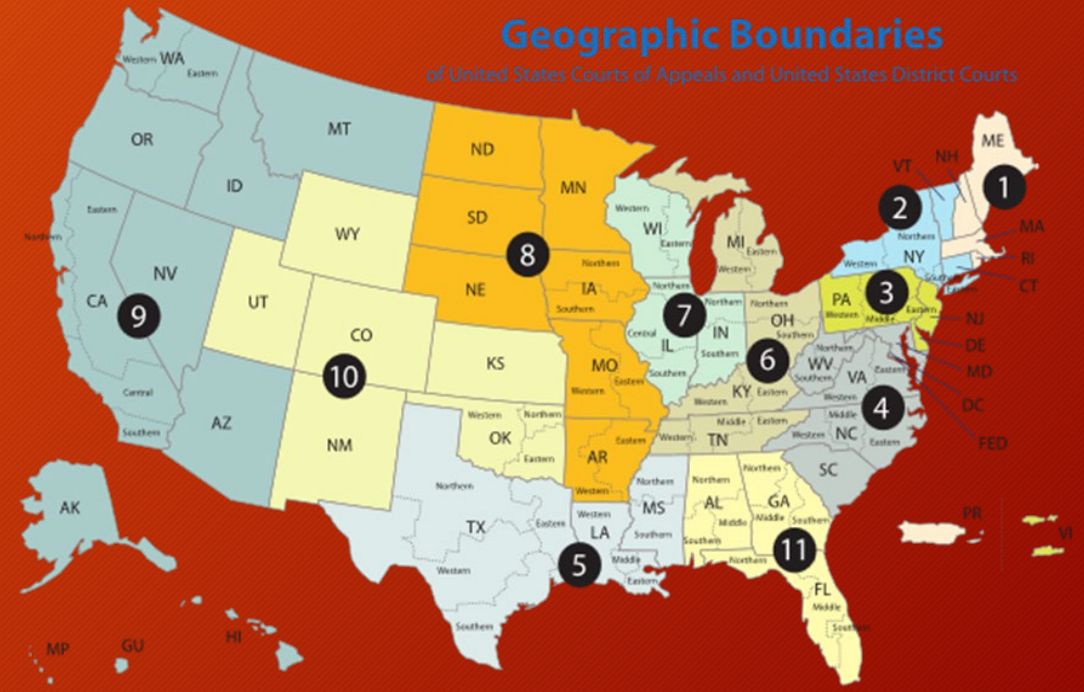
- District court grants summary judgment in favor of Carrizo, and Crescent's insurers appeal
- Issues on Appeal:
 - 1) Is the contract a maritime contract?
 - 2) If the contract is maritime does the "maritime but local" doctrine void the indemnity agreement?

In Re Crescent Energy Services, LLC (2018)

- Fifth Circuit refuses to consider the “maritime but local” issue because it was raised for the first time on appeal - “doubtful” that it would make a difference
- P&A work is part of the life cycle of drilling and production of oil and gas
- Contract anticipated substantial use of vessels that were used for wireline activities, to house equipment and as crew quarters
- Contract is maritime; the indemnity is enforceable

Moving on up...Crescent's insurers petition the U.S. Supreme Court

- Petition for Writ of Certiorari filed on October 5, 2018
- Circuit split regarding the proper test for determining if a contract is maritime

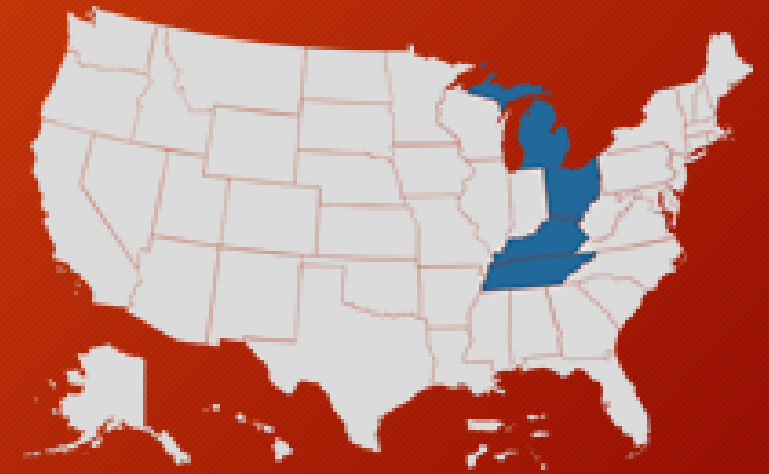


WHERE YA AT? Splitsville!

Different strokes for different folks;
the circuits have different tests!

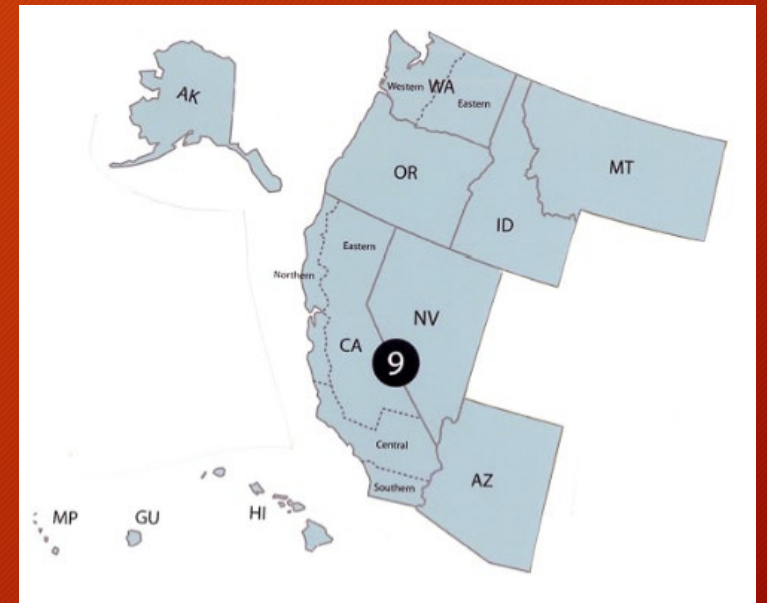
Sixth Circuit - *New Hampshire Insurance Co. v. Home Savings & Loan Co.*

- Yacht dealer made a claim on yacht dealer policy based on violations of consumer law and fraudulent misrepresentation in failing to deliver boats with clear titles
- Court focused on whether the contract's primary objective has a maritime nature
- Court found the policy was not a maritime contract - neither the involvement of boats nor the operation of a structure that relates to boats is enough



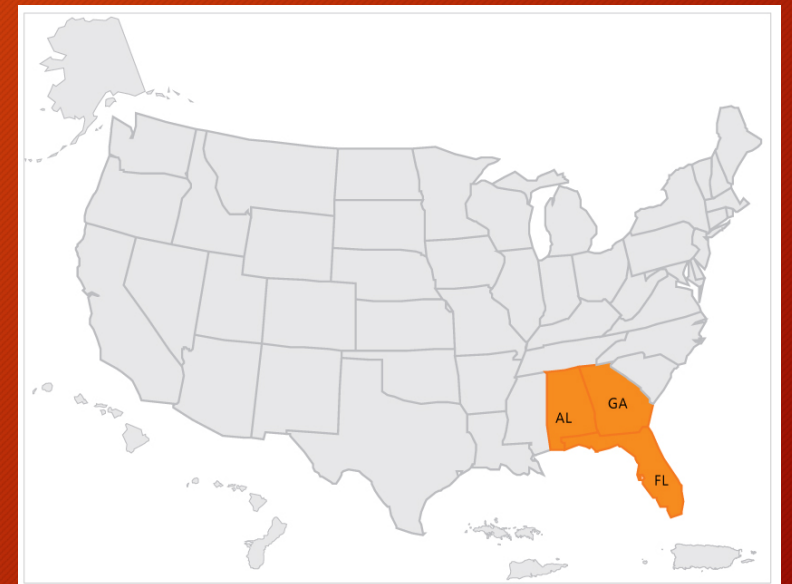
Ninth Circuit - *Sentry Select Insurance Co. v. Royal Insurance Co.*

- Excess policy of marine employer's liability policy is not a maritime contract
- Court looked to the nature and subject matter of the contract, specifically whether it has reference to maritime transactions or commerce
- Principal purpose of the policy is to provide coverage in excess of shore side policies not to protect maritime commerce operations



Eleventh Circuit - *Odyssey Marine Exploration v. Unidentified Shipwrecked Vessel or Vessels*

- Contract to provide research and data regarding the location of a ship was maritime
- Same approach as the Ninth Circuit - Do the nature and character of the contract have a reference to maritime service or transactions?



Moving on up...Crescent's insurers petition the U.S. Supreme Court

- The *Doiron* test is contrary to Supreme Court precedent
- *Kirby* held that courts should not focus on the involvement of a vessel but instead on the *primary objective* of the contract (i.e. maritime commerce)
- *Herb's Welding v. Gray* (1983) held that offshore drilling - exploration and production - is not maritime commerce

Where are we now? The legal perspective

- New test that is currently being challenged at the Supreme Court
- If certiorari is denied, the second prong concerning the parties' expectation of a substantial role of a vessel is certain to be a highly litigated point
- Courts will have to establish a true standard for what constitutes "substantial"
- Certain to see the "maritime but local" doctrine asserted more often for those seeking application of state law
- If certiorari is granted, may see narrower standard and more reflective of *Kirby*

Where are we now? The underwriting perspective

- In the Fifth Circuit, potentially greater exposure on knock-for-knock indemnity agreements because the test focuses on the role of the vessel instead of the underlying activity
- Exposure analysis could be challenging because it can be difficult to predict how much a vessel(s) is expected to be used on certain job
- In the Sixth, Ninth and Eleventh circuits the exposure analysis is more fragmented based on primary purpose of the contract analysis

Where are we now? The claims handling perspective

- Look to the language of the contract to determine if it calls for the use of a vessel(s)
- How was the vessel used?
- What was the vessel constructed and designed for?
- Records, Records, Records - look to logs, invoices, daily work reports in analyzing the role of the vessel

May you live in interesting times...

- This is a transformational time concerning the determination of whether a contract is maritime
- The *Doiron* test and its application in *In Re Crescent* potentially set the stage for a future in which more oilfield contracts will be found to be maritime
- But, the Supreme Court can weigh in if it so desires, so it is never over until it is over



Questions, Comments or Thoughts?