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DISCUSSION OF SELECT 1996 MARITIME CASES

By

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1996 was another active year in the evolution (or regression) of maritime personal injury law in the United States. The general trend continues to be retraction of the federal admiralty court's constitutional and historical role as the seaman's guardian. The U.S. Fifth Circuit authored significant opinions in cases involving the seaman's duty to protect himself, the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, et seq., and Limitation of Liability under 46 U.S.C. § 183, et seq., among others.

In the most significant maritime personal injury decision of the year, the United States Supreme Court expanded the remedies available to "non-seafarers" beyond those in the general maritime law. The case, Yamaha Motor Corp. U.S.A. v Calhoun,[1] shows that the general maritime law, developed by a once benevolent federal judiciary to protect a class of persons subjected to unique employment circumstances and hazards, now lends less relief to seafarers than to individuals whose remedies are normally governed by common law tort principles but are fortuitously killed in a marine setting.

This paper examines select significant cases in 1996 from the perspective of the admiralty plaintiff practitioner.

I. MARITIME OR NOT MARITIME

In Calhoun, the decedent was a twelve year old Pennsylvania resident killed in a collision between her jet ski and an anchored sailboat in Puerto Rican territorial waters. Pennsylvania wrongful death law allowed recovery by the Calhouns for loss of society, lost future earnings and

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[1] 116 S.Ct. 619 (1996). (Hereinafter Calhoun.)

punitive damages. The general maritime law arguably allowed loss of society only; loss of future earnings and punitive damages were not a part of the general maritime law recovery.

Plaintiffs sued in federal court in Philadelphia, alleging admiralty and diversity jurisdiction. The trial court held that federal maritime law controlled to the exclusion of state law, but asked the Third Circuit to determine what recovery was available to the decedent's parents under this "maritime cause of action." The appeal court did not answer the question. It held that this case is governed by state law because maritime law had not clearly spoken on the issue.

Justice Ginsburg, writing for a unanimous court, confirmed the Third Circuit. Calhoun is high court precedent for application of state law remedies to death claims of non-seafarers[2] in state territorial waters. The opinion goes to great lengths to define its parameters. Those issues specifically not affected include (1) whether the wrongful death remedy of Moragne v. States Marine Lines[3] extends to non-seafarers; (2) whether Moragne provides a survival action; (3) the legal rights of seamen and longshoremen (i.e., seafarers); (4) incidents beyond territorial waters (DOSHA claims); and (5) whether federal or state law liability standards, as distinguished from remedies, govern this claim.

The decision was given practical application in American Dredging Co. v Lambert.[4] The court applied Calhoun in allowing the personal representatives of persons killed when a pleasure boat collided with a dredge pipeline trailing behind a dredge in Florida waters to recover non-pecuniary damages under Florida law. The court applied substantive maritime law in this limitation of liability case to find that American Dredging's statutory violations caused the accident and constituted negligence per se. The vessel owner had knowledge of the violations and was not allowed to limit. The plaintiffs recovered state law damages in an otherwise uniquely maritime case.

While Lambert is correct, it shows how protection of marine workers has taken a subservient position in the law. If the Lambert decedents had been Jones Act seamen, they would not have been permitted non-pecuniary recovery. Loss of society is available to surviving spouses of longshoremen killed in state waters,[5] the only vestige of seafarer non-pecuniary recovery left. The anomaly is heightened in states like Alabama, where the wrongful death statute is a punitive damages statute by its terms. Remember that Calhoun did not decide the

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[2] The decision defines "seafarers" as "persons who are neither seamen covered by the Jones Act, 46 U.S.C. §688, nor longshore workers covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq."

[3] 398 U.S. 375 (1970).

[4] 81 F.3d 127 (11th Cir. 1996).

[5] Sea-Land Services, Inc. V. Gaudet, 414 U.S. 573 (1974).

applicable liability law; therefore, limitation of liability, the general maritime law reasonable care standard[6] and maritime products liability law[7] may apply in a case where punitive damages are recoverable under state law, a recovery clearly not contemplated by the substantive liability law.

After Calhoun, the damages available to families in state-water wrongful death cases are pecuniary losses (seaman), pecuniary losses and loss of society (LHWCA) and state law damages (non-seafarers), regardless of the law controlling the underlying cause of action.

Louisiana maritime personal injury practitioners are familiar with American Dredging v. Miller,[8] which held that state courts in maritime claims can adhere to their forum non conveniens rules and can generally follow state procedure regardless of federal differences. Viewed in conjunction with American Dredging, Calhoun sets the following parameters:

A. In state court, state procedure can apply in lieu of an inconsistent federal rule in seaman and non-seaman cases;

B. The substantive rights and recoveries of seamen and longshoremen, and governed exclusively by federal common and statutory law;

C. State law supplies recoverable elements of damages in non-seafarer, state water wrongful death cases; and

D. The underlying cause of action for a non-seafarer state-water wrongful death is provided by the general maritime law in cases where there is an applicable general maritime liability standard.

The Calhoun decision is a welcome break in the Supreme Court's trend, started in Miles v. Apex Marine Corp.,[9] of restricting the rights of maritime tort victims. Instead of using uniformity to relegate non-seafarers to the same relief afforded seafarers, the Court granted non-seafarers access to state law remedies. State law fills the gap left by the federal courts' failure to fulfill its mandate to create maritime law to cover facts such as those in Calhoun, which failure works to the benefit of non-seafarer claims covered by the decision. In essence, non-seafarers have become the new "wards" of the admiralty court, a result that many admiralty jurists of yesterday would certainly find repugnant.

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6 See Kermerac v. Campagnie General Transatlantique, 358 U.S. 625 (1959).

7 East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986).

8 510 U.S. 443, 114 S.Ct. 981 (1991).

9 498 U.S. 19 (1990).

II. SEAMEN——ORDINARY CARE OR SLIGHT CARE

Perhaps in no federal circuit in the country has there been more retraction of seamen's rights than in the Fifth Circuit Court of Appeals. Once the seaman's safest harbor, the Fifth Circuit is becoming non-navigable for the seaman and his attorney.

By now, everyone is familiar with the case of Guevara v. Maritime Overseas Corp.,[10] in which the Fifth Circuit, sitting en banc, held that punitive damages are no longer available for willful failure to pay maintenance and cure. The seaman is limited to compensatory damages for exacerbation of his injury specifically caused by the failure to pay and attorney's fees incurred in prosecuting the maintenance and cure claim. These potential damages provide little deterrent to willful conduct and place the onus on the seaman's lawyer to care for his client in a manner heretofore not contemplated by the general maritime law. The attorney, not the federal admiralty court, is the seaman's guardian. The simple truth is that Jones Act employers can now place their injured seamen employees in extreme physical and financial hardship with little threat of monetary retribution. The best that claimants can hope for is willful behavior that will inflame a jury and result in an inflated general damages award.

The 1996 version of Guevara may be in Gautreaux v. Scurlock Marine, Inc..[11] Mr. Gautreaux, a pushboat relief captain, lost an eye when he was struck by a manual crank handle of an electric winch. When the electric winch would not engage during a barge offloading operation, plaintiff began turning the manual crank while pressing the electric ignition. The ignition suddenly activated the winch, causing the crank handle to fly off and strike Mr. Gautreaux in the face. The jury awarded the claimant $854,000 in damages, apportioning fault 95% to the employer and 5% to the plaintiff.

Two particular appealed issues are important: (1) whether a seaman/employee is held to the same standard of care as a non-seaman and (2) the degree to which an employer's liability can be limited (see Limitation of Liability herein).

On June 6, 1996, the Fifth Circuit upheld the trial court's jury instruction on the issue of the claimant's contributory negligence. The employer sought to have the traditional reasonable prudent person standard apply to seaman; however, the contributory negligence instructions given by the trial court conformed to the Fifth Circuit pattern jury instruction on the issue of seaman's comparative fault. Specifically, Judge Edith Clement charged the jury with respect to the seaman's alleged contributory negligence as follows:

> A seaman does not have the same control over his work conditions as does a person who works on land. A seaman must,

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[10] 59 F.3d 1496 (5th Cir. 1995), cert. denied, 1995 WL 642301 (January 8, 1996).

[11] 84 F.3d 776 (5th Cir. 1996).

> to a certain degree, accept conditions as they are. Therefore, he is not obligated to devise a safer method of doing the work and he is not obligated to call for additional or different equipment.
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> If a seaman is provided with a safe way to work and he chooses to do something in a way that he knows or should know is unsafe or dangerous, his employer is not responsible for the results of a choice made knowingly by the seaman. Therefore, if you find that the plaintiff Charles Gautreaux did what he was told to do by the defendant and was not at fault himself, you are not to find him negligent. On the other hand, if you find that the plaintiff Charles Gautreaux chose to use an unsafe method that he knew or should have known was unsafe, or in violation of instructions, you may find he was wholly or partly responsible for what happened.

The Fifth Circuit has chosen to re-hear the alleged jury charge error en banc. This does not bode well for seamen plaintiffs. The Court has two choices: it either affirms the charge as currently written or holds a Jones Act seaman to a duty to use ordinary care for his own safety.

The charge as currently written is consistent with longstanding Fifth Circuit jurisprudence and the realities of a seaman's work environment. If the seaman's duty is to exercise "ordinary" care, then he could be held liable for doing an assigned task with a recognized potential for danger, even if he neither knew nor should have known of an available reasonable alternative. Stated differently, the seaman could be found contributorily negligent for carrying out orders that result in his injury if he recognizes possible danger, whether or not a reasonable work alternative could have been used. Unless the marine industry is willing to begin allowing its seamen employees to ignore orders at sea or tell vessel superiors that they refuse to do a job due to unsafe work conditions or potential hazards, holding a seaman to an ordinary duty of care places the seaman in the untenable position of being held liable for carrying out orders that are inherently dangerous or being fired for refusing to work.

Those who practice maritime personal injury work know that seamen must, in fact, accept shipboard working conditions as they are. The seaman is not free to leave his place of employment if it is dangerous or to drive to the local equipment supplier for parts or tools. If a job needs to be done at sea, the seaman must do it under prevailing conditions and with the tools and equipment aboard the ship at that time. This is the reason that the Jones Act employer has a substantially greater obligation (duty) to his employees than the "ordinary" employer. It is reasonable, prudent and fair under these circumstances to relax the contributory negligence standard just as the employer negligence standard is heightened. Charging seaman with an ordinary duty of care obliterates the distinction between maritime and land-based employment. A change in the contributory negligence standard by the Fifth Circuit would be yet another example of the federal admiralty court turning its back on its time honored duty to these seamen/wards of the court to provide more, not less.

Plaintiffs with pending Jones Act trials may face reversible error if the court utilizes the current pattern Fifth Circuit charge on seaman's contributory fault. The Jones Act employer could use a future change in the instruction from slight to ordinary care to argue that the relative fault of a seaman must be increased or re-tried in light of the change in the law. The seaman plaintiff should submit a charge that does not focus so much on the requisite care, but rather is framed in terms of the relative duties of the employer and his seaman employee. When viewed in this light, it is correct to say that the seaman's duty to perform his job in a prudent manner is less than or slighter than the duty of the Jones Act employer for the safety of his employees. Duty-wise, they are not on an equal footing. This will avoid the problems inherent in using terms like "slight negligence" and "slight care" that Professor Robert Force criticized in his article entitled "Allocation of Risk and Standard of Care Under the Jones Act: Slight Negligence, Slight Care?".[12] In any event, this is not an aspect of the case that can be taken for granted by either side.

III. LIMITATION OF LIABILITY——NEEDS ITS OWN LIMIT

A number of limitation cases were reported in the last year. As most of you know, limitation is utilized regularly and is considered by vessel owners and their counsel as vital to maritime commerce. This vitality must be called into question in an age of corporate vessel ownership, marine insurance, contractual claim limitation and modern technology which provides ship owners with readily available tools to retain operational control over vessels at sea. This is particularly true in Louisiana, where limitation is regularly sought by owners of inland tugs, river pushboats, oilfield supply/crew boats and drill barges that either never venture into open waters or rarely travel more than 100 miles from the coast.

Gautreaux, supra, also involves a limitation issue. Plaintiff claimed that Scurlock, the vessel owner, negligently failed to train him in the proper operation of the electric winch and that this failure in part caused his injuries. This failure was specifically alleged as to the managing officer and owner of Scurlock Marine, Inc.

Thankfully, the Fifth Circuit had little trouble affirming the district court's finding that the vessel owner was not entitled to limit liability under these circumstances. Despite the fact that Mr. Gautreaux was an experienced tankerman who held a United States Coast Guard master's license, the evidence confirmed that the claimant had never used an electric towing winch or its manual crank handle and had not been trained by Scurlock on proper use of the equipment. The court correctly found that the vessel owner's failure to provide this training or to determine whether this plaintiff was competent to use the winch constituted privity or knowledge of the injury-causing condition under 46 U.S.C. App. § 183 (a). The failure to sufficiently train an employee is enough to defeat limitation. This is a good decision for injured claimants in the area of liability limitation.

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[12] Journal of Maritime Law & Commerce, Vol. 25 (January 1994).

This opinion is inconsistent with the earlier Fifth Circuit case of In Re: Kristy Lee Enterprises, Inc..[13] While navigating a group of barges through the intracoastal waterway, a tug captain collided with two fishing boats due to negligent navigation. The district court found the tug captain competent but denied limitation due to the vessel owner's negligence in failing to hold safety meetings, enact safety policies or make any inquiry into the captain's operational decisions.

The Fifth Circuit reversed. It reaffirmed the rule that an owner may rely on a competent ship's master in utilizing his navigational expertise. More troubling is the court's conclusion that the record did not support a conclusion that the captain was incompetent and needed additional training or instruction in performing his duties and that the vessel owner had no knowledge that its captain was incompetent or unsafe. The mere negligence of the captain at sea was insufficient to deny limitation.

Thus, in Gautreaux the ship owner could not limit due to its failure to determine competence or properly train the claimant in his work, while in Kristy Lee the vessel owner did not have to make any inquiry into the captain's competence or training. How many times must a master make potentially deadly navigational mistakes before a vessel owner can no longer limit liability? The more sensible approach, particularly in inland vessel operation cases, is to require the vessel owner to have some type of ongoing master evaluation/safety meeting program as a means of quality control. Otherwise, inland vessel owners and operators can hire anyone with a license and put him/her to work. Only if that person has a history of incompetence will the owner be unable to limit liability under Kristy Lee. This does not serve the policy behind 46 U.S.C. § 183 et seq. nor is it prudent industry practice.

Under 46 U.S.C. § 185, a vessel owner has six months after a claimant has given to or filed written notice of a claim to petition a U.S. District Court of competent jurisdiction for limitation of liability. In Tom-Mac, Inc.,[14] the Fifth Circuit addressed the issue of when a vessel owner or operator has sufficient notice under § 185 to assert his defense of limitation so as to start the six month clock. This is a decision that vessel owner defendants should take notice of.

Tom-Mac arose out of the deaths of two men killed by a crane boom which collapsed aboard a barge upon which the men were working as part of a pier piling repair procedure. The decedents' surviving spouses sued the operator of the barge in state court, which answered with a limitation plea. Two years later, the plaintiffs amended their pleadings to claim that the deceased workers were members of a vessel crew and that Tom-Mac owned and operated a fleet of vessels, those being the barge and the attached tug. Three months following the amended petition and over nine months after the original state court suit was filed, Tom-Mac petitioned the federal district court for protection under the Limitation Act.

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[13] 72 F.3d 479 (5th Cir. 1996) rehearing denied, 81 F.3d 159.

[14] 76 F.3d 678 (5th Cir. 1996).

The state court plaintiffs responded that the federal court limitation petition was untimely under the notice provision of § 185. Tom-Mac contended that its liability petition was timely filed because written notice is sufficient under § 185 if it reveals a "reasonable possibility"[15] that the claim made is one subject to limitation. It argued that the amended complaint alleging Jones Act and vessel fleet causes satisfied the § 185 written notice provision but the original complaint revealed no reasonable possibility that the claim fell within the Limitation Act because there was no reasonable possibility that the barge was a vessel under the Limitation Act.[16]

The Fifth Circuit held that the original state court complaint raised the reasonable possibility sufficient to commence the six month time period. The court looked at the actual uses and physical characteristics of the barge[17] and held that there was clearly a "reasonable possibility" that the barge was a "vessel" under the Act.[18] Further, because Tom-Mac pled the Limitation Act as a defense to the original claims, the state court petitions gave Tom-Mac notice of a reasonable possibility that a claim subject to the Limitation Act had also been made against the attached tug. The six month time limit in § 185 began running as of the date of filing of those state court petitions so the vessel operator's federal court petition for limitation was dismissed.

Tom-Mac's fall back position was that the amended petition constituted a new or separate claim sufficient to re-start the six month filing time period. The Fifth Circuit rejected this argument on the basis that the amended petition was based on the same accident, had the same parties and sought the same damages from Tom-Mac as the original petition. The Fifth Circuit referred to the Ninth Circuit[19] and adopted that Circuit's observation that shipowners have only a single opportunity to invoke limitation once they have notice that a claim has been made. Subsequent amendments or additional claims with respect to the same incident do not initiate a new six month period.

Plaintiffs and vessel owners should keep this decision in mind when handling limitation cases involving the flotilla doctrine. If the petitioning vessel owner does not tender all of the

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[15] 76 F.3d at 683.

[16] Id.

[17] The barge was described as a standard deck barge designed and used for transportation of materials and equipment along Gulf Coast inland waterways. It has the attributes of a vessel, a rake bow, navigational lights, life saving equipment, pumps and depth markings on the side. The plaintiff's nautical expert, a ship's captain with over 25 years experience, opined that the barge was a vessel.

[18] See Matter of Sedco, Inc., 543 F. Supp. 561 (S.D. Tex. 1982) for criteria for determining whether a craft is a vessel under the Limitation Act.

[19] Esta Lader Charterers, Inc. v. Ignacio, 875 F.2d 234 (9th Cir. 1988).

vessels in the flotilla pending resolution of the underlying claim, in this case a tug and her barge under common ownership being treated as a single vessel, those flotilla members not tendered will not be subject to the protections of limitation once the six month period lapses. In certain circumstances this can be a valuable tool for resourceful plaintiffs to partially avoid limitation.

Maritime plaintiffs' lawyers were again reminded how difficult and frustrating it can be to obtain the maritime law required stipulation to lift a federal court's limitation proceeding stay order to permit injured parties to pursue personal injury claims in state court. In Odeco Oil & Gas Company, Drilling Division v. Bonnette[20] (Odeco II), injured limitation claimants stipulated to Odeco's right to limit its liability in federal court in order to obtain an order lifting the limitation stay and permit the claimants to pursue their Texas state court personal injury claims. The incident in suit involved a 90 foot free fall of an escape capsule in which the plaintiffs were seated during safety drills on a fixed platform in the Gulf of Mexico. Shell Offshore, Inc. owned and operated the fixed platform and Whitaker Corporation designed and manufactured the capsule. Odeco sought to limits its liability to the value of the escape capsule "vessels".

Shell and Whitaker filed contribution and indemnity claims against Odeco in both state court and the federal court limitation proceeding. Whitaker sought contribution from Odeco for its potential liability and Shell sought indemnity for defense cost and attorney fees and legal and contractual indemnity and contribution should Shell be held liable. These entities refused to stipulate as to Odeco's right to limit. The injured plaintiffs responded with a second amended stipulation to protect Odeco's right to limit as to Shell and Whitaker. The second amended stipulation stated that all limitation issues would be litigated in federal court free of res judicata, the injured individuals would not seek recovery in excess of the $30,000 vessel value figure alleged by Odeco until Odeco's right to limit had been decided, agreed not to pursue claims against Shell and Whitaker in excess of $30,000 to the extent that those claims would be ultimately born by Odeco and agreed that Shell's and Whitaker's indemnification claims for cost and attorney fees would take precedence over any recovery by the individual plaintiffs. The district court found this new stipulation adequate and partially lifted the stay to allow state court action to proceed against Odeco, Shell and Whitaker as well as to allow Shell to pursue its legal and contractual indemnity and contribution claim and Whitaker to pursue its contribution claim. The court maintained the stay as to Shell's claim for defense cost and attorney fees and included in her order a specific prohibition on Shell and Whitaker from utilizing res judicata to undermine Odeco's right to limit.

Despite these herculean efforts, the Fifth Circuit refused to permit the claimants to proceed in state court. It found Shell and Whitaker to be "claimants" within the meaning of the Limitation of Liability Act[21] and held that the failure of all claimants to sign the stipulation did not adequately protect Odeco's right to limit in federal court.

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[20] 74 F.3d 671 (5th Cir. 1996).

[21] See In Re: Complaint of Port Arthur Towing Co. Ex Rel. M/V MISS CAROLYN, 42 F.3d 312 (5th Cir.), cert. denied, 116 S.Ct. 87 (1995).

This decision permits non-vessel owner defendants who are not entitled to limit liability to frustrate the plaintiffs' attempt to litigate their cases in the form of their choice. The refusal by Shell and Whitaker to join the stipulation amounts to a self-imposed injunction against plaintiffs who were suing them and Odeco in state court. The Limitation Act can therefore be used by personal injury defendants for whom it is not intended to provide protection and to stifle damages cases against those defendants. We all know that delay in case resolution is a victory for the defendants. Mr. Bonnette and his four fellow injured workers were forced to await resolution of the limitation proceeding simply because Shell and Whitaker refused to cooperate. Given the history of this case to date and the length of time it took to get to this point,[22] the injured individuals will bear the hardship of delay while Shell, Whitaker and ultimately Odeco reap the benefits.

As is the case with Kristy Lee, supra, this result was not intended and should not be a consequence of 46 U.S.C. § 183 et seq. Other examples of over-application of the Limitation Act are Lambert (supra) and Beiswenger Enterprises Corp. V. Carletta,[23] where the owner of a parasailing boat used the Act to try to exonerate or limit liability to the family of one parasailer killed while parasailing and to a second parasailer severely injured in the same accident. The decedent was killed after his ankle became tangled in the tow line that had been severed by the vessel operator due to adverse weather conditions. He was lifted by the parachute, hanging upside down, and thrown into several shoreside objects when the parachute passed over land. He died fourteen days later. If successful, the vessel owner could limit his liability to the decedent's estate and his four minor children to $40,090, the value of the vessel and her freight.

The admiralty courts now look to Congress to act first rather than taking the lead in formulating admiralty law.[24] Congress should therefore take another look at the Limitation Act in light of the realities of modern marine commerce. Vessel owners such as those in Gautreaux, Kristy Lee, Tom-Mac, Odeco, Lambert and Carletta should not have limitation available to them. The Act's scope should be limited to blue water commercial shipping vessels, ocean-going tugs and any other vessels that routinely ply the open seas and travel great distances away from their corporate owners. The current philosophical makeup of Congress offers victims little encouragement that such a change is forthcoming.

IV. MARITIME OR OCSLA JURISDICTION

Since the United States Supreme Court held in Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969) that events occurring on OCS stationary platforms are governed solely by

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[22] See Odeco Oil & Gas, Drilling Division v. Bonnette, 4 F.3d 401 (5th Cir. 1993) (Odeco I), cert. denied, 114 S.Ct. 1370 (1994).

[23] 86 F.3d 1032 (11th Cir. 1996)

[24] See Miles (fn.8).

the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331-1356, the federal courts have struggled to reconcile the tension between OCSLA and admiralty jurisdiction. The distinction is very important because these two jurisdictional keys to the federal courthouse have important consequences with respect to case removability and jury trial availability. The case of Tennessee Gas Pipeline v. Houston Casualty Ins. Co.,[25] tilts the battle in favor of the OCSLA to confer federal question jurisdiction, even in cases where the underlying "event" is an otherwise classic maritime tort. Although Tennessee Gas is a property damage case involving a vessel/platform allision, its impact on personal injury actions could be far-reaching.

First, some background. A maritime tort occurs at the place where negligent conduct takes effect; that is, the site of injury.[26] Under Executive Jet Aviation, Inc. v. City of Cleveland[27] and Grubart v. Great Lakes Dredge and Dock Co.,[28] a casualty occurring at a maritime location and having a connection to maritime activity is a maritime tort falling within federal admiralty jurisdiction. Such a cause of action is not removable under 28 U.S.C. § 1441(b) and is not triable to a jury. Once a "maritime tort" is established, even where admiralty and OCSLA jurisdiction overlap, substantive maritime law governs the claim.

However, while maritime jurisdiction may apply to an OCS vessel-based casualty under the principals of Rodriguez, Executive Jet and Grubart, 43 U.S.C. § 1349(b) grants original jurisdiction over OCSLA claims to the federal district court. What happens when an injury occurs on the Outer Continental Shelf, satisfies the Executive Jet/Grubart admiralty jurisdiction requirements, involves OCS platform operations (but does not occur the platform) and suit is brought under the general maritime law in state court under 28 U.S.C. §1333?

Since Tennessee Gas, the answer may be that this otherwise classic maritime tort brought in state court pursuant to the savings to suitors clause is both removable and triable to a jury. Before Tennessee Gas, the nature of the tort determined the jurisdictional key to the courthouse. Maritime torts involving vessel operations on the OCS fell under the court's maritime jurisdiction only. This was the only jurisdictional access to federal court if no diversity existed among the parties. Plaintiff tried his case to a judge. Alternatively, plaintiff could elect to bring his case in state court with no possibility of removal.

Tennessee Gas now makes it difficult, if not impossible, to define a "maritime tort" in the context of OCS operations. In Tennessee Gas, a tugboat captain towing a vessel on the Outer Continental Shelf was reading a novel when he inadvertently struck a OCS stationary platform. The platform owner filed suit against the tug's insurer in state court under Louisiana's Direct

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[25] 87 F.3d 150 (5th Cir. 1996).

[26] Solet v. CNG Producing Co., 908 F. Supp. 375 (E.D. La. 1995).

[27] 93 S.Ct. 493 (1972).

[28] 115 S.Ct. 1043 (1995).

Action Statute. The insurer removed the case to federal court, and the platform requested remand. The district court denied remand but certified the question for interlocutory appeal to the Fifth Circuit.

The Fifth Circuit upheld removal. The court confirmed that maritime claims are generally not removable under the constitution, treaties and laws of the United States, but then stated that a cause filed in state court under the savings clause is removable if the action is truly one grounded under the original jurisdiction of federal courts. Despite the fact that Tennessee Gas' well pleaded complaint asserted only a maritime claim brought under savings to suitors, the court disregarded the well pleaded complaint rule to find that disputes occurring on the OCS conferred federal question jurisdiction. The court found jurisdiction based upon its broad interpretation of 43 U.S.C. §1349(b)(1):

> . . . The district courts of the United States shall have jurisdiction of cases in controversies **arising out of or in connection with (A) any operation conducted on the Outer Continental Shelf which involves exploration, development or production** of the minerals of the subsoil and seabed of the Outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension or termination of a lease or permit under this subchapter. (Emphasis added)

The court then applied the "but for" analysis articulated in Herb's Welding, Inc. v. Gray,[29] to determine whether or not this case arose out of or was in connection with an OCS operation. Ignoring what would be thought to be an obvious maritime tort (i.e., an allision caused solely by master negligence) in an apparent effort to expand OCSLA's ability to confer federal question jurisdiction, the Fifth Circuit held that "but for" the operation of the platform on the Outer Continental Shelf, there would have been no navigational error. [30] Accordingly, the court affirmed federal question jurisdiction under OCSLA. The platform owner's maritime, saving to suitors case was now in federal court.

The Fifth Circuit found removal jurisdiction under § 1441(b) because both plaintiff and defendant were Texas residents and the suit was brought in Louisiana. Although the plaintiff's maritime claim did not arise under federal law, it did meet the second part of § 1441(b) in that it was an action in which none of the defendants was a citizen of the state in which the action was brought. Thus, not only did the Fifth Circuit find federal question subject matter jurisdiction in a case specifically pled as an admiralty case but it also found removal jurisdiction over this maritime case under 28 U.S.C. § 1441.

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[29] 766 F.2d 898 (5th Cir. 1985).

[30] 87 F.3d at 155.

Although Tennessee Gas is a property damage case, it has the potential to cause major problems for persons injured in Outer Continental Shelf operations. Where the injury occurs on a platform, Rodriguez makes it plain that the OCSLA applies to the exclusion of maritime jurisdiction and maritime law. However, Tennessee Gas makes it very difficult to identify and define a "maritime tort" on the Outer Continental Shelf that occurs off of the platform. If the "but for" test can be applied to an OCS accident that occurred solely as a result of a captain's negligent operation of his vessel without any platform involvement other than the structure being there, then what is to prevent defendants from arguing that all OCS operation-related injuries satisfy the "but for" test. A plaintiff who is confident that his well-pleaded complaint has safely landed him in state court without fear of removal, or who has requested and is ostensibly entitled only to a judge trial in a maritime claim may suddenly find himself facing a federal court jury. The Tennessee Gas opinion begs the question of whether an action brought under the OCSLA is sufficient to create federal question jurisdiction and thereby preempt any general maritime law claims. If so, a plaintiff can allege OCSLA federal question jurisdiction in a maritime tort case absent diversity and obtain a federal court jury. Although this is unlikely in today's perceived plaintiff-hostile federal court environment, the federal court would then have to determine applicable substantive law——the general maritime law or adjacent state law as surrogate federal law under the OCSLA.