

**VESSEL ANALYSIS APPLIED TO
HYBRID DEEPWATER STRUCTURES
AND THE IMPACT ON INDEMNITY AND
ADDITIONAL ASSURED ISSUES**

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INTRODUCTION

The past several years have been remarkable in terms of leasing activity, operations, and production in the deep water portion of the Gulf of Mexico. Economic realities and technological advancement have brought about a variety of new facilities for use in the offshore oil and gas industry. There are spars, tension leg platforms, gravity base structures, deep draft caisson vessels (DDCVs), floating storage and offloading units (FSOs) and floating production storage and offloading units (FPSOs). It is necessary that energy companies, oilfield contractors, marine and energy underwriters and claim handlers, as well as the counsel who represent them, know how these structures will be classified by the courts when claims, particularly those involving personal injury and death arrive at the doorstep. With many of these facilities already in use around the world, and with it likely that FPSOs will be deployed in the U. S. Gulf of Mexico it is critical that insurance and legal professionals anticipate the variety of circumstances in which claims may arise and endeavor to predict how they will be treated by the courts.

The focus of this discussion will involve FPSOs. The Minerals Management Service (MMS) recently released the final environmental impact statement (EIS) regarding the use of FPSOs in the deepwater Gulf of Mexico. The MMS found that the use of FPSOs would enhance industry's ability to recover deepwater oil and gas reserves while posing environmental risks comparable to other deepwater production solutions. The EIS evaluated FPSOs in general. The study was based upon a generic ship shaped, permanently moored, double hulled FPSO capable of holding up to 1 million barrels of oil. The EIS also considered standard subsea production equipment, associated shuttle tankers, and pipelines for produced gas in the study. With proper preparation and mobilization, savvy operators and contractors could have FPSOs in service in the Gulf of Mexico within a year.

Before focusing on FPSOs and the variety of claims that may develop in connection with their use, it is important to have a basic description of a variety of alternative facilities currently in use. This will allow for consideration of their characteristics in connection with a more detailed analysis of FPSOs.

OFFSHORE STRUCTURES

SPAR

There are ten spar type platforms installed, planned or under construction currently in the Gulf of Mexico. A spar consists primarily of a long cylinder that is positioned vertically

above a number of well heads. The typical spar used in the Gulf of Mexico has a hull diameter of about 130 feet and an overall height of about 700 feet. About 90% of the structure floats below the surface and is anchored with chain/wire lines connected to pilings driven into the seabed. The platform positioned at the surface has limited space for production equipment and storage. The spar is a custom-built structure designed for a specific field and, as such, has minimal adaptability. A good example of a spar is Oryx's Neptune Spar, one of the first of these alternative structures deployed in the U. S. Gulf. It is the only type of alternative structure the status of which the United States Court of Appeals for the Fifth Circuit analyzed in connection with a Jones Act claim.

DDCV

The deep draft caisson vessel (DDCV) is a custom-built facility similar to a spar and a gravity base structure in that it is composed primarily of a long column secured vertically to the sea floor with the majority of the structure resting below the surface. The DDCV has a cylindrical hull that is buoyed with air filled compartments in the upper portion of the hull and ballasted with seawater and fixed ballast in compartments in the lower part of the hull. Exxon Mobil has deployed a DDCV to its Hoover and Diana oil fields in the Gulf of Mexico. The United States Coast Guard proudly claims that this DDCV obtained a certificate of inspection by its Corpus Christi, Texas office. This facility is designed to produce 100,000 barrels of crude oil and 325 million cubic feet of natural gas per day to be transported by pipeline to Louisiana and Texas.

A similar custom-designed facility is a gravity base structure. It consists of a lengthy vertical concrete caisson with storage tanks and shafts for drilling and utility equipment and risers. The caisson is closed at the top and bottom with horizontal slabs. It is secured in place with solid ballast. Like the spar, it is capable of supporting only a limited platform. A gravity base structure is probably the most similar of these specialized structures to a fixed platform.

TLP

There is the tension leg platform and mini-tension leg platform. It is composed of sealed columns connected by a ring pontoon structure with a rectangular cross section. The hull, with its modular deck, is secured by a number of tendons over twenty-five inches in diameter to a foundation system of tendon receptacles held in place by large piles. The moorings are held in tension by the buoyancy of the hull.

FPSO

Finally, there are FPSOs, floating production, storage and offloading facilities. The original FPSO and the majority of them in use today are structures that served at one time as oil tankers and, therefore, were at one time vessels in the traditional sense. They are typically double-hulled tankers that have been converted to produce, store and transfer hydrocarbons in fields where reserves are marginal or questionable. After conversion from tanker to FPSO, the structure retains most of the characteristics of a vessel. Only when fixed in place and stripped of navigation and propulsion features do they lose the characteristic features of a vessel as that term is understood in law.

FPSOs have onboard production and processing equipment, storage facilities for produced hydrocarbons and the capability to offload crude oil to shuttle tankers for transportation and fixtures for transporting natural gas to shore by pipeline. An FPSO may be moored to the sea floor or dynamically positioned with thrusters over a production site. Turret mooring systems allow the FPSO to weathervane, which allows it to take the position of least resistance based on prevailing wind, waves and current.

FPSO utilization has increased dramatically in recent years and that trend is expected to continue. Brokers involved in the sale and lease of FPSOs have described the market as “exploding.” Intertanko predicts that FPS, the term used to describe floating production systems of all kinds, are expected to account for 50% of offshore oil output by 2005 and increase to 60% by 2007. FPSOs currently account for two-thirds of the FPS’s in service today. According to Lloyd’s List, at least forty-seven FPSOs are now in service and another twenty-four units are under construction. FPSOs in use today are capable of processing up to 120,000 barrels of crude oil a day and newer systems are being designed and constructed to handle up to 175,000 barrels per day. As shallow water supplies dwindle and deep water discoveries increase in a fluctuating market, we can expect that FPSOs will be utilized extensively.

FPSO UTILITY and DEPLOYMENT

Although FPSOs have been in use since 1977 fleet growth has expanded most rapidly since 1994. Shell and Petrobras first put FPSOs into use in separate projects off the coasts of Spain and Brazil, respectively. Because the systems are based on the use of a tanker hull, their hull performance is well understood, unlike some of the other specialty facilities described above. Due to the length of time and volume of the operation of FPSOs, their use is well

proven. Because they offer large water-plane areas, they offer greater load-carrying capacity and more deck space for production equipment. The tanker hull format also allows for more rapid construction as opposed to the custom fabrication processes required for tension leg platforms, spars, DDCVs, etc.

In addition to their deep water capacity, the tanker hull system of the FPSO allows deployment at a variety of depths with only a relatively short downtime for conversion although the catalyst for their use in the U. S. Gulf has been the discovery of a large number of deepwater reservoirs. Their primary area of current utilization, the North Sea, illustrates their durability and resiliency in heavy weather. Finally their mobility, an issue extremely relevant to their status as a vessel, offers versatility and economic attraction. FPSOs are especially practical for marginal reservoirs and fields with unproven reserves. If production in a particular field ends or becomes economically impractical, they can be moved and, if necessary converted relatively rapidly and their productivity only briefly interrupted. As a result of a less significant capital investment, they reduce the risk to producers and offer smaller contractors and operators opportunities for lease or purchase options.

The American Bureau of Shipping has recently released three guides addressing the operation of FPSOs. The *FPSO Guide* incorporates the ABS SafeHull technology for analyzing static and dynamic load effects. The *Guide for Building and Classing Facilities for Offshore Installations* has been updated to incorporate new technology and standards for enhanced management of FPSOs. The *Guide for Building and Classing Offshore Pipelines and Risers* provides technical documentation for system installation. The publication of these resources by ABS provides support for the MMS and USCG to approve installations of FPSOs in the U. S. Gulf. There is little doubt that FPSOs will become a fixture in the U. S. Gulf and therefore should be understood and analyzed in the context of United States law relating to maritime personal injury and death.

FPSOs AS VESSELS

One purpose of this paper is to consider vessel status. Whether or not an FPSO is considered a vessel at any particular time will dictate what law is applied, most significantly in the personal injury-wrongful death context. For example, if an FPSO in the U. S. Gulf is considered to be a vessel, those on board who contribute to its mission, i.e. production, storage and off loading of hydrocarbons, should be afforded seaman status and entitled to recovery under the Jones Act, Death on the High Seas Act, penalty wage statutes, and other laws designed

to protect seamen. The benefits of the Jones Act, most particularly its liberal recovery scheme and the maintenance and cure obligations, are well known. Whether an FPSO is a vessel will also dictate certain procedural options. For example, maritime cases, including those brought under the Jones Act, cannot be removed to Federal Court. Whether a craft is a vessel can also be determinative of the law to be applied to indemnity and insurance obligations. In some instances, a finding that a structure is a vessel may be beneficial such as where its owners seeks to limit its liability under the Limitation of Shipowners' Liability Act or where a claim for salvage is involved.

As the Fifth Circuit has observed, “[t]he existence of a vessel is a ‘fundamental prerequisite to Jones Act jurisdiction’ and is at the core of the test for seaman status.” *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290 (5th Cir. 1990.) The Fifth Circuit has admitted that the term “vessel” is incapable of precise definition. It observed in the *Gremillion* case that the vagueness of the term is such that “it has been suggested that ‘three men in a tub would also fit within our definition, and one probably could make a convincing argument for Jonah inside the whale.’” In the past, the Fifth Circuit has produced conflicting opinions depending upon which panel has decided a particular case. The results of the vessel status inquiry become even less predictable when decided by juries.

VESSEL STATUS FACTORS

In this regard, pattern instructions to be submitted to a jury in determining vessel status have been developed. The pattern jury instruction used by the Fifth Circuit, which was developed in connection with a lawsuit involving moveable work platforms used in a ship repair yard, states as follows:

You must determine whether the structure was a vessel. A vessel is a structure designed or used in navigation for the transportation of passengers, cargo, or equipment across navigable waters. In determining whether the structure is a vessel, you may but need not consider whether it had the following features:

- (1) Navigational aids;
- (2) A raked bow;
- (3) Lifeboats or other lifesaving equipment;
- (4) Bilge pumps;
- (5) Crew quarters; or
- (6) Coast Guard registration.

You may also consider the size of the structure, its ability to float, the permanence of its attachment to the shore or the water bottom, and the fact of its movement, if any, across navigable waters. However, the fact that the structure had any one of these features is not conclusive. They are merely factors that you might wish to consider in determining whether the structure was a vessel.

It is easy to see from the pattern jury instruction why conflicting results obtain when juries are asked to determine whether a structure is a vessel. Several of the features listed are traditional vessel components like navigational aides and a raked bow. On the other hand, other features, such as life boats and Coast Guard registration, are the type which are also found on non-traditional structures.

SPARS ARE NOT VESSELS

The Fifth Circuit has been analyzing the issue of vessel status relative to special purpose structures since the seminal decision of *Robison v. Offshore Co.* 266 F.2d 769 (5th Cir. 1959) in essentially the same fashion. The Fifth Circuit's consideration of whether a spar is a vessel occurred in *Fields vs. Pool Offshore, Inc.*, 182 F.3d 353 (5th Cir. 1999). Following a lengthy analysis, Oryx's Neptune Spar was determined to be a work platform and not a vessel for Jones Act seamen status purposes. The basic facts of the case are as follows: Fields, an employee of Pool Company, sued Pool and Oryx alleging negligence under the Jones Act. Fields worked as a roughneck/deckhand on a couple of Pool's platform drilling rigs. He had been assigned to one rig but was transferred to another, which Oryx contracted for use on its Neptune Spar. The spar, which had been installed on location in the Viscosca Knoll area on the Outer Continental Shelf about 100 miles off the coast of Alabama in September of 1996, was anchored by six chain wirelines connected to six pilings driven 180 feet into the seabed. The spar was connected to production risers from each seven wellheads and to transport pipelines. The spar lacked self propulsion machinery found on traditional vessels and was only able to be moved within a 250 foot range by tightening and slackening the six securing chains. The spar was intended to remain at that location until the reservoirs below were exhausted which was not expected for fifteen years.

Fields was assigned to Pool's rig, which was affixed to the spar. He allegedly sustained serious injuries when a section of the rig unexpectedly struck him in the head. Suit was originally filed in Louisiana State Court then removed to Federal Court on the basis of diversity of citizenship and, alternatively, under the Outer Continental Shelf Lands Act. The defendants contended that the Jones Act claim was fraudulently plead to defeat removal to Federal Court

and that Fields was not a Jones Act seaman. In connection with various procedural issues, the Federal District Court found that the Neptune Spar was not a vessel as a matter of law.

In order to prove seaman status, Fields had to establish a connection to a vessel in navigation or to an identifiable fleet of vessels that was substantial in terms of both duration and nature. Pool's rig was not a vessel, but simply a collection of a number of separate items of Pool's drilling equipment used for workover and drilling operations on offshore platforms which had been brought to and installed on the spar prior to the alleged injury. The issue presented was the status of the spar as a vessel.

The Court looked first to the traditional definition of a vessel, then turned to the vessel vis-a-vis work platform analysis. The Court first observed the definition of a vessel found in the statutes. In 1 U.S.C. Section 3, a vessel is defined as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation over water." It observed, citing the *Gremillion* case, that the more the structure resembled conventional sea watercraft, the greater the odds of securing vessel status. The court also observed that an unusual appearance alone would not preclude vessel status, recognizing its prior case law concerning floating drilling rigs, including its recent decision in *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (5th Cir. 1998), in which it found a spud barge with a drilling rig mounted on it to be a vessel.

The Court cited three factors that should be used to determine whether a structure is a work platform and, therefore, not a Jones Act vessel. (1) Was the structure constructed to serve primarily as a work platform? (2) Was the structure moored or otherwise secured at the time of the accident? (3) Does the transportation function of the structure go beyond theoretical mobility in occasional incidental movement?

Most significant in the court's analysis was the stationary nature of the spar, which it discussed extensively in connection with the first factor of the test. Unlike submersible or semi-submersible drilling rigs which are moved to many locations in a short amount of time, the Court reasoned, the Neptune Spar would be kept in place for approximately fifteen years, the expected life of the reservoir it was installed to service. The court also observed that, "[u]nlike [drilling barges and drilling craft], the Neptune Spar [was] designed not only to discover and open a field, but also to exploit it - a goal that requires considerably greater commitment to a particular location." The Fifth Circuit concluded that "the primary, indeed only, purpose of the Neptune Spar is to serve as a work platform in a specific, fixed location for the foreseeable future."

Addressing the second factor of the test, the court acknowledged the difficulty and expense of moving the structure following attachment to the seabed and the fact that it was anchored in position, in part, by massive pilings that were installed at considerable expense, as well as underwater risers specifically positioned for production and transportation from the wellheads to the surface for transport to shore. The court focused on the “commitment” of the spar to the location. In this regard, it compared a submersible petroleum storage barge sunk to the bottom and connected to a nearby platform by piping and catwalk (a vessel) with a submersible barge anchored with steel cables attached to fixed pilings and a rig attached by pilings driven two hundred feet into the seabed into the seabed (not vessels).

The third factor also militated toward non-vessel status. The spar could only be moved in a limited and incidental fashion through chain tension, which made it evident that it lacked any real transportation function.

Its analysis having weighed in favor of the conclusion that the spar was a work platform and not a vessel, the Fifth Circuit did not venture into examining other factors often considered in a vessel analysis. The court noted in this regard what it considered the “most comprehensive annunciation” of factors instructive in determining vessel status: (1) intention to move on a regular basis; (2) ability of submerged structure to be refloated; (3) the length of time the structure has remained at its current location; (4) the presence of navigational aids; (5) a raked bow; (6) lifeboats and rescue equipment; (7) bilge pumps; (8) crew quarters; (9) registration as a vessel with the Coast Guard. Because the non-vessel status of the spar was completely determinable in the vessel vis-a-vis work platform analysis, the Court felt that it need not consider these “secondary” factors. Because the spar was not a vessel, Fields was not a seaman and recovery was limited to that provided under the U. S. Longshore and Harbor Workers’ Compensation Act.

LOOKS LIKE A VESSEL, FLOATS LIKE A VESSEL . . .

A Louisiana federal court has also found that a tension leg platform is not a vessel. Spars and tension leg platforms are custom-designed structures with little resemblance to a vessel. On the other hand, FPSOs, particularly those that have been converted from tankers, generally look like vessels. In fact, it is the vessel-like structure which adds to their desirability in terms of durability and resiliency in heavy weather. As the Fifth Circuit has observed, the more a structure resembles a conventional sea water craft, the greater the odds of securing vessel status. It would generally appear then to be more likely that a FPSO would be

deemed a vessel than the other specialty structures identified above because it does look like a vessel while those structures do not.

How will the courts characterize the FPSO? Is it a vessel? The better question is probably: when is it a vessel? To understand why, the circumstances surrounding the stages through which a tanker being converted to an FPSO should be traced. After years of service in its intended capacity, the vessel is brought into dry dock for conversion to FPSO. Once in the shipyard, it may lose vessel status if its navigational and propulsion equipment is removed since it will be considered out of navigation. Those employed in the service of the tanker, if they remain aboard, arguably could move into the realm of coverage under the LHWCA or, in some instances, state worker's compensation statute coverage with respect to their rights against their employer. On the other hand, one would expect such individuals to allege they are seamen on temporary shore assignment.

More likely, the tanker's crew will be replaced by workers such as pipefitters and welders employed by a shipyard to perform the conversion. Certainly in the United States, the majority of these workers will be entitled to LHWCA compensation, which provides the mechanism for claims against their employers. The workers entitled to that coverage may also have tort claims against the structure's owners under ' 905(b) of the LHWCA if the structure remains a vessel.

In addition to shipyard workers, there will likely be architects, surveyors and others who lack the status entitling them to LHWCA coverage or they may be persons specifically excluded from coverage by the Act, such as clerks and security guards. These persons will be entitled to assert claims for state workers' compensation coverage in actions against their employers for personal injuries and either state law or general maritime law actions against third parties.

If injuries involve traditional maritime activity or otherwise come within the scope of general maritime law, a personal injury or wrongful death claimant could have claims cognizable under federal admiralty jurisdiction. Depending on the forum in which the claim will be pursued, the preference might be to assert a state law cause of action particularly in forums where punitive damages or other enhanced damages are recoverable.

HYPOTHETICAL INS AND OUTS

An employee of the structure's owner strains his back while lifting pipe during the

conversion process. At the time of the incident, piping has been installed on the deck of the vessel, which is still capable of propulsion through its main engines and bridge controls. It still retains the majority indicia of vessel status. The federal courts, in part as a result of their duty to protect the interest of seamen as wards of the court, would find vessel status and the injured worker would have a Jones Act claim against his employer, assuming he satisfied the other seamen requisites, i.e. (1) his duties contributed to the function of the vessel or to the accomplishment of its mission and (2) his connection to the vessel was substantial in terms of both its duration and its nature. The injured worker would also have general maritime law claims against other involved parties. A non-employee, such as a contractor, worker or representative, could successfully assert general maritime law claims. As can be seen, there are a number of variables that will have to be anticipated during the conversion process.

The FPSO has now been fully refitted at the shipyard and is on its way to the oil field. It is not unusual for vessels to travel many miles over a period of days or weeks to reach the mobilization arena. It is common for the fitted FPSO to sail of its own power from the dry dock to its assigned location. During this pre-mob, there is little question that the FPSO is a vessel. Those assigned to deliver it to location would likely have the rights and remedies of seamen. In the U.S. Gulf, the Jones Act and general maritime law unseaworthiness claims will be at the forefront and plaintiffs will endeavor to assert those claims.

The FPSO will sail under the preconversion status it held as a tanker. This should be anticipated by risk management and counsel of its owner and operator. Those involved in the conversion and mobilization process should be forewarned to keep risk management closely informed of progress at all stages.

When the FPSO arrives at its intended mobilization site, mooring and securing devices are installed. Navigation and propulsion equipment may be removed to allow for additional space for equipment. At some point during the installation process, the status of the FPSO as a vessel should change again. One thing that will not change, however, is the fact that the typical FPSO will still look like a vessel. It will still have a hull capable of navigation. It floats. It has been on location in the initial stages only a short amount of time. It may have a raked bow, bilge pumps, crew quarters, life boats and rescue equipment. It will be inspected and registered, if in Gulf of Mexico waters, by the United States Coast Guard.

But, once secured to the seabed, is the FPSO a vessel? The pattern jury instruction will not be of any significant assistance in determining vessel status. The best guidance can be obtained from the *Fields* case and the work platform versus vessel authority applied therein.

The questions to be answered are: (1) Was the FPSO constructed primarily as a work platform? (2) Was it moored or otherwise secured at the time of the accident? (3) Does its transportation function go beyond theoretical mobility and occasional incidental movement?

While the FPSO will typically not be constructed initially as a work platform, it arguably has been converted to serve primarily as a work platform. The Fifth Circuit has struggled with the significance of the initial construction of a structure. Recently, the court decided it is not the purpose of the structure's initial construction that controls, but the use of the structure at the time of the incident giving rise to the claim. If this position remains controlling, the answer to the first prong of the vessel/work platform analysis will be "yes". The FPSO's primary function should be found to be as a work platform.

Next should be considered the second prong of the work platform versus vessel analysis: Was the FPSO moored or otherwise secured at the time of the accident? The Fifth Circuit seemed particularly impressed by the massive and expensive pilings driven into the seabed which secured the Neptune Spar. On the other hand, one of the attractions of the FPSO is its ability to be mobilized and relocated at limited expense. Therefore, it may be more significant to consider the duration of time that an FPSO is expected or has actually been on site than the expense and/or effort of relocation. Looking at Fifth Circuit precedent, it would appear that the longer a structure is expected to be on location, the more likely that the answer to this prong of the vessel/work platform analysis will favor a finding that the FPSO is not a vessel.

The FPSO will be secured to the sea floor by a system of cables and chains allowing only limited movement while in service. Its function will no longer be (if it ever was) to transport anything; rather, it will serve in capacity akin to the platform with the added benefit of a substantial storage capacity. Furthermore, it will operate as a terminal, transferring product to the vessels that will transport it to shore. As such, even though it will retain some features of a traditional vessel, it will no longer serve as a means of transporting people, cargo or equipment across navigable waters and may not have the ability to do so unaided. Therefore, the third prong of the work platform versus vessel test will favor the conclusion that the FPSO is not a vessel.

We should also mention that drilling capabilities are also being installed on some FPSOs with additional construction cost of approximately 100 million, making them FPDSOs. The idea is to add flexibility to the structure by permitting it to explore for hydrocarbons, make discoveries and then obtain initial production to test the new well. One must assume if

the well was producing in paying quantities the FPDSO would be moved off the well so it could explore elsewhere and a production offshore unit installed in its place. If the FPDSO is utilized in this fashion it more likely would be found to be a vessel since it would not be permanently moored and the operator's intention is to move the structure once the well is completed. Furthermore, if the FPDSO is fitted with self propulsion the conclusion that it is a vessel appears inescapable.

As should be understood from this discussion, the FPSO could pass through several stages before it is fully installed in the field, which will bear on its status. As the FPSO goes through its life in service, its status may change again if it is relocated to different fields or modified for different applications. The features of each specific FPSO will also have to be considered in placing cover. For example, it is more likely that a FPSO which is secured to the seabed will not qualify as a vessel than a FPSO which is held in place by dynamic positioning through thrusters. It will be critical for operations personnel to keep risk management fully informed of the timetable for conversion as well as the current condition of the structure, along with the specific features of each structure so as to assure that the proper cover is in place at all times. Fortunately, or unfortunately, depending upon your perspective, most companies involved in such wet and dry activities should obtain coverage for all risks. FPSOs and those working aboard directly or as contractors may sail or walk into a different status depending upon the numerous factors identified.

We will now turn to a discussion regarding indemnity and additional assured issues that routinely are presented in offshore energy litigation.

INDEMNITY/ADDITIONAL ASSURED ISSUES

The following discussion involves a fairly common scenario in Gulf of Mexico oilfield operations. Actually, the contractual relationships and terms we are about to describe are from a case we are currently handling. In this case, the oil company acting as the operator for the deep water project has separately contracted with many companies for various services related to the drilling of new wells and workover of existing wells. All of the contractors have individual agreements with the oil company, usually of the Master Service Agreement (MSA) type, the terms of which were essentially forced upon the various contractors without any negotiation. The contracts all contain indemnity provisions as well as additional assured agreements in which the contractor agrees to name the oil company as an additional assured on its general liability policies. As an added twist, the MSAs arguably require the employer of the injured person to not only defend and indemnify (act as indemnitor) the oil company

(indemnitee) but also any of the oil company's contractors. Furthermore, the additional assured provision is expanded to include the oil company and its contractors as additional assureds and waive all rights of subrogation against all other parties.

In return, the oil company agrees to defend and hold harmless the individual oilfield service contractor for injuries or damages to oil company people or property, but not the other contractor's personnel. This arrangement is a type of a knock-for-knock indemnity agreement and is similar to a pass-through indemnity provision. Rather than requiring the oilfield service contractor to indemnify any company that the oil company is contractually obligated to indemnify, the definition of indemnitee includes the contractors working at the lease site

CHOICE OF APPLICABLE LAW

Whenever evaluating or analyzing this type of oilfield scenario for the inevitable claims for defense and indemnity, it is necessary to first understand which law is to be applied to the various contracts at issue. The following is a checklist of steps that can be taken to assist in the analysis:

1. Determine the location of the structure, whether it is on OCSLA, Louisiana, Texas or other State waters.
2. Determine the situs of the incident, whether the injury occurred on a vessel, platform, work barge, spar, FPSO, DDCV, etc.
3. Review the contract at issue to determine if it is a maritime or non-maritime contract.
4. Based upon the review and analysis of the steps noted above, determine which law is to be applied when interpreting the contract(s).
5. Determine whether the indemnity language or additional assured provision is valid under the applicable law.
6. Assuming the indemnity agreement is invalid under the applicable law, review the entire contract for any additional assured provisions and determine if they are enforceable.
7. Review choice of law provision, if any, and enforceability of same.

CHOICE OF LAW ANALYSIS

1. Determine the location of the structure: whether it is on OCSLA, Louisiana, Texas or other State waters.

The first question that must be answered is whether the incident occurred in federal or state waters. In other words, will the contract at issue involve the application of federal law (the OCSLA or general maritime), or Louisiana, Texas or other state law? One of the key elements in making this determination is the location of whatever structure the injured person was working upon at the relevant time. If the incident occurred in Louisiana state waters, the Fifth Circuit has recently held that irrespective of the fact that the parties had contractually agreed to apply Texas law, that Louisiana's public policy mandates that its state law applies to such contractual indemnity claims and hence, any attempts at enforcing indemnity or additional assured language are prohibited by the terms of the Louisiana Oilfield Indemnity Act. *Roberts v. Energy Dev. Corp.*, 235 F.3d 935 (5th Cir. 2000).

This case is interesting not only for its result, but also for its procedural history. Following a personal injury claim by a platform worker, the platform owner and operator filed a third party claim against the injured person's employer for defense, indemnity and additional assured status. Initially, the federal district judge ruled that these agreements were unenforceable under the LOIA which applied by virtue of the OCSLA. The Fifth Circuit reversed, noting the platform was in Louisiana state waters, and therefore the OCSLA was not applicable. Furthermore, they remanded with instructions to the district court to determine the effect of the choice of law provision in which the parties chose Texas law as the law that would govern their relationship. After this remand, the district court applied Texas law to the contract, noting that the contract was executed in Houston, the parties both had offices in Houston, and much of the work under the MSA was generated from Houston. The court held the indemnity invalid under Texas law, but noted that the additional assured language was enforceable and hence, the employer's carrier was obligated to reimburse the parties for the settlement monies paid to the plaintiffs.

The Fifth Circuit again reversed, this time indicating that even though the parties had contacts with Texas, the incident occurred in Louisiana state waters, the plaintiff was called out to the platform from a Louisiana office and essentially that Louisiana public policy mandated that its law apply, rather than the law of Texas. Consequently, the same result that the federal district judge originally ordered, and for essentially the same reasons, was reached by

the appellate court after considerable time was spent and expense incurred by the parties.

If the incident forming the basis of the indemnity claim happened in Texas state waters, the result would be much different. Application of the Texas Oilfield Indemnity Act would be the issue. The TOIA would invalidate any attempts at indemnity unless the parties agreed to insure or self-insure their indemnity obligations. Furthermore, the Act makes a distinction between unilateral and mutual indemnity obligations and the amounts of insurance that is available in each case. Recently, the Texas Supreme Court announced the rule with respect to the TOIA and differing amounts of insurance obtained by the various parties. In *Ken Petroleum Corp. v. Questor Drilling Corp.*, 24 S.W. 3d 344 (Tex. 2000), the Court dealt with the issue of what happens when the indemnitor and the indemnitee have different amounts of insurance available to cover their respective indemnity obligations. Previously, in a Fifth Circuit case (*Greene's Pressure Testing & Rentals v. Flournoy Drilling Co.*, 113 F.3d 47 15th Cir. 1997), the Court applying the TOIA, indicated that the agreements are not enforceable unless the parties obtain equal amounts of insurance or self-insurance to support their mutual indemnity obligations.

The Texas Supreme Court indicated that *Greene's* is not the law. Rather they held that in those types of situations, the lesser amount of insurance that is obtained by either party would be the amount of insurance available to support the indemnity obligation. Consequently, using our fact scenario, if the oilfield service company obtained 1 million in coverage but the oil company had 25 million in coverage, and the oil company owed indemnity to the service company, the indemnity owed would be limited to the lesser amount of insurance coverage, or 1 million dollars.

If the same incident occurred on an OCS situs, being a federal mineral lease site, then the law of the adjacent state should be applied to determine the validity of the indemnity language. It has been long established that the law of the adjacent state controls but not the state's conflict of law principles. *Chevron Oil Co. v. Huson Controls* 404 U.S. 97 (1971). This result would be obtained with respect to any non-maritime contract. See *Hodgen v. Forest Oil Company*, 87 F.3d 1512 (5th Cir. 1996). In that case, the court again reiterated the test to be applied in OCS cases. The three prong test is simply: (a) Did the incident occur on an OCS situs? (b) Does federal maritime law apply on its own force? (c) Is the adjacent state law inconsistent with federal law? *Id* at 1526. If the answer to (b) or (c) is yes, then general maritime law applies to the agreement. The issue of maritime vs. non-maritime contract will be dealt with in greater detail later in this paper.

2. Determine the situs of the incident, whether the injury occurred on a vessel, platform, work barge, spar, FPSO, DDCV, etc.

The purpose of this inquiry is to determine if general maritime law applies of its own force and address the test noted above, if the incident occurred on an OCS site. Likewise, if the incident occurred on a vessel, and the injured plaintiff is a seaman, it is likely, though not guaranteed, that the indemnity provisions would be interpreted under general maritime law, rather than state law. In many instances where the accident or damage happens on a vessel, federal maritime law is applicable to the contract. Since general maritime law has no policy prohibitions against these types of agreements (unlike Louisiana and Texas), these agreements are valid if drafted correctly.

If the incident occurred on a drilling vessel, even if the vessel is located in state waters, the majority of times the indemnity and additional assured provisions would be enforceable. Drilling structures, such as jack-up rigs, semi-submersible rigs, and drill ships are currently held to be vessels. This definition does not always extend to all barges. As we discussed, some barges are treated as work platforms and therefore are denied vessel status. While it is not automatic that if a vessel is involved, general maritime law applies to the contract, that statement is true in many cases and should be the first source of one's inquiry into the enforceability of the agreements.

If the incident occurred on a platform, work barge, or spar (and possibly other new structures as well), then the law of the adjacent state would most likely serve to interpret the agreements. This is true whether the platform is in state or federal waters. One caveat to the above pertains to situations in which a vessel is used in conjunction with a platform or work structure. In that instance, one must delve deeper into the facts of the incident and the intent of the contract at issue (to determine maritime vs. non-maritime contract) in order to resolve the question of what law applies.

Of course, there can be situations in which vessel involvement occurs but the individual making a claim is not a seaman. The OCSLA has a specific provision that notes that those individuals who work upon the outer continental shelf, performing services related to the extraction of minerals, are considered longshoreman for purposes of workers compensation benefits. As has been addressed in other parts of this seminar, simply because a person works on a vessel, does not mean that person is a seaman. If the incident happened on an OCS situs, then that person, if not a seaman, would be a covered employee under the Longshore and

Harbor Workers Compensation Act.

3. Review the contract at issue to determine if it is a maritime or non-maritime contract

Assume that our contracts relate to a semi-submersible rig conducting drilling operations on the Outer Continental Shelf. The rig, by law, is a vessel. Assume further that an incident happens in which several people (none of which are drill crew members) are injured, one of them very seriously. While the initial impression might be that the injured persons are seaman since they were working on the rig/vessel, in fact they are not seaman but are longshoremen by virtue of the language of the OCSLA. In the case we are currently handling based on these facts, the plaintiffs are receiving longshore benefits, are not claiming to be seaman, and have filed suit under the general maritime and state law seeking damages as a result of the negligence of the various companies noted in our example.

Even though the incident occurred on a vessel, the contract between the employer and the oil company may be non-maritime. The contract should be reviewed under the six prong test of *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990) to determine if the contract is maritime or non-maritime. The six inquiries are: (1) what does the specific work order in effect at the time of the injury provide? (2) What work did the crew assigned under the work order actually do? (3) Was the crew assigned to work aboard a vessel in navigable waters? (4) To what extent did the work being done relate to the mission of that vessel? (5) What was the principal work of the injured worker? (6) What work was the injured worker actually doing at the time of the injury?

If it can be determined that the contract is maritime, then the general maritime law of the U.S. is applicable and likely the indemnity and additional assured provisions are valid. If, however, the contract is non-maritime (in that it deals with non-maritime matters as well as some maritime matters), then even with a vessel involved in the incident, the law of the adjacent state would apply to any contractual indemnity and additional insured claims. *Hodgen* at 1528-1529, *Wagner v. McDermott*, 79 F.3d 20 (5th Cir. 1996), *Union Texas Petroleum v. PLT Engineering*, 895 F.2d 1043 (5th Cir. 1990).

Assuming that the rig is offshore Louisiana, then we are faced with several possible results. The first is that the contract between the oilfield service contractor/employer and the oil company is a maritime contract in which general maritime law applies to the agreement. Second, it could be argued that the contract is non-maritime, therefore the law of Louisiana applies invalidating the indemnity and additional assured provisions. There is still

one other analysis that may be required under this fact pattern

Due to the fact that the injured persons are covered employees and treated as longshoremen, we should also examine the Longshore Act to determine if the indemnity and additional insured provisions are valid. 33 U.S.C. 905(a) deals with the exclusive remedy of the longshoremen with his employer

One might be tempted to argue for the application of 905(a), which would permit indemnity agreements with a non-vessel even if located offshore Louisiana. Unfortunately, the Fifth Circuit rejected this argument in two 1986 cases. The court noted that 905(a) “neither expressly permits nor forbids contractual indemnity agreements between non-vessels and compensation paying employers. This silence is a gap in federal law that, according to the Shelf Lands Act, is to be filled by state law governing such indemnity contracts.” *Doucet v. Gulf Oil Corp.*, 783 F.2d 518, (5th Cir. 1986), see also *Knapp v. Chevron USA, Inc.* 781 F.2d 1123, 1130-31 (5th Cir. 1986).

Curiously, subsequent to these 1986 decisions both the Fifth and Eleventh Circuits have held that 905(a) allows indemnity agreements between the longshore employer and any non-vessel owners with whom a contractual indemnity has been entered. These decisions did not however occur in the same offshore scenario as the 1986 cases.

Section 905(b) specifically prohibits any indemnity agreements between a vessel owner and a longshore employer. As noted above, the semi-submersible drilling rig is a vessel and hence, arguably any agreements with respect to indemnity are invalid. Congress however created an exception to the above, with the enactment of Section 905(c). In that statute, if two requirements are met, then an agreement with respect to indemnity of a vessel is allowed. The law states that if a person is working in the oilfield on the Outer Continental Shelf and thereby a covered employee under the Longshore Act, and if the employer and the vessel reciprocally agree to indemnify the other for injuries to their people, then such indemnity agreements are permitted.

Consequently, Section 905(a) should have no applicability. Section 905(b) will prohibit any indemnity as to the drilling company owning the vessel unless the drilling company also agrees to indemnify the longshore employer thereby fitting within the exception of 905(c). Complicating matters further, the Fifth Circuit draws a distinction between a contractor acting in its capacity as vessel owner and one who incidentally utilizes a vessel to accomplish their work. The court has prohibited 905(c) indemnity even though the contractor was the owner of the vessel and the injury occurred on the vessel if the vessel owner contracted

with the injured worker's employer in its capacity of contractor, not as vessel owner. See, *Wagner v. McDermott, Inc.* 79 F.3d 20 (5th Cir. 1996).

If, however, this exact fact pattern is moved from a rig to a spar, which has been held not to be a vessel, then one would be faced with the application of the adjacent state law exactly like situations involving a stationary platform.

4. Based upon the review and analysis of the steps noted above, determine which law is to be applied when interpreting the contract(s).
5. Determine whether the indemnity language or additional assured provision is valid under the applicable law.

As noted above, if Louisiana law is applicable to the contractual provisions, then it is irrelevant whether the language is in any particular format or has any "magic words." The provision is void as a matter of public policy. If not a Louisiana law application, then the courts will use applicable state law or the general maritime tests.

If we are asked to apply Texas law, then the language of the clauses must meet the "express negligence test" as well as the conspicuousness requirement. These tests mandate that the language in which the indemnitor agrees to pay for the negligence of the indemnitee must be stated in express terms. The language cannot imply or by exception hint or indicate that the intent of the parties was to provide such indemnity. Likewise, in Texas the language must either be of a different type -set, font, or set off with a heading or in some other manner distinguished from the other words and type in the contract. Assuming both of these tests are met, and the TOIA is satisfied, then the agreement will be enforced under Texas law.

The general maritime law uses a less stringent test known as the clear and unequivocal standard. Under this rule, the intent of one party to indemnify another must simply be noted in clear and unequivocal language. Furthermore, there is no requirement of specific types, fonts or conspicuousness in the federal law.

6. Assuming the indemnity agreement is invalid under the applicable law, review the entire contract for any additional assured provisions and determine if they are enforceable.

Many U.S. oilfield contracts not only require that one party indemnify the other

(or create a knock-for-knock situation), they often necessitate that the party with the least bargaining power also name the other as an additional assured on that party's general liability policy. The same analysis should be applied when considering the enforceability of this separate remedy that might be available.

Initially, it must be noted that the law determined to be applicable will apply to the indemnity provision and apply to the additional assured provision. Consequently, if Louisiana law applies, either by incorporation due to the application of the OCSLA or of its own force, then any requirements to name a party an additional assured are void as against public policy. There is one exception to this. In the case of *Marcel v. Placid Oil Company*, 11 F.3d 563 (5th Cir. 1994), the Fifth Circuit noted that if the additional assured participated in the payment of the premiums associated with obtaining the additional assured coverage, then it would be permissible for the additional assured to get the benefit of its bargain, coverage for its negligent conduct. Subsequent Louisiana state court opinions have narrowed this remedy by noting that the consideration paid for the coverage must be real and must be related to the amount of coverage that is to be obtained.

Unlike Louisiana, under Texas law, even if the indemnity clause is invalid, it is still possible to obtain additional insured coverage, if the contract calls for same. *Getty Oil Co. v. Insurance Company of North America*, 845 S.W.2d 794 (Tex. 1989), *Roberts, Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000). General maritime law is consistent with Texas law on this point.

Under the Longshore Act, we observed that indemnity agreements between the vessel and the longshore employer were generally prohibited by 905(b). The same is not necessarily true for additional assured provisions. In *Voison v. ODECO*, 744 F.2d 1174 (5th Cir. 1984), the Fifth Circuit held that Section 905(b) does not address additional assured provisions and hence they are not prohibited. In *LeBlanc v. Global Marine Drilling Co.*, 203 F.3d 826 (5th Cir. 1999), the Court was asked to rule that Section 905(b) prohibits either direct or indirect indemnity agreements and requiring someone to provide insurance for another is an indirect indemnity agreement. The Court rejected this argument. The Court also recognized an exception to the rule it announced. It noted that if the contractual language ties the provision of additional assured status to the existence of a valid indemnity agreement, and if the indemnity portion of the contract is not valid, then the additional assured requirement fails as well.

7. Review choice of law provision, if any, and enforceability of same.

The last step that must be taken is to ensure that no choice of law provision exists in the contract or alternatively, determine if that clause is enforceable. As noted above, if Louisiana law applies to the agreement, then any choice of law provision attempting to circumvent Louisiana law and apply some other law is void and unenforceable. This is based upon the underlying Louisiana public policy prohibition of oil-field indemnity agreements.

Texas law, however, does allow choice of law provisions, as long as the law chosen by the parties bears some rational relationship to the parties and the work being conducted. For example, parties in Texas who are drilling off the coast of Louisiana can choose that Louisiana law shall apply to their contract. While this is difficult to imagine, we have encountered contracts in which this choice as well as the choice of Louisiana law in maritime contracts has been made. As a result, the indemnity and additional assured provisions are rendered void by the choice of law.

Likewise, general maritime law allows choice of law provisions. The law chosen should have some bearing or relationship to the parties and the work or services contemplated under the agreement. On the other hand, if public policy prohibits the choice as an evasion of applicable state law the provision will be ineffective. Accordingly, selection of general maritime law as the applicable law has been held invalid where Louisiana law applies as a matter of law and would operate to void an indemnity agreement.

CONCLUSION

In sum, the issues related to the enforceability or non-enforceability of indemnity and additional assured contractual provisions are complex and dependent upon applicable law. These issues revolve around the status of the structure upon which a casualty occurs. Each situation is fact intensive and contains in many cases, mixed questions of law and fact. Generally, however, the analysis noted above will be used by the courts to determine the validity of the contractual language as a matter of law.

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