

**OILFIELD CONSTRUCTION AND SERVICE CONTRACTS -
MARITIME OR NON-MARITIME IN NATURE**

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	THE <i>DAVIS</i> TEST	4
III.	SUPREME COURT AND OTHER JURISPRUDENCE	6
	A. Supreme Court Jurisprudence	6
	B. Precedents for Specific Contracts	8
	C. Borderline Cases and Mixed Contracts	9
IV.	WHEN OILFIELD WORK GOES TO SEA	11
V.	DEVELOPMENT OF THE <i>DAVIS</i> TEST	15
VI.	A RETURN TO THE CONCEPTUAL STANDARD	18
VII.	WHERE TO FROM HERE?	19

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I. INTRODUCTION

For centuries, vessels, barges and floating platforms have been used in many construction and other non-transportation activities. In some instances, courts have treated these vessels as “not in navigation” or not engaged in maritime commerce, and thus not subject to admiralty jurisdiction. In others, admiralty jurisdiction applied because of a transportation element of the vessel’s service was not incidental to the vessel’s work.²

In the latter half of the last century, a robust and technologically modern oilfield industry has spawned the development of many “special purpose” vessels which provide services and perform functions quite different from the traditional activities of maritime commerce. These include such water-borne work as platform construction and demolition, pipe-laying activities, oil well drilling and workover operations, petroleum storage and separation tasks, etc. These special purpose vessels are supported by a wide-range of discrete oilfield services, such as casing and cementing, snubbing and stripping, well logging and surveying, wireline operations, etc.

As a practical matter, many oilfield activities cannot be physically or efficiently accomplished offshore without the use of vessels, floating platforms, equipment and

¹The author wishes to acknowledge the substantial research and writing assistance provided by Porter H. Nolan, summer associate with Wagner & Bagot, LLP.

²See, generally, the discussion in *Stewart v. Dutra Const. Co.*, 543 U.S. 481 (2005).

crane barges, special purpose vessels, etc. When an accident or dispute arises from these operations, a frequent legal issue arises as to whether the claim falls within the admiralty jurisdiction and is thus governed by the general maritime law, or whether other federal or state jurisdiction and law are applicable. This issue arises in two discrete, but overlapping, arenas – tort claims and contract disputes.³ This paper treats these issues in the contract arena.

Over the last few decades, the courts of the Fifth Circuit have grappled with these jurisdictional and choice of law questions governing contract disputes related to offshore development and oilfield services. Oilfield development contracts typically concern the construction, installation, demolition or removal of fixed facilities, pipelines, and the like. The parties to such agreements often use “manuscript” contracts which delineate multiple segments of the development - design and fabrication, load out and transport, offshore installation or demolition, and ending with completion, painting, final construction or removal details.

In the field of oil well services, the contracting parties often engage in repetitive or similar services at multiple sites at different times. In that setting, the principal often uses its “master service agreements” (or “MSA”), coupled with individual work orders

³For discussion of admiralty jurisdiction arising from tort disputes, see, *e.g.* *Sisson v. Ruby*, 497 U.S. 358, 363 (1990); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). In the context of the offshore setting, see also, *Texaco Exploration and Production, Inc. v. Amclyde Engineered Products Company, Inc.*, ___ F.3d ___ (5CA No. 03-31208, May 5, 2006) (outlining the test for admiralty jurisdiction in tort as being of two parts: 1) status and 2) situs. The situs test is satisfied when the injury occurs on navigable water. The status test requires a potential impact of the event upon maritime commerce and a nexus between the activity involved and traditional maritime commerce.)

for specific work assignments. The MSA may specify the type of work to be performed, such as, wireline operations, or it may simply recite oilfield services generally. The MSA prescribes the general terms and conditions of the parties' relationship, which may include indemnity and insurance provisions and forum selection and choice of law clauses. When a specific job or service is needed, the contract principal issues a work order to the service provider for the specific work to be performed, with pertinent job details, i.e. when, where, etc.

Repeated litigation in the Fifth Circuit has led to a jurisprudential rule, known as the *Davis* test, used by lower courts to determine jurisdiction and choice of law in such contract disputes. *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990). While the tenets of the *Davis* test are clear,⁴ its application has been often criticized as cumbersome, overly fact-specific and prone to produce inconsistent results. In *Hoda v. Rowan Drilling Co., Inc.*, 1119 F.3d 379 (5th Cir. 2005), (now Chief) Judge Jones described current status of this law, as follows:

. . . once more [we sort] through the authorities distinguishing maritime and non-maritime contracts in the offshore exploration and production industry. As is typical, the final result turns on a parsing of the facts. Whether this is the soundest jurisprudential approach may be doubted, inasmuch as it creates uncertainty, spawns litigation, and hinders the rational calculation of costs and risks by companies participating in this industry. Nevertheless, we are bound by the approach this court has followed for more than two decades.

Hoda, 419 F.3d at 380.

This paper reviews underlying jurisprudence of maritime contract law with related authorities and other relevant developments which formed the premises leading

⁴See discussion, *infra* at pp. 4-5.

to the *Davis* test and then presents the author's view of a more reliable conceptual rule founded upon Supreme Court jurisprudence, new and old.

II. THE DAVIS TEST

Since so much oilfield development has occurred off the coasts of Louisiana and Texas, the Fifth Circuit and its lower courts have produced a considerable volume of jurisprudence treating this subject. In 1990, the late Judge Rubin reviewed the decisional law relating to jurisdiction and applicable law and articulated the *Davis* test for determination of whether a contract is maritime or non-maritime for purposes of maritime jurisdiction and applicable law. *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990).

The *Davis* Court adopted a two-step analysis for determining whether a contract falls within or without admiralty jurisdiction. The courts first look to the jurisprudence for any "historical" treatment of the contract work in question, *i.e.* workover operations, snubbing, well-logging, wireline activities, etc. *Id.* at 316. If there is clear precedent, this first factor is supposed to be dispositive. *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492, 500 (5th Cir. 2002). However, due to the modern, and ever-changing, nature of oilfield services, there is often little or no jurisprudential history for particular contract activities. Further, the courts seem uneasy about relying upon limited precedent *per se* and frequently undertake the second part of the analysis, even when there is judicial history for the work in question.⁵

This second part of the *Davis* test requires an analysis of the following six factors:

⁵See, *e.g.*, *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 500-01 (5th Cir. 2002).

1. The terms of the specific contract or the work order in effect;
2. The work actually performed or to be performed by the crew assigned under the work order;
3. Whether the crew is assigned to work aboard a vessel in navigable waters;
4. The extent to which the work is related to the mission of a vessel;
5. The principal work of the injured worker; and
6. The work actually being done by the worker at the time of the injury.

Davis, 919 F.2d at 316.

As is obvious, factual variables under the *Davis* test change from case to case even when the nature of the underlying contract activity or work-order remains constant. Consider, for example, an offshore well surveyor who performs two identical jobs, back to back, for the same principal, one on a fixed platform and the other on a jack-up rig. Under the *Davis* test, the contractual disputes, arising from his work or from an injury during such work could be governed by different legal regimens depending on minor factual differences even though his work activity was identical at both sites.

The *Davis* test thus produces inconsistent rulings often premised upon minor factual variations having nothing to do with the contract work itself. The test further requires expensive, discovery-laden litigation; and per force, the parties must litigate practically through trial before learning whether there is maritime jurisdiction and what law applies.

III. SUPREME COURT AND OTHER JURISPRUDENCE

A review of maritime contract jurisprudence and related factors is helpful to an understanding of the premises underlying the Fifth Circuit's adoption of the *Davis* test.

A. Supreme Court Jurisprudence

As early as 1815, Justice Story, while riding circuit in Massachusetts, articulated a general rule for determining whether admiralty jurisdiction exists over contract disputes. He concluded that admiralty contract jurisdiction "extends over all contracts . . . which relate to the navigation, business or commerce of the sea." *DeLovio v. Boit*, 7 Fed. Case 418, 443 (CCD Mas. 1815) (holding that a maritime insurance policy was a maritime contract). This conceptual approach focuses upon the contract activity.

In 1848, the Supreme Court held that maritime jurisdiction governed contracts "to be performed upon the sea or upon waters within the ebb and flow of the tide." *New Jersey Steam Navigation Co. v. Merchants' Bank*, 47 U.S. (6 HOW) 344 (1848). This approach premised jurisdiction upon situs of the work, a locality test like the former English rule for maritime contract jurisdiction.

In *New England Mutual Marine Insurance Co. v. Dunham*, the Supreme Court held, as Justice Storey had in *DeLovio*, that admiralty jurisdiction applied to a marine insurance dispute. In so holding, the Court expressly disavowed the English locality rule:

. . . as to contracts, it has been equally well settled that the English rule which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon (making *locality* the test) is entirely inadmissible, and that the true criterion is the nature and subject matter of the contract, as whether it was a maritime

contract, having reference to maritime service or maritime transactions.

Dunham, 78 U.S. at 26.

Dunham, like *DeLovio*, focused upon the nature and subject matter of the contract rather than the locality of the breach or the place of execution or performance. One commentator has suggested that the “vagueness” underlying this conceptual rule “has lead inevitably to a case-by-case approach, so that the guide to the contours of admiralty contract jurisdiction is often judicial precedent.” Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 3-10, 131, (West 2d Ed. 1994) (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961)).

In *Kossick*, the Supreme Court held that admiralty jurisdiction governed an oral agreement between a shipowner and a seaman concerning the consequences relating to medical treatment afforded by an U.S. Public Health Service Hospital. The commentator drew upon the following *dicta* from Justice Harlan in *Kossick*:

The boundaries of admiralty jurisdiction over contracts - - as opposed to torts or crimes - - being conceptual rather than spacial, have been difficult to draw. Precedent and usage are helpful in so far as they exclude or include certain types of contracts . . .

Kossick, 365 U.S. at 735.

B. Precedents for Specific Contracts

While the precise boundaries of maritime contract jurisdiction are not easily drawn, the conceptual rule has nonetheless effectively served the Supreme Court and lower courts in the development of reasonably uniform body of jurisprudence declaring whether specified types of contracts fall within or without the admiralty jurisdiction.

Contracts traditionally invoking admiralty jurisdiction include those for wharfage agreements,⁶ stevedoring contracts,⁷ maritime insurance contracts,⁸ and salvage contracts,⁹ amongst others; further, some contract services have been consistently held as non-maritime, including those for shipbuilding¹⁰ and sale of a vessel.¹¹

The formulation of these judicial precedents make it unnecessary for courts to look to factual specifics in order to determine whether, for example, a shipyard repair contract or a vessel sale contract are governed by admiralty or state law. The precedents are set, and the participants know, when the contract is formed, whether a dispute arising thereunder will be governed by maritime or state law.

C. Borderline Cases and Mixed Contracts

The difficulty with the conceptual rule, as with any general rule, occurs with those borderline activities for which there is no precedent or when contracts contain multiple undertakings, *i.e.* mixed contracts with some traditional maritime activities and some non-maritime functions.

⁶*Ex Part Easton*, 95 U.S. 68 (1877)

⁷*Sanderlin v. Old Dominion Stevedoring Corp.*, 385 F.2d 79, 81 (4th Cir. 1967)

⁸DeLovio, 7 F.Cas. 418

⁹*The Louisa Jane*, 15 Fed.Cas. 949 (C.C.D.Mass. 1873) (No. 8532)

¹⁰*J.A.R., Inc. v. M/V Lady Lucille*, 963 F.2d 96 (5th Cir. 1992)

¹¹*See, e.g., Magallanes Investment, Inc. v. Circuit Systems, Inc.* 994 F.2d 1214 (7th Cir. 1993)

Davis itself contains a cumulation of such cases involving work activities which were thought to be borderline when performed aboard vessels.¹² The borderline nature of the contract disputes in those cases typically arose from the fact that the work, while not inherently maritime, was in fact done aboard drilling vessels and contributed to the vessels' mission or purpose. *Id.* at 316-7.

Disputes arising from mixed contracts produced similar uncertainties. Some courts hold that a contract "must be wholly maritime in nature to be cognizable in admiralty." *Simon v. Intercontinental Transport B.V.*, 882 F.2d 1435, 1442 (9th Cir. 1989); see *Lucky-Goldstar Int'l (America), Inc. v. Phibro Energy Int'l*, 958 F.2d 58 (5th Cir. 1992). This rule may be traced back to the Supreme Court's holding in *The Steamer Eclipse*, 135 U.S. 599, 608 (1890), with Mr. Chief Justice Fuller stating, "[Admiralty] jurisdiction...depends, in cases of contract, upon the nature of the contract, and is limited to contracts, claims and services *purely maritime*, and touching rights and duties appertaining to commerce and navigation." Some courts limit the "wholly maritime" rule to cases where the contract activities are inseparable and extend admiralty jurisdiction to maritime work in mixed contracts where 1) the maritime element was separable or 2) the non-maritime element was incidental. See

¹²*Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990); see, e.g. *Thurmond v. Delta Well Surveyors*, 836 F.2d 952 (5th Cir. 1988); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538-39 (5th Cir. 1986); *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083 (5th Cir. 1990); *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329 (5th Cir. 1981); *Houston Oil & Mineral Corp. v. American Int'l Tool Co.*, 827 F.2d 1049 (5th Cir. 1987), cert. denied, 484 U.S. 1067 (1988); *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132 (5th Cir. 1981), cert. denied *Valero Energy Corp. v. Sohyde Drilling & Workover, Inc.*, 454 U.S. 1081 (1981).

Folksamerica, 413 F.3d at 314; see *Flota Maritima Browning de Cuba, S.A. v. Snobl*, 363 F.2d 733 (4th Cir. 1966).

In the Fifth Circuit, admiralty jurisdiction and maritime law will not apply to the non-maritime segment of a mixed contract. *Laredo Offshore Contractors v. Hunt Oil Co.*, 754 F.2d 1223, 1229-30 (5th Cir. 1986). Nor will maritime law apply to a contract breach when the mixed obligations are inseparable. *Kuehne & Nagel (AG&CO) v. Geosource, Inc.*, 874 F.2d 283 (5th Cir. 1989).

Courts in the Second Circuit make a “threshold inquiry” into the subject matter of the dispute, as distinguished from the subject matter of the contract. *Folksamerica Reinsurance Company v. Clean Water of New York, Inc.*, 413 F.3d 307, 312 (2nd Cir. 2005); *Sirius Ins. Co. (UK) Ltd. v. Collins*, 16 F.3d 34, 37 (2nd Cir. 1994). Those courts “initially determine whether the subject matter of the dispute is so attenuated from the business of maritime commerce that it does not implicate the concerns underlying admiralty and maritime jurisdiction.” *Id.* (quoting *Atlantic Mutual Insurance Co. v. Balfour Maclaine Int’l Ltd.*, 968 F.2d 196, 200 (2nd Cir. 1992)(internal emphasis omitted)).

IV. WHEN OILFIELD WORK GOES TO SEA

In 1959, the Fifth Circuit handed down its landmark decision of *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959). Therein, the Court held that the Jones Act was applicable to personal injury claims of oilfield workers regularly assigned to special purpose offshore vessels and whose work contributed to the mission or function of the vessel. *Robison* involved a jack-up drilling rig which, when its legs are jacked-down into the seabed, raises the floating hull above the water’s surface to form a

stationary, stable platform for performance of drilling operations. Ultimately, *Robison* and other Fifth Circuit jurisprudence was adopted by the Supreme Court to define the boundaries of seaman status for all workers claiming seaman status as a result of vessel-related employment.¹³

In 1953, Congress passed the Outer Continental Shelf Lands Act (“OCSLA”) as a segment of the Submerged Lands Act of the United States. 43 U.S.C.A. §§ 1331, *et. seq.* (Amended 1978). This broad legislative enactment declared that the authority and jurisdiction of the United States extended to the natural resources under the seabed of the Outer Continental Shelf (“OCS”) extending seaward from the coast of the United States. It further declared that federal jurisdiction, federal law, and state law, in some instances, as surrogate federal law, are applicable to disputes associated with offshore development and exploration. 43 U.S.C.A. § 1333(a)(1)-(3).

Following enactment of OCSLA, the Fifth Circuit initially concluded that maritime law was made applicable by OCSLA to tort claims arising out of casualties occurring upon fixed or structures utilized in offshore exploration: In *Pure Oil Co. v. Snipes*, 293 F.2d 60 (5th Cir. 1961); see also, *Loffland Bros. Co. v. Roberts*, 386 F.2d 540 (5th Cir. 1967), *cert. denied*, 389 U.S. 1040, 88 S.Ct. 778, 19 L. Ed. 2d 830 (1968); *Movable Offshore Co. v. Ousley*, 346 F.2d 870 (5th Cir. 1965).

The Supreme Court disagreed with this interpretation of OCSLA. In *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), the Court held that OCSLA made the law of the adjacent state, as surrogate federal law, applicable to accidents occurring

¹³*McDermott Int’l, Inc. v. Wilander*, 98 U.S. 337 (1991); *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548 (1997).

upon fixed OCS platforms. The Court held maritime law did not apply of its own force to platform-based events and that Congress expressly determined that maritime law was unsuited to such disputes. *Id.* at 361-7.

Following *Robison* and *Rodrigue*, the tort claims of offshore oilfield workers fell into two broad categories. The general maritime law and the Jones Act would apply, under their own force, to tort claims arising from accidents aboard traditional and special purpose vessels; while platform accidents would be governed by the law of the adjacent state. Offshore workers, who were not covered by the Jones Act, would be entitled to compensation benefits under the LHWCA pursuant to the express extension of same under OCSLA. 43 U.S.C.A. § 1333(b)

In 1985, the Fifth Circuit examined the jurisdiction and law applicable to a dispute arising from a contract for the construction of a stationary OCS platform. *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223 (5th Cir. 1985). The manuscript contract therein divided the contractor's obligations into four discrete work segments: (1) loadout, transport and installation of jackets, piles, deck and heli-deck; (2) weldout deck and ship loose items; (3) diver inspection of seabed and well conductor; and (4) blast and prime welded and damaged platform areas. The contractor in *Laredo Offshore* sued the principal for payment of services, and the principal defended that the contractor had improperly installed the piles securing the well jacket to the seabed. The contractor asserted that admiralty jurisdiction existed because the contract required the use of vessels and seamen in its performance and further contending that "offshore oil and gas drilling" was a traditional maritime activity. The district court dismissed the

claim because the dispute concerned a non-maritime portion of the contract, the actual building of the platform. *Laredo*, 754 F.2d at 1225-6.

On appeal, the Fifth Circuit requested additional briefing as to whether federal jurisdiction existed under OCSLA. Noting that OCSLA extended federal jurisdiction to the OCS “development” operations and that by definition, “development” included “platform construction,” the Court found that federal jurisdiction existed under OCSLA. *Id.* at 1226-9, *citing* 43 U.S.C.A. §§ 1349(b), 1331(1).

The contractor contended that concurrent jurisdiction existed in admiralty. However, the court concluded that “admiralty jurisdiction and maritime law will only apply if the case has a sufficient maritime nexus wholly apart from the situs of the relevant structure in navigable waters.” *Id.* at 1230. In pertinent part, the court stated:

while the contract no doubt contemplated the hiring of vessels and seamen to build the structure, the subject matter of this case has no direct relationship with these traditional subjects of maritime law. It is fundamental that the mere inclusion of maritime obligations in a mixed contract does not, without more, bring non-maritime obligations within the pale of admiralty law. That the contract contemplated in part the use of instruments of admiralty, therefore, as not sufficient to oust OCSLA - adopted state law in this case.

Laredo Offshore, 754 F.2d at 1229-30. Lastly, replying upon *Rodrigue*, the Court suggested, in *dicta*, that even were maritime jurisdiction applicable under admiralty jurisprudence, the congressional policy underpinning OCSLA would preclude the application of maritime law “unless explicitly made applicable by statute.” *Id.* at 1232.

The significant contractual premise in *Laredo Offshore* was that the Court focused upon the specifics of the controversy, *i.e.* the portion of the contract which gave rise to the lawsuit, rather than the subject matter of the contract as a whole.

Coincidentally in 1985, the Supreme Court considered whether an oilfield welder, working on a fixed platform in state waters, was engaged in maritime employment within the meaning of the LHWCA. *Herb's Welding v. Gray*, 470 U.S. 414 (1985). In a split (5-4) opinion, the Court held that oil well drilling from a fixed platform is not "inherently maritime." The Court defined activities which are not inherently maritime as those "which are also performed on land, and their nature is not significantly altered by the marine environment, particularly since exploration and development of the Continental Shelf are not themselves maritime commerce." *Id.*, at 425.

In 1986, the Fifth Circuit confronted the question of whether or not a contract to drill and complete a well in inland waters was maritime or non-maritime in nature. *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986). The contractor performed its obligations with its submersible drilling barge.¹⁴ The Court concluded that the Supreme Court's pronouncement in *Herb's Welding* was limited to oilfield or drilling activities on fixed platforms, not vessels. *Theriot*, 783 F.2d at 539. The Court held that the drilling contract was a maritime contract, relying upon Fifth Circuit precedent that drilling operations on navigable waters aboard a vessel had long been recognized to be maritime commerce. *Pippen v. Shell Oil Co.*, 661 F.2d 378, 384 (5th Cir. 1981); *Boudreaux v.*

¹⁴A submersible drilling barge is a vessel which is floated onto site and then is flooded and submerged upon the water bottom where it lies stationary while performing drilling operations.

American Workover, Inc., 664 F.2d 463, 466 (5th Cir. 1981), *cert. den.* 459 U.S. 1170 (1983).

V. THE DEVELOPMENT OF THE DAVIS TEST

By 1990 when *Davis* was decided, the jurisdiction and applicable law for tort claims arising offshore accidents was well established. Injuries occurring aboard oilfield vessels, whether traditional or special purpose craft, were governed by the general maritime law. Crewmembers regularly assigned to those vessels were seamen entitled to pursue a negligence action under the Jones Act and an unseaworthiness claim under the general maritime law. Non-seamen workers injured on vessels could pursue the vessel owners or operators for negligence claims under general maritime law. *Lormand v. Superior Oil Company*, 845 F.2d 536 (5th Cir. 1988). It was likewise clear that casualties occurring aboard fixed platforms were governed by the law of the adjacent state as surrogate federal law; and the LHWCA covered non-seamen offshore workers regardless of the situs of their particular work activities. As to tort claims, therefore, the location or situs of the work and/or injury was practically dispositive for jurisdiction and applicable law.¹⁵

The jurisdiction and law applicable to offshore contract disputes was not so clear. Those disputes were often inter-related with incidents giving rise to tort claims. As a consequence, the situs of the incident, which was essentially dispositive for the tort claims, often influenced the jurisdictional decisions for the breach of contract claims.

¹⁵While admiralty jurisdiction also requires proof of status as indicated in *Texaco, supra*, this element was largely satisfied when the injuries occurred aboard or in connection with vessels in navigation, *i.e.* engaged in maritime commerce.

Over time, various aspects of situs largely displaced the nature of the contract, as the test for maritime contract jurisdiction. See, e.g. *Lewis v. Glendel*, 898 F.2d 1083 (5th Cir. 1990) (while there was traditional treatment of wireline services as non-maritime, a contract for the provision of such services was maritime when performed aboard a vessel in state territorial waters).

The *Davis* test announced by the Fifth Circuit in 1990 resulted from the merging or, if you will, the “confusion” of disparate criteria underlying jurisdictional and choice of law decisions involving both tort and contract disputes. Today, the courts have largely abandoned the conceptual test relating to the subject matter of the contract itself. Instead, the principal focus for contract disputes has become the six factors of second tier of the *Davis* test. Further, relying upon principles of mixed contracts, the courts, as in *Laredo Offshore*, focus upon the nature and location of that portion of the work activity giving rise to the dispute. As applied today, the *Davis* test has become, in the view of the author, a brittle fusion of elements which do not bond to form a reliable judicial standard.

Offshore development contracts present a special problem due to the substantial internal tension in their resolution within the Fifth Circuit. See, e.g. *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986); *Laredo Offshore Contractors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223 (5th Cir. 1985); cf. *Texaco Exploration and Production, Inc. v. Amclyde Engineered Products Company, Inc.*, ___ F.3d ___ (5CA No. 03-31208 May 6, 2006). In *Theriot*, the Court upheld admiralty jurisdiction over a dispute arising from a drilling contract performed by a drilling barge in inland waters. In *Laredo Offshore*, the Court found no admiralty jurisdiction for a contract dispute relative to the construction

of an offshore platform which was substantially performed by vessels. Premised upon the rationale of *Laredo Offshore*, the same result obtained in *Texaco* with respect to tort jurisdiction for a casualty occurring during the installation of an offshore structure by vessels.

Theriot was a contractual claim related to a personal injury claim arising in inland waters. In upholding maritime jurisdiction, the *Theriot* Court relied upon authorities which the *Laredo Offshore* indicated were inapposite to an offshore construction contract performed by vessels.¹⁶ In denying admiralty jurisdiction, the *Laredo Offshore* and *Texaco* Courts concluded that OCSLA's reference to "platform construction" as a part of "development" was controlling, particularly since the disputes in question arose after the transportation segment of the vessels' work had largely been completed. *Laredo Offshore*, 754 F.2d at 1231-1233. Both *Laredo Offshore* and *Texaco* found nothing traditionally maritime in nature in the undertaking of platform construction by vessels. Should not the same result obtain contract and tort claims involving offshore drilling by special purpose vessels. "Drilling" is likewise defined as a part of "development" in OCSLA; and the Supreme Court in *Herb's Welding* has indicated that offshore exploration and development are not maritime commerce. 43 U.S.C.A. §1331; *Herb's Welding*, 470 U.S. at 425. If so, does *Theriot* and even *Robison* fall under the crush of OCSLA's mandate?

¹⁶*Laredo Offshore*, 754 F.2d at 1232.

VI. A RETURN TO THE CONCEPTUAL STANDARD

Two Supreme Court cases handed down after the *Davis* decision supports a return to the conceptual test.

In *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603 (1991), the Supreme Court expressly approved the principle in *Dunham, supra*, that “the ‘nature and subject matter’ of the contract should be the crucial consideration in assessing admiralty jurisdiction.” *Id.* at 611. *Exxon* concerned an agency contract under which an oil company acted as agent in arranging for the overseas supply of marine fuels or bunkers to a vessel operator. While contracts to supply bunkers are maritime in nature (*See Gulf Oil Trading Co. v. Creole Supply*, 596 F.2d 515, 520 (2nd Cir. 1979)), the Supreme Court had long ago held that agency contracts were *per se* excluded from admiralty jurisdiction. *Minturn v. Maynard*, 58 U.S. 477 (1855). Overruling *Minturn*, the Supreme Court examined whether the services underlying the agency agreement were maritime in nature. *Exxon*, 500 U.S. at 612. The Court thus held that the agency agreement was a maritime contract since the nature and subject matter of the contractual undertaking, supply of bunkers, was maritime in nature. *Id.* at 612-3.

More recently in *Norfolk So. Railway Co. v. James N. Kirby PTY LTD*, 543 U.S. 14 (2004), the Supreme Court again applied the “subject matter” test to a claim for cargo loss arising from the multi-modal carriage contract. The Court there held multi-modal contracts are maritime in nature when a substantial part of the contemplated transport involves ocean carriage. *Id.* at 27. The Court expressly disavowed the mixed contract rule that a contract need be wholly maritime to be cognizable in admiralty, holding that so long as a substantial portion of the contract calls for maritime services,

then “its purpose is to effectuate maritime commerce—and thus is a maritime contract.” *Id.* at 27 (holding that the geographic rule applied in, *inter alia*, *Kuehne & Nagel, supra*, as “inconsistent with the conceptual approach our precedence requires”). Thus, admiralty jurisdiction existed and maritime principles applied even though the cargo loss occurred as a result of a train derailment during the land-based segment of the shipment.

VII. WHERE TO FROM HERE?

The difficulty with the *Davis* test and need for en banc review have been noted by several jurists of the Fifth Circuit. See, the opinions of (now Chief) Judge Jones in *Hoda v. Rowan*¹⁷ and *Lewis v. Glendel Drilling*;¹⁸ Judge DeMoss dissenting in *Demette v. Falcon Drilling Co., Inc.*,¹⁹ and Judge Garwood dissenting in *Thurmond v. Delta Well Surveyors*.²⁰ What follows here is the author’s view of a better rule and clearer approach to offshore contract cases.

The Supreme Court decisions in *Exxon* and *Norfolk Southern* clearly argue for the use of the “nature and subject matter of the contract” test, coupled with a renewed commitment by the courts to hand down binding precedents as to specific contracts as either maritime or non-maritime in nature. This determination need no longer concern the situs of the work or accident or whether the work contributes to the mission of a vessel. The development of contract law precedents, detached from the factual parsing

¹⁷419 F.3d at 3.

¹⁸898 F.2d at 1088

¹⁹280 F.3d at 517-519

²⁰836 F.2d at 957.

of the *Davis* test, will allow the participants engaged in offshore development and service contracts to know the subject matter jurisdiction and governing law at the time they contract to engage in oilfield activities.

Guided by the conceptual rule and existing jurisprudence, a wide group of service contracts may readily be classified as non-maritime under the current law. Under the precedent of *Herb's Welding*, it is clear that many contracts for specialized oilfield tasks are not maritime employment *per se*. Their work activities are not inherently maritime; their performance in a maritime setting is not materially different from their performance ashore or on platforms. Thus, for instance, contracts for well logging, which is performed when a rig is stable and stationary, should be classed as non-maritime in nature since the task is performed essentially the same way ashore. Focusing solely upon the subject matter of the contract or work order, service contracts for many oilfield activities will remain non-maritime in nature regardless of where these services are performed.

In the writer's view, the resolution of the Fifth Circuit tension in offshore development contracts can be found in *Norfolk Southern* and in OCSLA itself. *Norfolk Southern* directs that admiralty contract jurisdiction applies when a significant segment of the contract is maritime in nature even when the claim arises during a non-maritime activity. *Norfolk Southern*, 543 U.S. at 25-8. In *Laredo Offshore*, significant transportation and construction aspects of the contract were performed by vessels in navigation; accordingly, admiralty jurisdiction and maritime law should have applied by their own force. Further, nothing in OCSLA replaces maritime law and jurisdiction with respect to vessel operations or maritime contracts. While OCSLA jurisdiction extends to

disputes concerning offshore development, the laws of the adjacent state are made applicable, as surrogate federal law, only to “that portion of the subsoil and seabed [of the OCS], and artificial islands and fixed structures erected thereon. . .” . 43 U.S.C.A. §1331(a)(2)(A). OCSLA does not supplant either admiralty jurisdiction and maritime law to disputes involving maritime contracts or to the operations of vessels engaged in offshore drilling or construction contracts.

This approach balances the proper roles of admiralty and OCSLA jurisdiction. It extends the uniformity of maritime law to contracts involving vessels engaged in maritime commerce. Consistent with the Fifth Circuit decision in *Robison*, it recognizes that admiralty jurisdiction extends to modern operations of special purpose vessels which perform many non-traditional maritime services. Likewise, OCSLA jurisdiction and state law govern those contracts for specialized non-maritime work which is performed in the same fashion ashore, on platforms or on vessels.