



**THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT MUDDIES THE WATERS
IN OFFSHORE ENERGY CONTRACTUAL DISPUTES**

Grand Isle Shipyard Inc. v. Seacor Marine LLC, ___ F.3d ___ (5th Cir. Dec. 10, 2009) (en banc).

In *Grand Isle Shipyard Inc. v. Seacor Marine, LLC*, ___ F.3d ___ (5th Cir. Dec. 10, 2009) (en banc), the U.S. Court of Appeals for The Fifth Circuit, sitting *en banc*, issued a new standard for determining when and how indemnity clauses in offshore energy contracts are triggered. Specifically, the *en banc Grand Isle* court rejected the notion that indemnity obligations are triggered by the location of the occurrence, and requires instead that district courts look to the “focus of the contract” or where the “majority of the work” would occur. Unfortunately, this standard will no doubt lead to more uncertainty and litigation in an already contentious and confusing area of the law.

Factual Background

The *Grand Isle* dispute stemmed from the underlying personal injury lawsuit of Grand Isle employee Denny Neil. Neil worked offshore on one of BP’s platforms and bunked on another platform. Seacor Marine, in turn, provided transportation for workers like Neil on their crew boats. Grand Isle had entered into a Master Maintenance and Construction Services Contract (“MSA”) with BP, while Seacor had entered into a Vessel Charter Contract with BP.¹ Both the Grand Isle and Seacor contracts contained indemnity provisions designed to create reciprocal defense and indemnity agreements between and among the various BP contractors.

Neil was injured while off-duty, being transported on board the M/V SEAHORSE IV from his work platform to the residence platform. He subsequently brought suit against Seacor in the U.S. District Court for the Southern District of Texas-Galveston Division.² As part of that case, Seacor tendered its claim for defense and indemnity to Grand Isle and a request for insurance coverage to Grand Isle’s Insurance, Gray Insurance.

¹ For purposes of this newsletter, these contracts will be referred to as Master Service Agreements or “MSAs.”

² Legge Farrow handled the underlying personal injury litigation in the Southern District of Texas but was not involved in the subsequent Louisiana federal actions.



Declaratory Judgment Actions

In turn, Grand Isle and Gray filed declaratory judgment actions in the U.S. District Court for the Eastern District of Louisiana seeking a declaration that Seacor was not entitled to indemnity by virtue of the Louisiana Oilfield Anti-Indemnity Act (“LOIA”) and, further, that Seacor was not entitled to insurance coverage in any event. The Louisiana District Court held that that because the BP MSAs called for the work to be carried out on BP’s platform, the focus of the BP MSA was on an Outer Continental Shelf Lands Act (“OCSLA”) situs; i.e., the platform itself. Consequently, because (1) OCSLA, 43 U.S.C. § 1331, *et seq.*, adopts the adjacent state’s law as surrogate federal law and (2) the LOIA bars indemnity provisions such as those in the BP contract, the Louisiana District Court entered summary judgment in Grand Isle’s favor.

Fifth Circuit Reverses

On appeal, the Fifth Circuit panel (3 judges) reversed, holding that because Neil was injured on a vessel that was not adjacent to an OCSLA situs, the General Maritime Law of the United States, not Louisiana state law, applied. Grand Isle moved for *en banc* re-consideration, which was granted.

The En Banc Court Issues the “Majority of the Work” Test

The Fifth Circuit *en banc* (16 out of the 17 Fifth Circuit judges³) reversed the original panel, and implemented a new “bright-line” rule for offshore energy contract interpretation. Circuit Judge W. Eugene Davis, writing for the majority, first analyzed the methodology that district courts should use in determining appropriate choice-of-law principles for contract interpretation. Specifically, the majority rejected the tort-based approach of *lex loci delicti* in determining when an indemnity provision in an offshore energy contract is triggered. Instead, the majority announced that courts should instead examine the “focus of the contract” or the “majority of work of the contract.” As discussed below, this approach creates a number of new problems for crew boat operators like Seacor.

³ Judge Smith was recused and did not participate.



Unfortunately, courts involved in OCSLA disputes have used tort and contract standards interchangeably causing much of the current confusion. Foremost, the OCSLA is a jurisdictional choice-of-law statute that defines what law governs claims arising on platforms on the Outer Continental Shelf. It was designed to provide a jurisdictional answer for workers injured while working on fixed platforms outside the territorial waters of the United States. In *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, 895 F.2d 1043, 1047 (5th Cir. 1990), the Fifth Circuit adopted and modified the three-part tort-based analysis announced in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969). *Rodrigue* articulated a three-part test for determining whether an OCSLA's choice-of-law provision is triggered.

- (1) The controversy must arise on a situs covered by the OCSLA (i.e., the subsoil seabed, or artificial structures permanently or temporarily attached thereto);
- (2) Federal maritime law must not apply of its own force; and
- (3) The state law must not be inconsistent with federal law.

In *Grand Isle*, the majority held that under the first step of *PLT Engineering*, courts should not examine where the controversy arose (here on a vessel on the high seas), but instead look to where the "majority of the work" of the contract was anticipated to be performed. Without discussing that the majority of work pursuant to the BP MSAs was to be performed on a platform, the Fifth Circuit granted OCSLA situs in this case.

The majority opinion also noted that the court should examine the individual work orders and not the MSA to determine the focus of the contract. This approach, however, creates the following troubling scenario and question: If the work order in the *Grand Isle* case called for transportation of workers from work platforms to residential platforms on the high seas, how can any offshore transportation contract that involves transits to or from a fixed platform escape OCSLA's choice-of-law provisions? Indeed, one conclusion is that under *Grand Isle*, any contract related in any way to an OCSLA situs can no longer opt for the application of the General Maritime Law of the United States or any other law in a choice-of-law provision.



The Dissenters

Four judges dissented from the majority opinion. Judge Emilio Garza, joined by judges Elrod and Southwick, dissented on the grounds that the underlying tort occurred upon the high seas and not the Outer Continental Shelf; they would have examined the situs of the controversy to determine which law applied. Judge Garza notes that the instant dispute did not involve work on any platform. Rather, the contractual event that triggered the obligation to provide indemnity occurred on a vessel sailing on the high seas. Judge Garza argues that the majority opinion creates a distinction between tort and contract cases in the OCSLA's choice-of-law provision where no such distinction previously existed. Moreover, the majority's test implicates important questions that are left unanswered: Which party's work orders are examined? How do courts determine where the "majority of the work" under the contract is performed?

Judge Priscilla Owen, writing alone, would have remanded the case to the district court to determine which choice-of-law rules applied. She opined that the majority opinion ignores the contractual choice-of-law provision in the MSA which called for the application of maritime law or Oklahoma state law. Instead, Judge Owen noted that the majority opinion improperly creates new federal common law. Judge Owen also raised the issue of how to handle MSAs that relate to work occurring offshore of both Louisiana and Texas.

Potential Impact of the Grand Isle Decision's "Majority of the Work" Test

It has long been the practice in the offshore energy for platform owners and operators to simply agree upon and execute an MSA, which blankets all the individual contractors and sub-contractors. This approach provides a uniform agreement for all the parties involved in servicing offshore platforms and reduces the legal expense involved with individual contract negotiations and provides a nexus for disputes. Unfortunately, the impact of *Grand Isle* will undercut this convenience and place a heavy burden on crew boat operators and helicopter services, who rely on MSAs to recoup defense and indemnity from other contractors. Indeed, following *Grand Isle*, it could be argued that all choice-of-law provisions in MSAs related to an OCSLA situs are now null and void, because each and every one of these contracts will require the "majority of the work" to take place on an OCSLA situs. Though previously crew boat operators and helicopter services could safely assume their personal



injury claims would be handled under the General Maritime Law of the United States, they may now largely be decided by the adjacent state's law. In the past such crew boat operators and helicopter services companies anticipated reciprocal indemnity agreements. These assumptions may now have to be reconsidered.

In order to adequately protect themselves, crew boat operators, and indeed all offshore energy transportation contractors, will be forced to negotiate separate contracts with the other contractor, for whose workers they provide transportation. For example, in the underlying case, Seacor had no contractual relationship with Grand Isle and was forced to rely on its MSA with BP in an attempt to obtain indemnity and insurance coverage. If Seacor had a contract in place with Grand Isle, the focus of that contract would ostensibly have been on maritime transportation, even though it was ancillary to transportation to and from an OCSLA situs. Under the federal maritime law, Grand Isle would have been required to provide Seacor with defense and indemnity. Certainly, the Fifth Circuit's *Grand Isle* decision requires all existing MSAs to be scrutinized to ensure offshore companies are adequately protected.

Apart from the questions raised by the dissenters, there are also other issues that remain unanswered by the *Grand Isle* opinion. First, the U.S. Supreme Court has never addressed the issue of whether LOIA conflicts with federal maritime law. Second, does OCSLA require the adoption of the adjacent state's choice-of-law rules? Finally, as shown by the disagreement among the panel on what "majority of the work" even means, this case is likely to create problems that the lower courts will have to address, unless and until the U.S. Supreme Court provides some uniform guidance.



Legge Farrow attorneys represent a variety of marine entities ranging across all segments of the offshore energy sector and have considerable experience in negotiating the related contracts and understanding the long term ramifications. If you have any questions about this topic, please contact any of the following Legge Farrow attorneys:

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