In re Larry Doiron Inc.: The Fifth Circuit Adopts New Maritime Contract Test

by Kelly T. Scalise

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Whether a contract is maritime would seem to be an intuitive concept, but courts have long been mired in a multifactor test that may lead to unintuitive results.[1] This incongruity is particularly prevalent within the Fifth Circuit, due to its steady docket of Gulf of Mexico-based oil and gas exploration and production cases.[2] Oilfield cases involve complicated maritime operations that are quite different than the traditional cargo carriage operations comprising the volume of maritime jurisprudence. As a result, the district courts of the Fifth Circuit are often called upon to determine whether contracts are sufficiently "salty" to qualify as maritime. In a recent *en banc* decision, *In re Larry Doiron Inc.*,[3] the Fifth Circuit provided much-needed clarity in adopting a "simpler, more straightforward test consistent with the Supreme Court's decision in *Norfolk Southern Railway Company v. Kirby*."[4]

The determination of which law applies to a contract bears on such critical questions as the validity of indemnity provisions and the apportionment of fault, as well as remedies including the right to utilize processes like arrest, attachment, and other uniquely admiralty features of federal procedure. With such important consequences flowing from the characterization of a contract, one would have expected clear guidance for contracting parties. Unfortunately, such clarity was lacking. The contractual framework that parties undertook always remained subject to judicial scrutiny focused on "minute parsing of the facts."[5]

Prior to *Doiron*, the Fifth Circuit utilized the heavily fact specific test set out in *Davis & Sons Inc. v. Gulf Oil Corp.*,[6] which was itself an attempt to resolve "apparent inconsistencies" in the jurisprudence.[7] Although the court recognized that there was no single method of analysis, it did articulate a "fairly consistent underlying approach."[8] First, a court should consider the "historical treatment in the jurisprudence" of the particular type of contract at issue.[9] Second, a court should conduct this six-pronged, fact-specific inquiry[10]:

1. What does the specific work order in effect at the time of 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?

The *Davis & Sons* test often compelled courts to perform detailed analysis, analogizing to previously determined maritime contracts.[11]

Urged by the panel concurrence to take the case *en banc* in order to simplify the test,[12] the *Doiron en banc* court did just that. It found guidance for a more straightforward path in *Kirby*. There, the Supreme Court found that two coextensive bills of lading, one by ship and one by rail, were both maritime contracts.[13] In doing so, the Court eschewed an inquiry of whether a vessel was involved[14] or where the contract was performed[15] in favor of whether the principal objective of the contract is maritime commerce; namely, does the contract have "reference to maritime service or maritime transactions"?[16] The Court recognized the evolution of maritime commerce, which is often "inseparable" from land-based obligations.[17]

Following these contract principles, the Fifth Circuit first reaffirmed that the "drilling and production of oil and gas on navigable waters from a vessel is a commercial maritime activity."[18] Then it presented its simplified test: "First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters?"[19] This prong alone seems to effectively end the "salty" (i.e., inherently maritime) inquiry under *Davis & Sons*. The second prong is: "Does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract?"[20] Notably, the Fifth Circuit did not set out a defined test for "substantial," leaving it to the district courts to develop.[21]

The Fifth Circuit noted that this approach properly

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[21]*See supra* text accompanying note 11.
[22]40 C.F.R. § 260.43
[23]*See Am. Petroleum Inst. v. Envtl. Prot. Agency*, 862 F.3d 50, 57 (D.C. Cir. 2017).
[24]40 C.F.R. § 260.43(a)(1)-(4).
[25]*Am. Petroleum Inst.,* 862 F.3d at 68-69.
[26]*Legitimate Hazardous Waste Recycling Versus Sham Recycling*, U.S. Envtl. Prot. Agency, https://www.epa.gov/hw/legitimate-hazardous-waste-recycling-versus-sham-recycling (last updated Aug. 28, 2017) (examples of sham recycling include: (1) producing a product with higher concentrations of hazardous constituent than would normally be found within such a product; and (2) storing materials in a leaking surface impoundment instead of a tank that is in good condition and intended for storing such raw materials).
[27]*See Am. Petroleum Inst.*, 862 F.3d at 67.
[28]*See id.* at 62-63.
[29]40 C.F.R. § 261.4(a)(23).
[30]*See Am. Petroleum Inst.,* 862 F.3d at 62.
[31]*Id*. at 63 (emphasis added).
[32]*Id*.
[33]*Id*. at 75.
[34]*Am. Petroleum Inst.,* 862 F.3d at 76 (Judge Tatel, dissenting).
[35]*Id*. at 81 (quoting *Am. Pub. Gas Ass'n v. Fed. Power Comm'n*, 567 F.2d 1016, 1037 (D.C. Cir. 1977)).
[36]*Am. Petroleum Inst.,* 862 F.3d at 81 (Judge Tatel, dissenting).
[37]*Id*. (quoting *ATK Launch Sys. Inc. v. Envtl. Prot. Agency*, 669 F.3d 330, 338 (D.C. Cir. 2012)).
[38]Gwendolyn Fleming, *supra* note 20 *D.C. Circuit Decision Loosens Restrictions on Solid Waste*, Van Ness Feldman LLP: Alerts (April 4, 2018, 2:40 PM), http://vnf.com/dc-circuit-decision-loosens-restrictions-on-solid-waste.
[39]*Id.*
[40]*Am. Petroleum Inst.,* 862 F.3d at 81 (Judge Tatel, dissenting).
[41]*See supra* text accompanying note 36.

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focused on the contract and the expectations of the parties, rather than on some of the tort-based factors of *Davis & Sons*.[22] Applying it to the facts at hand, the court found that a work order for downhole work on a gas well accessible only from a fixed platform, which later required a vessel to resolve an unexpected problem, was not a maritime contract.[23] The contract did not provide, nor did the parties expect, that a vessel would play a substantial role in the performance of the work.[24] While this result may have been the same under *Davis & Sons*,[25] the newly articulated standard certainly simplifies the analysis.

Although the Fifth Circuit acknowledged its limitation to the oil and gas sector, the application of *Doiron* should nevertheless be far-reaching.[26] ⊙

Endnotes

[1]*See*, *e.g.*, *Thurmond v. Delta Well Surveyors,* 836 F.2d 952 (5th Cir. 1988) (holding that a contract to provide wireline services on a wireline barge was non-maritime).
[2]In *Hoda v. Rowan Co. Inc.*, 419 F.3d 379, 380 (5th Cir. 2005), the Fifth Circuit noted the difficulties and practical effects of distinguishing between maritime and non-maritime contracts: "Whether this is the soundest jurisprudential approach may be doubted, inasmuch it creates uncertainty, spawns litigation, and hinders the rational calculation of costs and risks by companies participating in this industry."
[3]*In re Larry Doiron Inc.* 879 F.3d 568 No. 16-30217, 2018 WL 316862 (5th Cir. 2018).
[4]*Id.* at 569 (citing *Norfolk S. R.R. v. Kirby*, 543 U.S. 14 (2004)).
[5]*Hoda*, 419 F.3d at 380.
[6]*Davis & Sons Inc. v. Gulf Oil Corp*., 919 F.2d 313 (5th Cir. 1990).
[7]*Id*. at 315.
[8]*Id*.
[9]*Id.* at 316.
[10]*Id*.
[11]*See*, *e.g.*, *Hoda*, 419 F.3d at 381-383 (analogizing torqueing bolts on a blow-out preventer from a jack-up rig to casing services on jack-up rigs).
[12]*In re Larry Doiron Inc.*, 869 F.3d 338, 347 (5th Cir. 2017).
[13]*Kirby*, 543 U.S. at 23-27.
[14]"To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute, as we would in a putative maritime tort case." *Id.* at 23.
[15]"Geography, then, is useful in a conceptual inquiry only in a limited sense." *Id.* at 27.
[16]*Id*. at 24.
[17]*Id.* at 25.
[18]*Doiron.*
[19]*Id*. at 576.
[20]*Id*.
[21]*Id*. at 576, n. 47.
[22]*Id*. at 576-77.
[23]*Id.* at 577.
[24]*Id*.
[25]The initial panel decision concluded the contract to be maritime under *Davis & Sons*, but noted that the question was "close." *Doiron,* 869 F.3d at 340.
[26]*Doiron*, 879 F.3d at 577 n.52 ("If an activity in a non-oil and gas sector involves maritime commerce and work from a vessel, we would expect that this test would be helpful in determining whether a contract is maritime.").