

## Full 5th Circuit Clarifies What Constitutes a Maritime Contract

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This month, the Fifth Circuit en banc unanimously set aside prior precedent and adopted a “simpler, more straightforward test” for determining whether a contract relating to oil or gas activities on navigable waters constitutes a maritime activity. *In re Larry Doiron, Inc.*, No. 16-30217, 2018 WL 316862 (5th Cir. Jan. 8, 2018) (en banc). This classification is important because it often determines whether an indemnity provision is unenforceable under state law or instead is enforceable under general maritime law. This decision will have profound effects on oil and gas operations and represents a significant departure from the Fifth Circuit’s prior approaches.

In 2005, Apache Corporation entered into a master services contract with Specialty Rental Tools & Supply, L.L.P. In 2011, Apache issued an oral work order that directed Specialty to perform “flow-back” services to remove obstructions affecting the flow of a gas well in navigable waters in Louisiana. The only access to the well was via a stationary production platform. This work order did not require a vessel, and neither party anticipated that a vessel would be necessary to perform the job.

After an unsuccessful attempt to fulfill the work order, the Specialty crew determined that it needed a different piece of equipment, which would require a crane to be moved. However, the production platform was too small to accommodate a crane, so Specialty suggested that Apache engage a barge equipped with a crane to move the equipment. Apache agreed to this suggestion and hired Larry Doiron, Inc. to provide a crane barge. During operations, one of the Doiron crane operators accidentally struck and injured a Specialty crewmember.

After the injured crewmember sued Doiron, Doiron sought a declaration that it was entitled to indemnity from Specialty under Specialty’s master services contract, while Specialty conversely sought a declaration that Doiron was not entitled to immunity. The resolution of this issue hinged on whether the master service contract was a maritime contract. If so, general maritime law would enforce its indemnity provisions. However, if it was not a maritime contract, Louisiana law would apply, and the Louisiana Oilfield Indemnity Act, La. Rev. Stat. § 9:2780, would preclude enforcement of the indemnity provisions. The district court held that maritime law applied, thus enforcing the indemnity provisions in favor of Doiron against Specialty.

On appeal, a three-judge panel of the Fifth Circuit affirmed on the basis of Circuit precedent in *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990), directing courts to consider six factors when determining whether the a contract is or is not a maritime contract:

(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? and (6) What work was the injured worker actually doing at the time of injury?

After exhaustively analyzing the *Davis & Sons* factors, the panel held that the “district court did not err by determining maritime law applies,” and therefore affirmed. However, Judge Davis, joined by Judge Southwick (the author of the panel opinion), specially concurred. Although Judge Davis joined the majority opinion because it faithfully followed precedent in *Davis & Sons* and its progeny, he recognized the criticism this case had received, especially in light of recent Supreme Court precedent. Finding that the test enumerated in *Davis & Sons* was “too inflexible to allow the parties or their attorneys to predict whether a court will decide if a contract is maritime or non-maritime or for judges to decide the cases consistently,” he urged the full Fifth Circuit to take the case *en banc* and correct this issue. See *In re Larry Doiron, Inc.*, 869 F.3d 338 (5th Cir. 2017) (panel opinion). Under most circumstances, three-judge panels are bound to follow Circuit precedent. However, when a case is taken *en banc*, the full court may overrule or modify Circuit precedent by a majority vote. The Fifth Circuit heeded Judge Davis’s request and granted rehearing *en banc*.

On rehearing, Judge Davis wrote unanimously for the entire court (newly appointed Judges Willett and Ho did not participate in this decision). He highlighted that the Supreme Court’s later decision in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004) allowed them to “avoid[] most of the unnecessary analysis required by *Davis & Sons*.” Under *Kirby*, Judge Davis emphasized, courts must look not just to whether a ship or other vessel was involved in the dispute, nor simply to the place of the contract’s formation or performance (those are tort factors, not contract factors), but instead must focus on the nature and character of the contract; “the true criterion” is whether the contract has reference to maritime services or maritime transactions. Judge Davis further recognized that the emphasis in *Kirby* that “the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce.”

Based on *Kirby*, the Fifth Circuit adopted a two-prong test to determine whether a contract is maritime:

First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters? The answer to this inquiry will avoid the unnecessary question from *Davis & Sons* as to whether the particular service is inherently maritime. Second, if the answer to the above question is “yes,” does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract? If so, the contract is maritime in nature.

Nevertheless, the Fifth Circuit did not fully dispose of *Davis & Sons*, and explained that its factors may be relevant when the scope of the contract is unclear. Applying this new test to the specific facts of the case, the Court reasoned that the vessel to lift equipment was an insubstantial part of the job and therefore the contract was non-maritime, subjecting it to Louisiana law. As such, Louisiana’s anti-indemnity statute barred enforcement of the master service contract’s immunity provisions.

Kudos again to Judge Davis. Yet again, he brings refreshing clarity to an issue mired in confusion and uncertainty for decades. As federal appeals courts infrequently hear cases *en banc*, this case is a rare and paradigmatic example of what the procedure was intended to accomplish and why it is so important. Parties engaged in oil and gas operations within the Fifth Circuit can now have far better certainty how their contracts will be classified, which in turn permits them to better assess their risks. This information behooves all parties involved.