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SUPREME COURT TO CLARIFY VESSEL STATUS OF INDEFINITELY MOORED FLOATING STRUCTURES

The U.S. Supreme Court has recently granted a writ of certiorari to review the U.S. 11th Cir. Court of Appeals' decision in *City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length*, 649 F.3d 1259. The question presented to the Supreme Court is whether a floating structure that is indefinitely moored, receives power and other utilities from shore, and is not intended to be used in maritime transportation or commerce constitutes a "vessel" under 1 U.S.C. § 3, thus triggering federal maritime jurisdiction. *Lozman v. City of Riviera Beach*, Docket No. 11-626, United States Supreme Court.

The Supreme Court, in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2007) defined a "vessel" as "any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment." 543 U.S. 481, 497, 125 S.Ct. 1118, 1129, 160 L.Ed.2d 932 (2005). The Court further found that "a watercraft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement." *Id.* at 494. The Court cited, but did not specifically affirm, the 5th Cir. decision in *Pavone v. Miss. Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995).

Following *Stewart v. Dutra*, a split developed between the U.S. 5th and 11th Cir. Courts of Appeals regarding the interpretation of the Supreme Court's definition of a "vessel" as set forth in *Stewart v. Dutra*. The 5th Cir. set forth the following three part test to be used in determining if a floating structure is a non-vessel: 1) the structure was constructed to be used primarily as a work platform; 2) the structure is moored or otherwise secured; and 3) although capable of movement, any transportation function is merely incidental to the structure's primary purpose. *Pavone v. Mississippi Riverboat Amusement Corp.*, *Id.* at 570. This test has been applied by the 5th Cir. in determining that floating casinos and other structures semi-permanently or indefinitely moored to shore are not "vessels" under maritime law even though they may have been towed in the past or could be towed in the future, such as for an evacuation in the event of a hurricane. The 5th Cir. has also held that indefinitely moored offshore production platforms called SPARS are not vessels. *Mendez v. Anadarko*, 2012 WL 1003575 (5th Cir. 2012).

The 11th Cir., in a similar case involving a floating casino, rejected the test set forth in *Pavone* on the basis that the *Pavone* test focused "on the intent of the ship owner rather than whether the boat has been 'rendered practically incapable of transportation or movement.'" *Board of Commissioners of Orleans v. M/V BELLE OF ORLEANS*, 535 F.3d 1299 (11th Cir. 2008). In focusing on whether the BELLE OF ORLEANS was "rendered practically incapable of transportation or movement," the 11th Cir. found that she was a "vessel" because she was capable of being transported over water either under her own power or by tow if her mooring cables were unmoored. This interpretation of *Stewart v. Dutra* is broader



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than that in *Pavone* as it appears to encompass any floating structure that is capable of being towed and capable of being unmoored.

The U.S. Supreme Court's decision in this matter may impact not only floating casino operators, but also operators of floating docks, wharfs, and drilling platforms. This decision could have potentially far-reaching implications affecting many areas of maritime law, including Jones Act seaman status, OCSLA coverage, vessel mortgages and financing, the applicability of U.S. Coast Guard regulations, marine insurance, maritime contracts, maritime liens, and maritime jurisdiction. Jones Walker will continue to monitor the progress of this case and will provide updates in future e*lets regarding the manner in which this decision may impact your business operations.

—[William P. Wynne](#)



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U.S. SUPREME COURT EXPANDS LHWCA JURISDICTION UNDER OCSLA

The Outer Continental Shelf Lands Act (“OCSLA”) extends the federal workers' compensation scheme established in the LHWCA, 33 U.S.C. § 901 *et seq.*, to injuries “occurring as the result of operations conducted on the Outer Continental Shelf (“OCS”)” for the purpose of extracting natural resources from the shelf. A split amongst various U.S. Courts of Appeals developed as to the proper test to apply in determining whether a worker was injured “as the result of operations conducted on the Outer Continental Shelf.” The split was resolved in *Pacific Operators Offshore, LP v. Valladolid*, 132 S.Ct. 680 (2012).

The U.S. 5th Cir. Court of Appeals had adopted a geographical “situs-of-injury” test holding that LHWCA coverage through OCSLA only applied to workers who “suffer injury or death on an OCS platform or the waters above the OCS.” *Mills v. Director, Office of Workers’ Compensation Programs*, 877 F.2d 356 (5th Cir. 1989). In contrast, the U.S. 9th Cir. Court of Appeals adopted a broader “substantial nexus” test holding that a “claimant must establish a substantial nexus between the injury and extractive operations on the shelf” to be eligible for LHWCA benefits through OCSLA. *Valladolid v. Pacific Operators Offshore, LLP*, 604 F.3d 1126 (9th Cir. 2010). To meet this standard, the injured worker must establish that the work performed directly furthers OCS operations and is in the regular course of such operations.” *Id.* at 1139.

In *Pacific Operators Offshore, LLP v. Valladolid* the Supreme Court adopted the 9th Cir.’s “substantial nexus” test. -- U.S. --, 132 S.Ct. 680, 181 L.Ed.2d 675 (2012). In *Pacific Operators*, the injured worker spent 98% of his time as a roustabout working aboard offshore drilling platforms but was killed in a forklift accident at an onshore oil and gas processing facility. After the Benefits Review Board denied coverage based upon the 5th Cir.’s “situs-of-injury” test, the 9th Cir. reversed and remanded holding that the proper test to be used when determining LHWCA coverage through OCSLA was the “substantial nexus” test. The Supreme Court affirmed the decision of the Ninth Circuit finding that “substantial nexus” test best reflects the text of OCSLA. A dissent by Justice Scalia questioned how the new test will be employed.

This decision will likely broaden the scope of LHWCA benefits coverage under OCSLA, which will impact insurance requirements for oil and gas operators and service providers operating both on the OCS and onshore. As demonstrated in *Pacific Operators*, it is likely that at least some injured shore based personnel may now fall under the scope of OCSLA if their injuries demonstrate a “substantial nexus” to oil and gas operations on the OCS. The extent to which this decision will broaden LHWCA benefits coverage under OCSLA is uncertain at this time as it is yet to be seen how courts will apply this test. As noted by the Supreme Court, the “substantial nexus” test “may not be the easiest to administer” and “will depend on the individual circumstances of each case.” *Pacific Operators Offshore, LLP v. Valladolid*, -- U.S. --, 132 S.Ct. 680, 181 L.Ed.2d 675 (2012). The case was remanded, and the application of this test will be followed.

—[Matthew S. Lejeune](#)



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BP MACANDO OIL SPILL LITIGATION ADDRESSES OFFSHORE MARITIME ISSUES

Court Upholds Transocean's Indemnity for Pollution

On April 20, 2010, a well blowout occurred at the Macondo Well site approximately 50 miles off the coast of Louisiana; and an explosion and fire ensued aboard the semi-submersible drilling vessel *Deepwater Horizon*. The vessel was owned and operated by Transocean and chartered to British Petroleum ("BP"). The explosion and fire resulted in fatalities, personal injuries, and the total loss of the *Deepwater Horizon*.

Hundreds of lawsuits have been filed throughout the country seeking to hold various parties liable for the damages sustained as a result of the disaster. The majority of the lawsuits were transferred and consolidated into Multi-District Litigation ("MDL") before the E.D. La. Jones Walker maintained a prominent role in the massively complex litigation, representing Weatherford International, Inc., a BP contractor involved in the Macondo project. As a result of Jones Walker's efforts and legal expertise, Weatherford was completely exonerated by the MDL Court in January, 2012 pursuant to a Motion for Summary Judgment filed by the Jones Walker litigation team, which was staffed out of Jones Walker's New Orleans and Lafayette, Louisiana offices.

Within the MDL, Transocean, as the owner of the *Deepwater Horizon*, sought to enforce its indemnity rights under its drilling contract with BP. The Court held that BP is required to indemnify Transocean for compensatory damages asserted by third parties against Transocean related to pollution that originated below the surface of the water, even if the claim was the result of Transocean's strict liability, negligence, or gross negligence. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, 2012 WL 246455 (E.D. La. Jan. 26, 2012). However, the Court declared that BP does not owe Transocean indemnity to the extent Transocean is held liable for punitive damages or to the extent Transocean is held liable for civil penalties under the Clean Water Act. Additionally, BP's duty to defend does not include the expenses Transocean incurred or will incur in proving its right to indemnity. Finally, BP is not obligated to fund Transocean's defense against third party claims at this time.

This ruling is significant for several reasons. Transocean had argued strenuously that the parties to the drilling contract were sophisticated parties that carefully allocated the risk of pollution; and therefore, the pollution indemnities should be enforced. Transocean contended that BP, as the operator of the Macondo well site, was the party in the best position to protect against pollution, and as such, had agreed to accept the risk of pollution via indemnity obligations owed to Transocean. Moreover, Transocean asserted that, if BP's indemnity obligations were voided due to allegations or proof of Transocean's gross negligence, then the insurance for drilling contractors would be impossible to afford. Contrary to Transocean's position, BP argued vehemently that public policy prohibited indemnity for gross negligence.

By enforcing the indemnity obligations of the drilling contract, the Court afforded some certainty to sophisticated entities involved in deep water drilling (as well as shallow water drilling). By affirmatively stating that Transocean was entitled to indemnity for compensatory damages even if Transocean is found to be grossly negligent, the Court gave strong credence to the parties' ability to allocate risk as they see fit and limited the scope of Transocean's liability for pollution, for which Transocean did not have extensive insurance coverage.



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Court Holds that Punitive Damages Are Not Available under the Jones Act

In addition to the above ruling on the Transocean indemnity claims, the MDL Court also rendered several other important rulings on various legal issues arising out of the Macondo oil spill. As part of the MDL, the Court established certain “pleading bundles” for the purposes of filing “master complaints” so that similarly situated plaintiffs could join in one master-styled complaint. One such pleading bundle is the “B3 Bundle,” which includes claims for punitive damages by certain individuals who may qualify as seamen under the Jones Act.

After several parties moved to dismiss the claims by the B3 Bundle Plaintiffs, the Court noted that the Jones Act prevents a seaman from recovering non-pecuniary damages, regardless of whether the claims are brought against an employer or a non-employer. *In re Oil Spill by the Oil Rig “Horizon” in the Gulf of Mexico*, 2011 WL 4575696 (E.D. La. Oct. 4, 2011). Since punitive damages are non-pecuniary in nature, the Court held that the Jones Act precludes a seaman from recovering punitive damages against both employers and non-employers. However, the Court did hold that non-seaman may recover punitive damages under the General Maritime Law.

This ruling by the Court should aid marine companies in Jones Act litigation since allegations of gross negligence and claims for punitive damages are common in Jones Act cases. Limiting an employer or non-employer’s liability to compensatory damages should promote more reasonable settlements in Jones Act suits. Moreover, as punitive damages may not be insured, employers and non-employers in the marine industry should be able to fully insure against future Jones Act claims.

—[William C. Baldwin](#) and [Michael G. Lemoine](#)



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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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