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The Jones Walker Energy E*Zine reviews and discusses developments in the energy industry, with a particular focus on matters that affect Louisiana. It addresses all legal disciplines within the energy industry, including the exploration and production of oil, gas, and other hydrocarbons; as well as the processing, marketing, and valuation of these products.

Former Lessee's Inactions Spell Trouble for Mineral Lessor

A Louisiana appellate court recently held a mineral lessor liable for injuries resulting from the former mineral lessee's abandoned oil well casing. Finding that, by failing to demand its removal, the lessor acquired ownership of the abandoned, injury-causing equipment, the court placed all blame on the lessor's shoulders.

In *Melerine v. State of Louisiana*, 2000-0162 (La. App. 4 Cir. 11/14/00), 773 So.2d 831, the Louisiana Fourth Circuit Court of Appeal held the State of Louisiana liable for a fisherman's personal injuries and property damage sustained when his boat struck a lessee's abandoned oil well casing in State waters. Applying Louisiana Civil Code article 493, the Court found that, upon expiration of the mineral lease, the State, as landowner, acquired ownership and custody of the well casing. The Court so found notwithstanding the operator/lessee's failure to remove the casing as required under the lease terms.

In 1963, Stall and Smith obtained an oil and gas lease from the State, drilling a well pursuant to the lease on the water bottom land owned by the State. After drilling a "dry" well, Stall and Smith plugged and abandoned it in 1964, complying with applicable Louisiana Department of Conservation regulations. In 1994, while boating in State waters, the Plaintiff struck the abandoned submerged oil well casing. The Plaintiff then sued Stall, Smith, and the State of Louisiana.

The Fourth Circuit observed that satisfaction of the following elements was necessary to establish liability: (1) ownership and/or custody of the well casing; (2) the creation of an unreasonable risk of injury by the well casing; (3) causation; and (4) to impose liability on a public body, notice of the unreasonable risk of harm.

Examining the "custody" element, the Fourth Circuit found that the

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casing constituted an “other construction permanently attached to the ground” within the meaning of Louisiana Civil Code art. 493. Under Article 493, the owner of a construction permanently attached to the land of another must remove the construction upon demand, and, if he does not, “the owner of the land acquires ownership of the improvements and owes nothing to the former owner.” Applying Article 493, the Court held that, when Stall and Smith failed to remove the casing, the State acquired custody and ownership of it.

Addressing the “notice” element, the Court concluded that, by filing a “Plug and Abandon Report” with the Department of Conservation, Stall and Smith provided the State with sufficient notice of an unreasonable risk of harm. In so concluding, the Court pointed out that the Department of Conservation approved the report and that it contained ample detail regarding the casing size and depth.

Seeking to avoid liability, the State argued that the Recreational Use Immunity Statutes provided it with immunity. In rejecting the State’s contention, the Fourth Circuit noted that the purpose of the statutes -- to induce private owners of large acreages to open expanses for public, outdoor, recreational use -- would not be served by their application under the circumstances in question. Further, the Fourth Circuit pointed to the well-settled principle that the intent of the Recreational Use Immunity Statutes was to prevent landowners’ liability arising from an injury-causing instrumentality found in the “true outdoors.” The court opined that, because an abandoned well casing results from commercial enterprise, it is not part of the “true outdoors.”

The Fourth Circuit also rejected the contention that Stall and Smith improperly plugged and abandoned the well. In making the improper abandonment argument, Plaintiff suggested that, although Stall and Smith satisfied the Department of Conservation’s 1964 requirements, they failed to meet the standards as amended in 1972. The Fourth Circuit disagreed, reasoning that the 1972 amendment was substantive, thus applying only prospectively. Further, the Fourth Circuit found that, in any event, retroactive application of the regulation would exceed the Commissioner of Conservation’s authority.

Louisiana Oilfield Indemnity Act Inapplicable to OCS Drilling Mud Services Contract

In *Fontenot v. Southwestern Offshore Corp.*, 99-1559 (La. App. 3 Cir. 2000), 771 So.2d 679, the Court held that a contract to perform drilling mud services on a jack-up rig barge on the OCS was maritime in nature. Upon so

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finding, the Court concluded that the Louisiana Oilfield Anti-Indemnity Act did not apply to invalidate certain indemnity and insurance provisions contained in the service contract.

In *Fontenot*, a drilling mud engineer employed by A&W Louisiana, Inc. (“A&W”) filed suit under general maritime law for personal injuries sustained while supplying drilling mud services aboard a jack-up rig barge in navigable waters on the Outer Continental Shelf. A master service and supply agreement between his employer, A&W, and Pennzoil Exploration and Production Company (“Pennzoil”) governed the work performed by the engineer. Pennzoil had also contracted with Southwestern to drill the well. In the contract between Pennzoil and A&W, the parties agreed to defend and indemnify each other for all claims brought as a result of certain enumerated risks, including any personal injury claims brought by employees of either Pennzoil or A&W and its contractors and subcontractors. The Agreement also required A&W to maintain insurance naming Pennzoil and its contractors, such as Southwestern, as additional insureds.

On cross-motions for summary judgment, the trial court determined that Louisiana law, rather than maritime law, governed the contract. Thus, the trial court held that Louisiana’s Oilfield Anti-Indemnity Act, La. R.S. 9:2780, applied to bar enforcement of the indemnity and insurance provisions in the Agreement.

In reversing the trial court, the Louisiana Third Circuit Court of Appeal relied on the factors set forth in *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990), to determine whether a contract is maritime in nature, stating:

Determination of the nature of a contract depends in part on historical treatment in the jurisprudence and in part on a fact-specific inquiry. We consider six factors in characterizing the contract: (1) What does the specific work order in effect at the time of the 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 the 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 the injury?

Analyzing the factors, the Third Circuit concluded that the contract was

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maritime in nature on the basis that the jack-up rig barge was a special purpose drilling vessel. The Court reasoned that, although drilling mud work may be peculiar to the oil and gas industry, when performed on a special purpose vessel, it becomes “inextricably intertwined” with the vessel’s mission. (*citing, Campbell v. Sonat Offshore Drilling*, 979 F.2d 1115 (5th Cir. 1992)). Accordingly, the Court held that Louisiana law did not apply, thus finding the indemnity and insurance provisions enforceable.

Federal Appellate Court Limits Texas Oilfield Anti-Indemnity Act’s Pipeline Exclusion

In *In Re: John E. Graham & Sons*, 210 F.3rd 333 (5th Cir. 2000), the United States Fifth Circuit reviewed the limits of the Texas Oilfield Anti-Indemnity Act, Tex. Civ. Proc. & Rem. Code § 127.001-007 (the “Act”), and specifically the “so-called” pipeline exclusion, Tex. Civ. Pract. & Rem. Code § 127.001 (4)(B)(i) - (ii). In the case, two employees of a service company were injured on a platform while fabricating and installing a manifold, connecting flowlines, safety system piping, risers, shut-down valves and check valves. The platform owner argued that the work fell under the amendment to the Texas Oilfield Anti-Indemnity Act that excluded certain activities related to pipelines. Specifically, the section provides an exclusion for:

- (i) purchasing, selling, gathering, storing, or transporting gas or natural gas liquids by pipeline or fix associated with the facilities; or
- (ii) construction, maintenance or repair of oil, natural gas liquids, or gas pipelines or fixed associated facilities.

Tex. Civ. Prac. & Rem. Code §127.001(4)(B)(i)-(ii).

On appeal, the Fifth Circuit observed that, if the work fell within the general ambit of work performed by a contractor to render “well or mine services” or to “perform a part of those services or an act collateral to those services,” the pipeline exclusion would not apply unless the agreement for the work “in its entirety, contemplated work within the exclusion.” *Id.* at 344. Because the agreement between the contractor and the platform owner involved work beyond construction, repair and maintenance of a pipeline, the Court held that it did not fall within the pipeline exclusion, and, accordingly, that the Texas Oilfield Anti Indemnity Act applied.

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“Bounded by Road” Property Description May Not Include the Roadway Itself

In the first two of many related cases to reach the State’s highest court, the Louisiana Supreme Court recently denied defendants’ applications for writ of certiorari. *Lamson Petroleum Corporation v. Hallwood Petroleum, Inc. et al*, 2000-2305 (La. 11/27/00), 2000 LW 1784512 (La.); 2000-2568 (La. 11/27/00), 2000 WL 1784558 (La).

In *Lamson*, plaintiff filed suit seeking recognition of its oil, gas and mineral leases on certain acreage that was subject to conflicting ownership claims by Hallwood Petroleum, Inc. and others. The parties disputed the boundary established by an ancient conveyance’s property description, describing the boundary as “bounded by public road.” The Louisiana Third Circuit Court of Appeal, adopting the trial court’s reasons for judgment, found the “bounded by public road” description to grant title up to, but not including, the road’s right-of-way. *See* 99-1937 (La. App. 3 Cir. 5/10/00), 763 So.2d 40; 99-1444 (La. App. 3 Cir. 5/24/00), 770 So.2d 786. To reach this conclusion, the Court examined La. R.S. 9:2971, a statute enacted in 1956, and *State Through Department of Highways v. Tucker*, 247 La. 188, 170 So.2d 371 (La. 1964).

Under the 1956 statute, unless an intent to establish otherwise was shown, the “bounded by public road” description conveyed title up to the road, including the right-of-way. In 1965, however, the Louisiana Supreme Court in *Tucker* determined that the 1956 statute could not be applied retroactively. Because the conveyance in question predated the statute, the Court found that the Lamson leases were valid and granted Lamson 100% of the production attributable to the roadbed property in dispute. In doing so, the Court quoted from the oft-cited case, *Meyer v. Comegys*, 147 La. 851, 86 So. 307 (La. 1920). *Meyer* set forth the relevant guides to consider in determining questions of boundary or location of a land line, listing them in order of priority as follow: (1) natural monuments; (2) artificial monuments; (3) distances; (4) courses; and (5) quantity. *Meyer*, 86 So. at 309. Using this list, the Court held that the public road was an “artificial monument,” trumping the weaker “quantity” call within the property description.

The Court next addressed whether Lamson was entitled to the proceeds of oil and gas production earned before the date of recordation of Lamson’s leases. The defendants argued that the public records doctrine entitled them to rely on the absence of recorded leases, seeking to prohibit Lamson from recov-

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ering any production paid before recordation. Rejecting this contention, the Court recognized that Lamson was entitled to recover all of the production proceeds received by the defendants, even those received before the recordation of Lamson's leases, under Article 488 of the Louisiana Civil Code.

FERC Jurisdiction Does Not Preclude Application of State Property, Tort, or Contract Law

In *Terrebonne Parish School Board v. Koch Gateway Pipeline Co.*, 2000-1782 (La. 9/29/00), 769 So.2d 1178, the Louisiana Supreme Court denied a writ of certiorari that sought the Court's consideration of an exception of lack of subject matter jurisdiction. In the case, the Terrebonne Parish School Board sought a mandatory injunction to require the shut down and removal of a natural gas pipeline maintained by Koch. Koch filed an exception of lack of subject matter jurisdiction alleging that the Federal Energy Regulatory Commission ("FERC") enjoyed exclusive jurisdiction over the pipeline under the Natural Gas Act. The trial and appellate courts both denied the jurisdiction exception. In likewise denying the writ, Chief Justice Calogero concurred, assigning written reasons. In his reasons, the Chief Justice observed that, although the Natural Gas Act applied, it did not prevent a state court from making a determination that Koch's use of its pipeline violated Louisiana property, tort, or contract law. Chief Justice Calogero further opined that FERC jurisdiction did not extend to the determination of violations of state property, tort, and contract law.

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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