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The Mixed Up Exercise of Admiralty Jurisdiction Over Mixed Contracts, Namely Umbrella Insurance Policies Covering Shore-side and Sea-side Risks

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THE MIXED UP EXERCISE OF ADMIRALTY JURISDICTION OVER MIXED CONTRACTS, NAMELY UMBRELLA INSURANCE POLICIES COVERING SHORE-SIDE AND SEA-SIDE RISKS

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I. INTRODUCTION

Given the broad-ranging implications associated with having a dispute decided by a federal court pursuant to the court's admiralty jurisdiction, potential parties to a dispute have strong motivations to either avoid a court sitting in admiralty or ensure the court hears the controversy under the exercise of its admiralty jurisdiction.

Prior to 2004, the legal test used by courts to determine whether or not they could hear a contractual dispute involving a contract with both maritime and non-maritime elements ("mixed contract") pursuant to their admiralty jurisdiction was relatively straight forward. Under that test, a court could exercise admiralty jurisdiction to hear a mixed contractual dispute where the non-maritime portion of the contract was (1) merely incidental to the overall contract or (2) the non-maritime portion of the contract could be separated from the maritime portion of the contract.[1] According to the above test, where the maritime and non-maritime claims were bound together and could not be separated, the court would dismiss the entire case, even the maritime portion of the contract, for a lack of admiralty jurisdiction.[2] This test was relatively straight forward and fairly easy to apply to contractual disputes. However, in 2004, the U.S. Supreme Court handed down its decision in *Norfolk Southern Railway Co. v. Kirby*, whereby the jurisdictional test was fundamentally

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1. Flota Maritima Browning de Cuba v. Snobl, 363 F.2d 733, 735-36 (4th Cir. 1965).

2. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 3-10 (4th ed. 2004); *see also* Brocsonic Co. v. M/V Mathilde Maersk, 270 F.3d 106 (2d Cir. 2001).

changed.[3] The rule asserted by the Court in *Kirby* focused on the maritime portions of the mixed contract and, according to this new test, a court could decide a contractual dispute involving a mixed contract under the exercise of its admiralty jurisdiction where the maritime portions of the contract were substantial, even when the dispute centered on non-maritime elements of the contract.[4] Whereas the Court's jurisdictional approach to mixed contracts as asserted in *Kirby* may have made sense with regard to contracts for multi-modal transportation, the application of the test by Circuit Courts has provided anything but uniformity or predictability with regard to other types of mixed contracts.

This lack of uniformity or predictability in the application of the general maritime law through the exercise of courts' admiralty jurisdiction is not a desirable outcome, especially as a predominant goal of admiralty practice in American courts has always been uniformity. This judicial emphasis on uniformity is best explained in the Supreme Court's decision in *The Lottawanna* where the Court specifically stated:

> One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.[5]

Given this disparity in the several Circuit Courts' application of the *Kirby* test for mixed contracts, and the broad goal of admiralty jurisdiction to provide uniformity in its application of the general maritime law,[6] the application of the *Kirby* test should be limited to multi-modal transportation contracts. With regard to other types of mixed contracts, the courts should take a different approach, specifically tailored to determine the substantiality of the maritime elements of that particular type of contract. The above approach would better facilitate the uniformity and predictability of maritime practice that courts have aspired to maintain since the beginning of the federal system of government in the United States.

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3. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14 (2004).
4. *Id.* at 27.
5. The Lottawanna, 88 U.S. 558, 575 (1874).
6. *Id.*

As such, this Article examines the three main types of contracts confronted by the courts in their application of the rule asserted in *Kirby*. These three main types of contracts include: (1) multi-modal transportation contracts exemplified by "through-bills of lading" (and other contracts with objective geographic elements); (2) master service agreements or blanket contracts common in the offshore oil rig context; and (3) umbrella or bumbershoot insurance policies that provide coverage for both shore-side and maritime risks. While master service agreements and multi-modal transportation contracts will be discussed herein, much of the jurisdictional confusion has been centered on mixed coverage insurance policies; therefore, this Article will focus on that issue area.

In examining the application of the modern jurisdictional test for the aforementioned mixed contract types, this Article will begin by investigating the basis for the courts' admiralty jurisdiction, looking at the historical, constitutional, statutory, and precedential origin of modern jurisprudence over admiralty jurisdiction. Through this prism, this Article will discuss the impact the Supreme Court's decision in *Kirby* had on the exercise of admiralty jurisdiction over mixed contracts. By looking at the various Circuit Courts' applications of the *Kirby* test, this Article seeks to illustrate the confusion the Supreme Court's decision in *Kirby* has caused. Based on this examination, this Article asserts that courts have done an altogether inadequate job of formulating a uniform, cohesive, and predictable rule or set of rules with which to determine which marine insurance contracts—that provide both sea-side and shore-side risk coverage—are sufficiently "salty"[7] to justify the exercise of admiralty jurisdiction for resolving controversies arising from such policies.

Additionally, this Article argues that given the magnitude of the implications associated with the exercise of admiralty jurisdiction in resolution of contractual disputes, such as the use of general maritime law or the availability of admiralty-specific procedural devices, the Supreme Court has done the maritime industry a great disservice in its failure to formulate an understandable and applicable set of jurisdictional rules. As such, commercial interests would be better served by a coherent, uniform, and predictable rule or set of rules so as to more effectively negotiate and draft contracts and resolve disputes derived therefrom. Given this reality, the *Kirby* rule should be limited in its application to multi-modal transportation contracts and other contracts involving an element of geographic movement or insurance coverage

7. Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961).

thereof and master service agreements, as applied in *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*.[8] But with regard to mixed insurance policies, the Supreme Court should follow the Second Circuit's approach as discussed herein.[9]

II. HISTORICAL, CONSTITUTIONAL, AND STATUTORY BASIS FOR ADMIRALTY JURISDICTION

The roots of American jurisprudence on admiralty jurisdiction and substantive maritime law were inherited from English law.[10] Whereas prior to American independence, many maritime disputes were decided by Vice Admiralty Courts, after the revolution and under the Articles of Confederation, there was no national judiciary and each state exercised sovereign powers, setting up state courts, including admiralty courts, and individual laws that created a very disjointed system in terms of maritime law.[11] As such, given the above experience and the fact that the legal issues and implications associated with maritime commerce and industry necessarily involved, and still involve, international relations, foreign trade, interstate commerce and trade, and potentially the rights of foreign citizens, uniformity of maritime law was then, and has remained, a goal of the judiciary.[12] This judicial interest in uniformity of maritime law, based on the national interests involved, was as relevant during the time of the Founders as it is today, and in order to better facilitate uniformity, the Founders believed the Federal Judiciary, rather than those of the several states, was the best body to adjudicate maritime issues.[13] Alexander Hamilton went so far as to say,

> [t]he most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.[14]

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8. 589 F.3d 778 (5th Cir. 2009).

9. *See infra* Section III(C)(2)(c).

10. SCHOENBAUM, *supra* note 2, § 1-6.

11. *Id.*

12. S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917) (citing The Lottawanna, 88 U.S. 558, 575 (1874).

13. THE FEDERALIST NO. 80 (Alexander Hamilton).

14. THE FEDERALIST NO. 80 at 403 (Alexander Hamilton) (Ian Shapiro ed., Yale Univ. Press 2009).

Based on the above, it was clear from the outset of the judiciary and the United States that the need for federal judicial authority to occupy the field with regard to maritime law for the sake of uniformity outweighed the interests of the individual states.

In response to the above experience, the drafters of the U.S. Constitution enumerated that "[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."[15] Because Article III of the Constitution only defined the judicial authority of the Supreme Court, Congress was forced to use its Constitutional authority "[t]o constitute Tribunals inferior to the supreme Court,"[16] and further confer admiralty jurisdiction to those inferior courts, which it first did in the Judiciary Act of 1789.[17] Substantively, the verbiage of the Judiciary Act of 1789 has remained unchanged and is now codified.[18] The original wording of the Judiciary Act of 1789 held that:

> the district courts shall have, exclusively of the courts of the several States . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it. . . .[19]

Much like that of the Judiciary Act of 1789, the wording of the modern incantation of the above statute holds that:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.[20]

15. U.S. CONST. art. III, § 2, cl. 1.
16. U.S. CONST. art. I, § 8, cl. 9.
17. Judiciary Act of 1789, 1 Stat. 73, ch. 20, § 9.
18. 28 U.S.C. § 1333 (2012).
19. Judiciary Act of 1789, 1 Stat. 73, ch. 20, § 9.
20. 28 U.S.C. § 1333 (2012).

Given the political and legislative history of the current grant of subject matter jurisdiction, it is plain that the intent of the above was to ensure that federal courts have jurisdiction over disputes concerning maritime matters in order to ensure uniformity.[21] It is based on the above historical, constitutional, and statutory basis that federal district and appellate courts are legally able to exercise jurisdiction over "all Cases of admiralty and maritime Jurisdiction."[22]

III. LEGAL IMPLICATIONS OF ADMIRALTY JURISDICTION

As is alluded to above, Article Three of the United States Constitution created the Federal Judiciary by vesting "[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[23] In addition to the Constitutional creation of the Supreme Court and grant of power given to Congress to establish inferior tribunals,[24] the Constitution also provided the legal basis for the federal courts' exercise of jurisdiction. In doing so, the U.S. Constitution holds that the judicial authority of Federal courts:

> shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[25]

In addition to the above grant of subject matter jurisdiction, the U.S. Constitution also specifies that with regard to the original and appellate jurisdictions of the Supreme Court:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme

21. The Lottawanna, 88 U.S. 558, 575 (1874).
22. U.S. CONST. art. III, § 2, cl. 1.
23. U.S. CONST. art. III, § 1, cl. 1.
24. U.S. CONST. art. I, § 8, cl. 9.
25. U.S. CONST. art. III, § 2, cl. 1.

> Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.[26]

Based on this Constitutional framework, and the Congressional power to "constitute Tribunals inferior to the supreme Court,"[27] there are historically and currently three bases for federal subject matter jurisdiction. These include: 1) federal question jurisdiction,[28] 2) diversity jurisdiction,[29] and 3) admiralty jurisdiction.[30]

The designation of jurisdictional basis, under which a federal court may hear a claim, is significant because it affects the choice of law in deciding the suit and the availability of certain procedural rules in litigating the controversy. Accordingly, where a claim is based on "the Constitution, laws, or treaties of the United States," a federal court has original jurisdiction to hear the claim based on its federal question jurisdiction and will decide the claim applying the law in controversy.[31] Alternatively, where a claim involves litigants of diverse citizenship and an amount in controversy that exceeds $75,000, a court may hear the case pursuant to its diversity jurisdiction.[32] Unlike the courts' choice of law in a federal question claim, when the court hears a case pursuant to its diversity jurisdiction, the court will apply the substantive state law of the forum in determining the rights and remedies of the parties.[33] Finally, where a dispute is heard by a court sitting in admiralty, pursuant to its admiralty jurisdiction, the parties have available to them, or are subject to, substantive maritime law and procedural rules of admiralty that are unique to admiralty and maritime law and give rise to significant legal implications.[34]

Because the exercise of a court's admiralty jurisdiction to hear maritime cases is accompanied by significant legal implications, parties have strong motivations to either avoid federal courts sitting in admiralty or ensure the court hears the dispute while sitting in admiralty. Some of the aforementioned legal implications include: 1) the availability of

26. U.S. CONST. art. III, § 2, cl. 2.
27. U.S. CONST. art. I, § 8, cl. 9.
28. 28 U.S.C. § 1331 (2012).
29. 28 U.S.C. § 1332 (2012).
30. 28 U.S.C. § 1333 (2012).
31. 28 U.S.C. § 1331 (2012).
32. 28 U.S.C. § 1332 (2012).
33. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
34. 28 U.S.C. § 1333 (2012).

"Federal Admiralty Common Law,"[35] exemplified by a lack of a Statute of Frauds;[36] 2) a significant amount of judge-made substantive maritime law due to a lack of Congressional legislation in the area of maritime law;[37] 3) the availability of theoretically less biased life-tenured judges;[38] 4) the availability of a bench trial before a sophisticated judge with expertise in admiralty and maritime law rather than a jury;[39] 5) the availability of maritime liens[40] and the corresponding ability to bring a suit *In Rem*;[41] 6) the ability to bring a suit *Quasi In Rem* and attach unrelated property of the defendant;[42] 7) presumptive validity and enforceability of contractual choice of law clauses;[43] 8) the availability of the principle of general average to disperse damages among parties to a common adventure;[44] and 9) the general maritime law doctrine of laches.[45] Based on the aforementioned legal implications arising of the courts' exercise of their admiralty jurisdiction and the accompanying application of substantive and procedural rules particular to maritime law, uniform, cohesive, and predictable jurisdictional rules should be a desired result of any court seeking to fashion tests for whether the exercise of admiralty jurisdiction is appropriate.

IV. JUDICIAL RULES ASSOCIATED WITH ADMIRALTY JURISDICTION

While the U.S. Constitution and federal statutes have provided the legal basis and framework for the Federal Judiciary's exercise of admiralty jurisdiction over matters of admiralty and maritime law, the vast majority of jurisdictional rules are judge made. With regard to

35. GRANT GILMORE & CHARLES L. BLACK JR., THE LAW OF ADMIRALTY (2d ed. 2001).

36. Selame Assocs., Inc. v. Holiday Inns, Inc., 451 F. Supp. 412 (D. Mass. 1978); Keller v. U.S., 557 F. Supp. 1218 (D.N.H. 1983); Vieira v. Maher Terminals, Inc., 1998 WL 1085912 (E.D.N.Y. 1998).

37. Robert J. Gruendel & Angelique M. Crain, *The Maritime Contract and Admiralty Jurisdiction: Recent Developments Help Clarify an Inherently Confused Landscape,* 77 TUL. L. REV. 1235, 1238 (2003).

38. *Id.*

39. *Id.*

40. SCHOENBAUM, *supra* note 2, § 9-1.

41. FED. R. CIV. P. C.

42. FED. R. CIV. P. B.

43. St. Paul Fire & Marine Ins. Co. v. Bd. of Comm'rs of Port of New Orleans, 418 F. App'x 305, 309 (5th Cir. 2011) (citing Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc., 585 F.3d 236, 242 (5th Cir. 2009)).

44. SCHOENBAUM, *supra* note 2, § 17-2.

45. *Id.* § 5-23.

admiralty jurisdiction, the rules the Supreme Court has created to decide whether it has jurisdiction to decide on a case depends on the basis of the claim. The judicially-created jurisdictional test the Court applies to determine whether it has subject matter jurisdiction under its admiralty jurisdiction depends on whether the cause of action arises out of a tort claim or a contractual dispute.

A. Admiralty Jurisdiction: Tort

Because much of the American admiralty common law has its roots in English admiralty law,[46] certain vestiges of that heritage remain in modern American admiralty jurisprudence. However, for various reasons, there are several departures from English law. Notably American courts have relied less on the English courts' emphasis on location in testing whether said courts may exercise admiralty jurisdiction. Unlike English courts, which base their jurisdiction over tort purely on location, such that the English court will only exercise admiralty jurisdiction over a controversy where the tort takes place within the "ebb and flow" of the tide,[47] American courts have adhered to a location- and nexus-based test.

As such, where the cause of action is based on tort, the court will use a two prong location and nexus test developed in trilogy of cases: *Executive Jet Aviation, Inc. v. City of Cleveland*,[48] *Foremost Insurance Co. v. Richardson*,[49] and *Sisson v. Ruby*.[50] This test was later definitively articulated by the Supreme Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*[51] In *Grubart*, the Court focused on the location of the tortious conduct that gave rise to the injury to determine whether it was able to exercise admiralty jurisdiction over a tort claim.[52] In doing so the Court held that the locational aspect of the two-part jurisdictional test was satisfied where "the tort occurred on navigable water or . . . [the] injury suffered on land was caused by a vessel on navigable water."[53] The Court went on to hold that the nexus portion of the jurisdictional test for the court's exercise of admiralty jurisdiction to decide a tort claim was satisfied where, given the "general features of the

46. *Id.* § 1-6.
47. Propeller Genesee Chief v. Fitzhugh, 53 U.S. 443, 457-58 (1851).
48. 409 U.S. 249 (1972).
49. 457 U.S. 668 (1982).
50. 497 U.S. 358 (1990).
51. 513 U.S. 527 (1995).
52. *Id.* at 534.
53. *Id.*

type of incident involved,"[54] the incident has "a potentially disruptive impact on maritime commerce" and the "general character" of the "activity giving rise to the incident" shows a "substantial relationship to traditional maritime activity."[55]

B. Admiralty Jurisdiction: Contract

Like the American jurisdictional test for tort, the American jurisdictional test for contracts also differs from that of English jurisprudence. According to the old test propagated by English law, a court sitting in admiralty may only exercise jurisdiction to decide a dispute when the contract was "made upon the sea and to be executed thereon."[56] Unlike the English jurisdictional test for torts and contracts, and the American jurisdictional test for tort, both of which focus on locale in determining whether or not a court may exercise its admiralty jurisdiction to hear a claim, American courts use a more conceptual approach with regard to the exercise of admiralty jurisdiction over contractual disputes.[57] For this reason, when the cause of action arises out of a contractual dispute, the court focuses on the nature and subject matter of a contract, rather than the location of where the contract was created or to be performed, to determine if the court may exercise its admiralty jurisdiction in order to decide a maritime contractual dispute.[58]

This marks a vast departure for American jurisprudence from its English heritage. The American tradition of focusing on the subject matter and nature of the contact rather than the location of the contract or the dispute had its roots in *Delovio v. Boit*,[59] where Justice Joseph Story pronounced:

> [t]he delegation of cognizance of "all civil cases of admiralty and maritime jurisdiction" to the courts of the United States comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea.[60]

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54. *Id*. (citing *Sisson*, 497 U.S. at 363).
55. *Id*.
56. New Eng. Mut. Marine Ins. Co. v. Dunham, 78 U.S. 1, 26 (1870).
57. *See* Kossick v. United Fruit Co., 365 U.S. 731, 735 (1961).
58. DeLovio v. Boit, 7 F. Cas. 418, 444 (C.C.D. Mass. 1815).
59. *Id*.
60. *Id*.

This position was further entrenched as American jurisprudence in the Supreme Court's watershed case *New England Mutual Marine Ins. Co. v. Dunham*.[61] In *New England Mutual Marine Ins. Co.*, the Court was asked to decide whether a marine insurance contract was one falling under the Court's admiralty jurisdiction. In so deciding, Justice Joseph P. Bradley wrote:

> [a]s to *contracts*, it has been equally well settled that the English rule which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon (making *locality* the test) is entirely inadmissible, and that the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions.[62]

The Court expanded on this notion in *Kossick v. United Fruit Co.*[63] by pronouncing that in determining whether a contract was a maritime contract or not, "[t]he only question is whether the transaction relates to ships and vessels, masters and mariners, as the agents of commerce."[64] It was from these jurisdictional decrees that the modern rule was derived, holding that the court may exercise admiralty jurisdiction over a contract so long as it was a maritime contract, such that the subject matter of the contract must be "relating to a ship in its use as such, or to commerce or navigation on navigable waters, or to transportation by sea or to maritime employment."[65]

However, because this jurisdictional test is conceptually amorphous and overly academic in nature, courts have had to resort to a case-by-case-based inquiry to determine which contracts were "salty"[66] enough to be classified as maritime contracts deserving of admiralty jurisdiction. In so doing, the courts look at the subject matter of the contract, but they are also heavily dependent upon judicial precedent in determining the "contours of admiralty contract jurisdiction."[67]

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61. New Eng. Mut. Marine Ins. Co., 78 U.S. at 20.

62. *Id*.

63. 365 U.S. 731 (1961).

64. *Id*. at 736.

65. J.A.R., Inc. v. M/V Lady Lucille, 963 F.2d 96, 98 (5th Cir. 1992) (quoting Thurmond v. Delta Well Surveyors, 836 F.2d 952, 954 (5th Cir. 1988) (quoting 1 E. JHIRAD, A. SANN, B. CHASE & M. CHYNSKY, BENEDICT ON ADMIRALTY § 183, at 11-6 (7th ed. 1985)).

66. *See Kossick*, 365 U.S. at 742.

67. SCHOENBAUM, *supra* note 2, § 3-10; *see also* Exxon Corp. v. Cent. Gulf Lines, Inc., 500 U.S. 603 (1991).

Given the above, courts have determined that the following contracts have a "genuinely salty flavor"[68] justifying the exercise of admiralty jurisdiction over the disputes arising therefrom: 1) marine insurance contracts;[69] 2) contracts for the carriage of goods or affreightment;[70] 3) charter party agreements;[71] 4) service contracts for cargo or vessels (including stevedoring services);[72] 5) container lease agreements;[73] 6) contracts for vessel repair and conversion;[74] 7) shipboard employment contracts;[75] and 8) towage and salvage contracts.[76] Conversely, the courts have declined to exercise admiralty jurisdiction over the following contracts due to their lack of the requisite "saltiness"[77]: 1) contracts for the building and sale of a vessel;[78] 2) certain agency contracts;[79] 3) contracts for the storage of cargo;[80] and 4) certain preliminary contracts (i.e., bond securing performance of a charter party[81] and marine insurance brokerage contract).[82]

Based on the modern jurisdictional rule and the plethora of precedential law, courts have provided an adequately uniform approach to the exercise of their admiralty jurisdiction in resolving contractual disputes. This uniformity has provided parties to both maritime and non-maritime contracts a desirable level of foreseeability and predictability with respect to which law will apply and what procedural and legal effects they will encounter in the event that a dispute arises out of the contract. With regard to mixed contracts, those contracts containing both

68. *See Kossick*, 365 U.S. at 742.

69. New Eng. Mut. Marine Ins. Co. v. Dunham, 78 U.S. 1, 1 (1870).

70. *Ex parte* Easton, 95 U.S. 68, 72 (1877).

71. Kirno Hill Corp. v. Holt, 618 F.2d 982, 984 (2d Cir. 1980).

72. Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962).

73. CTI-Container Leasing Corp. v. Oceanic Operations Corp., 682 F.2d 377 (2d Cir. 1982).

74. N. Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U.S. 119 (1919).

75. Clinton v. Int'l Org. of Masters, Mates & Pilots of Am., Inc., 254 F.2d 370 (9th Cir. 1958).

76. Sea Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A., 792 F.2d 989 (11th Cir. 1986); Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638 (1900).

77. *See* Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961).

78. People's Ferry Co. of Boston v. Beers, 61 U.S. 393 (1857); Herman Family Revocable Trust v. Teddy Bear, 254 F.3d 802 (9th Cir. 2001).

79. Exxon Corp. v. Cent. Gulf Lines, Inc., 500 U.S. 603 (1991).

80. Pillsbury Flour Mills Co. v. Interlake S.S. Co., 40 F.2d 439 (2d Cir. 1930).

81. Rhederei Actien Gesellschaft Oceana v. Clutha Shipping Co., 226 F. 339 (D. Md. 1915).

82. Angelina Cas. Co. v. Exxon Corp., U.S.A., 876 F.2d 40 (5th Cir. 1989).

maritime and non-maritime elements,[83] the conceptual approach has been greatly complicated by the Supreme Court's decision in *Norfolk Southern Railway Co. v. Kirby* [84]

C. Admiralty Jurisdiction: Mixed Contracts Generally

A "mixed contract" is one that contains both maritime and non-maritime elements.[85] This very academic approach to whether a contract has enough of a "genuinely salty flavor"[86] for maritime jurisdiction has presented difficulty for the courts in ascertaining whether the exercise of admiralty jurisdiction is proper with respect to mixed contracts. Defining the outer limits and scope of admiralty jurisdiction regarding contracts that contain both maritime and non-maritime elements has been described as "not the model of clarity."[87]

Prior to the Supreme Court's decision in *Kirby*, the test for whether a court could exercise admiralty jurisdiction over a mixed contract focused on the non-maritime elements of the contract. The now-overruled test held that where the non-maritime part of the contract (1) was merely incidental or (2) could be separated from the maritime portion of the contract, the court would exercise admiralty jurisdiction.[88] Where, however, the maritime and non-maritime claims were bound together and could not be separated, the Court would refuse to exercise admiralty jurisdiction in order to hear the dispute, even as to disputes arising out of the maritime elements of the contract.[89]

However, this now-antiquated jurisdictional test for mixed contracts that focused on the non-maritime elements of the contracts was completely abrogated by the Supreme Court in its 2004 decision, *Norfolk Southern Railway Co. v. Kirby*. In *Kirby*, the Supreme Court changed the jurisdictional landscape of federal courts with regard to admiralty jurisdiction and mixed contracts containing both maritime and non-maritime elements, shifting the focus of the jurisdictional inquiry away from the non-maritime elements and instead focusing on the substantiality of the maritime elements.[90]

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83. SCHOENBAUM, *supra* note 2, at 139.

84. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14 (2004).

85. SCHOENBAUM, *supra* note 2, at 139.

86. Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961).

87. Robert Force, *The Aftermath of Norfolk Southern Railway v. James N. Kirby, Pty Ltd.: Jurisdiction and Choice-of-Law Issues*, 83 TUL. L. REV. 1393, 1393 (2009).

88. *Kirby*, 543 U.S. at 23-24.

89. SCHOENBAUM, *supra* note 2, at 139.

90. *Kirby*, 543 U.S. at 23-24.

1. *Norfolk Southern Railway Company v. Kirby*

Kirby involved a contract for the carriage of goods (machinery) from Sydney, Australia to Huntsville, Alabama.[91] The bill of lading was a through-bill and initially issued by a freight forwarder, covering the entire journey, designating Sydney, Australia as the port of loading, Savannah, Georgia as the port of discharge, and Huntsville, Alabama as the ultimate destination of delivery.[92] The freight forwarder then contracted with a carrier that issued its own bill of lading designating the same ports of loading and discharge and ultimate destination.[93] The carrier then contracted with Norfolk Southern Railway to handle the land leg of the carriage.[94] The freight forwarder's bill of lading included a Himalaya Clause extending the carrier's protections to others involved in the transaction, but it did so at a rate higher than that of Carriage of Goods by Sea Act (COGSA) ($500 per package); additionally, the second bill of lading issued by the carrier also included a Himalaya Clause, but it included a liability limitation extending the carrier's protections to others involved in the transaction, and it did so at the limitation specified in COGSA ($500 per package).[95] While in route from Savannah, Georgia to Huntsville, Alabama the train derailed and caused damage to the machinery shipped by the claimant.[96]

Strictly regarding the jurisdictional aspect of *Kirby*, the Court was asked to decide "whether or not a suit brought to recover damages for property that was damaged on land while it was being transported by an overland carrier pursuant to a marine bill of lading [fell] within admiralty jurisdiction."[97] In answering the jurisdictional question, the Court looked to *Exxon Corp. v. Century Gulf Lines, Inc.*,[98] which held that "[t]he trend in modern admiralty case law . . . is to focus the jurisdictional inquiry upon whether the nature of the transaction was maritime."[99] However, the Court went further and disregarded the old jurisdictional test requiring that either the non-maritime aspect of the contract be either

91. *Id.* at 18.
92. *Id.* at 19.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 18.
97. *Id.*
98. 500 U.S. 603 (1991).
99. *Id.* at 611.

incidental to the contract or separable from the maritime elements[100] and instead chose to create a new test for determining whether it may exercise admiralty jurisdiction over a dispute involving a mixed contract.[101]

According to the Court's new rule, the focus was no longer on the non-maritime aspects of the contract. Instead, the Court held that exercise of admiralty jurisdiction over a mixed contract turned on the substantiality of the maritime aspects of the contract.[102] Where the maritime aspects of the contract are "substantial," the court may exercise admiralty jurisdiction over any dispute derived of that contract.[103] The new rule proffered in *Kirby* has come to be known as the "primary objective test,"[104] such that where the primary objective of the contract is maritime commerce, the court will exercise admiralty jurisdiction over the dispute despite the fact that the dispute may arise out of a shore-side incident.[105]

In so deciding, the Court ruled that it could exercise its admiralty jurisdiction over the contractual dispute. While this outcome and the resulting rule make perfect sense when applied to mixed contracts for multi-modal transportation of goods or warehouse to warehouse cargo insurance policies, both of which revolve around the carriage of goods over land and sea legs, the same rule is not as easily applied to mixed contracts that do not involve an objective geographical, distance-related aspect, such as umbrella insurance policies. The determination of whether the maritime element of a mixed contract is substantial is significantly easier to apply when a court is able to compare mileages or examine whether the primary objective of the contract necessarily involved insurance coverage of goods or transportation of goods over the ocean. Moreover, the *Kirby* approach may even be viable with regard to master service agreements, in so far as a court is able to look to the "focus of the contract."[106] Conversely, determining the substantiality of the maritime elements of a mixed contract not involving movement of

100. Flota Maritima Browning de Cuba, Sociadad Anonima v. Snobl, 363 F.2d 733, 735-36 (4th Cir. 1966).

101. *Kirby*, 543 U.S. at 23-27.

102. *Id.* at 26-27.

103. *Id.* at 27.

104. Sentry Select Ins. Co. v. Royal Ins. Co. of Am., 481 F.3d 1208, 1218 (9th Cir. 2007).

105. *Kirby*, 543 U.S. at 27.

106. Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 589 F.3d 778, 800 (5th Cir. 2009).

the subject of the contract has been far more beguiling of a concept and has proven to be a significantly more difficult task for courts to accomplish.

2. Application of the *Kirby* Rule

Much of the application of the jurisdictional test set out in *Kirby* has revolved around three areas, which include: (1) multi-modal transport contracts (carriage contemplated over sea and land like that litigated in *Kirby*), (2) master service contracts (also commonly called "blanket contracts"), and 3) bumbershoot or umbrella insurance policies (umbrella policies that provide primary or excess coverage for both maritime and shore-side risks). While these types of mixed contracts are the most litigated in reference to jurisdictional questions, they by no means form an exhaustive list of mixed contracts in which jurisdictional questions arise. As examined below, the courts are anything but uniform in their application of the *Kirby* test in determining whether they may properly exercise admiralty jurisdiction over the disputes arising out of the aforementioned common types of mixed contracts.[107]

a. Multi-Modal Transportation Contracts

Disputes over multi-modal transportation contracts involve the exact same types of dispute as was the case in *Kirby*, contemplating the carriage of goods over land and sea legs. The *Kirby* Rule holds that where the maritime portion of the contract is substantial, such that the primary objective of the contract is maritime commerce, then the fact that the contract also involves non-maritime elements does not affect a court's ability to exercise admiralty jurisdiction over a dispute arising from that contract.[108] Furthermore, determining whether the maritime

107. It is worth mentioning that courts have not been willing to extend admiralty jurisdiction to contractual issues associated with damages for breach of contract (like payment of demurrage and detention costs), where the contract was primarily for the sale of goods, but it contemplated that the seller would ship the sold goods. *See e.g.* Alphamate Commodity GMBH v. CHS Europe SA, 627 F.3d 183 (5th Cir. 2010). This is worth noting as these disputes involve very typical maritime issues, such as the payment of demurrage or detention cost pursuant to a voyage charter party, yet the court refuses to exercise its admiralty jurisdiction over disputes over such contracts. This seems counterintuitive as the contract for the sale of goods contemplates the transportation of the goods, the inclusion of the transportation terms are material to the contract of the sale of goods, and it would not be consummated but for the transportation of those goods to the buyer.

108. *Kirby*, 543 U.S. at 23-24.

element of a mixed contract is substantial is significantly easier to apply when a court is able to compare mileages or examine whether the primary objective of a given contract involved insurance coverage of goods or transportation of goods over the ocean. As a result, the jurisdictional test handed down in *Kirby* is not only very applicable in determining jurisdiction in these disputes, it also provides a level of foreseeability and predictability to parties to multi-modal transportation contracts, such that there are no surprises as to under which jurisdiction the court will hear a dispute.

Much like multi-modal transportation contracts, open cargo insurance policies—providing warehouse to warehouse coverage—present situations that have objectively measurable geographic elements that make the jurisdictional test delivered in *Kirby* easily applied. In fact, with regard to a court's jurisdictional inquiry, warehouse to warehouse cargo insurance policies are more like multi-modal transportation contracts than they are like umbrella insurance policies. Following *Kirby*, the Eleventh Circuit cited in a footnote that open cargo policies that include warehouse to warehouse clauses are maritime policies.[109] This is the case, like multi-modal transportation contracts, because a substantial portion of the contract is devoted to the coverage of cargo over the sea-leg of transit. The best example of this assertion is the Tenth Circuit jurisdictional analysis in *Commercial Union Insurance Co. v. Sea Harvest Seafood Co*.[110] Even though this case was decided prior to the Supreme Court's decision in *Kirby*, the court's analysis is remarkably similar to that which could be expected of a similar legal issue post-*Kirby*.

In *Commercial Union Insurance Co.*, the insurer brought an action for a declaratory judgment seeking a declaration that it was not liable under a marine open cargo insurance policy for loss of 36,000 pounds of decomposed frozen shrimp.[111] Prior to the above-cited controversy, Sea Harvest had contracted with Commercial Union for an ocean marine open cargo policy.[112] The policy purported to cover the cargo to its final destination, to include overland transportation (warehouse to warehouse coverage).[113] The policy included a temperature control provision whereby Commercial Union agreed to cover "[a]ll Risks of physical loss

109. Great S. Wood Preserving, Inc. v. Am. Home Assurance Co., 292 F. App'x 8, 10 n.3 (11th Cir. 2008).

110. Commercial Union Ins. Co. v. Sea Harvest Seafood Co., 251 F.3d 1294 (10th Cir. 2001).

111. *Id.* at 1296.

112. *Id.*

113. *Id.* at 1298.

or damage from any external cause, but excluding: A. Deterioration, decay or spoilage unless the Assured can demonstrate that such damage was directly caused by derangement or breakdown of the refrigeration machinery or directly caused by the vessel stranding, sinking, burning or in collision."[114]

The controversy arose when Sea Harvest undertook shipping 36,000 pounds of frozen shrimp from Bangkok, Thailand to Philadelphia, Pennsylvania.[115] The shipment of shrimp was to arrive in California and be transported by rail, first to Chicago, Illinois, and eventually on to Philadelphia.[116] However, somewhere in transit, someone forgot to attach a gen-set (a device that provides power to a reefer unit) to the cargo container containing the shrimp.[117] As a result of the mishap, the entire shipment of shrimp was spoiled.[118] Sea Harvest subsequently made a claim to its insurer, Commercial Union, who then denied the claim.[119] The following day, Commercial Union commenced an action for declaratory judgment, contending that it was not responsible for the payment for Sea Harvest's claim under the maritime insurance policy.[120]

Following filing for declaratory judgment, Commercial Union then moved for summary judgment arguing that under admiralty law, the failure to plug in a gen-set did not constitute an external "derangement or breakdown of refrigeration machinery."[121] The district court agreed and granted Commercial Union's motion for summary judgment.[122] Sea Harvest timely appealed, arguing that the district court erred in its application of admiralty law to the interpretation of the contract.[123] In determining whether admiralty law applied, the Tenth Circuit Court of Appeals did a "maritime contract" analysis to determine whether the "mixed contract" (as this policy covered cargo over the ocean transport as well as during land transport) was one that could be qualified as a maritime contract, the interpretation of which was to be done pursuant to admiralty law.[124] Importantly, regardless of whether the claim is made in state court or in federal court sitting in either diversity or admiralty,

114. *Id.* at 1296.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 1297.
121. *Id.*
122. *Id.*
123. *Id.* at 1298.
124. *Id.*

where the claim is a maritime controversy, the court will apply federal admiralty law.[125]

In determining the applicable choice of law, the court used a jurisdictional analysis, due to the above mentioned choice of law rules in *Southern Pacific Co. v. Jensen*.[126] In doing so, the court noted that while the policy was one that covered cargo, in this instance, the coverage of the cargo "involved significant maritime travel,"[127] as "the shipment from Bangkok to Los Angeles was clearly the predominant part of the transaction."[128] Thus, the court held that the contract was a maritime contract,[129] and coupled with the principles set out in *Jensen*,[130] general maritime law applied, and the maritime interpretation of the terms of the contract controlled.[131] Thus the Tenth Circuit has taken a geographic distance-type approach in determining whether the mixed contract was substantially maritime, such that the contact's connection with maritime commerce was not "too speculative and attenuated to support admiralty and maritime jurisdiction."[132]

Although this case was decided prior to *Kirby*, given the similarity of this type of controversy to that of a multi-modal transportation contract dispute, it is likely that the jurisdictional test set out in *Kirby* is as easily applied to warehouse to warehouse marine cargo insurance contract cases as it is to other multi-modal transportation contractual disputes. Furthermore, based on the factual similarities between those in *Kirby* and those predominating disputes over this type of mixed contracts and warehouse to warehouse marine cargo insurance contracts, it makes sense that the jurisdictional test set out in *Kirby* works. This is the case because multi-modal transportation contracts and warehouse to warehouse open cargo insurance policies inherently contain an objective geographic measure by which to determine the substantiality of the maritime portions of the contract, thus making the *Kirby* test for admiralty jurisdiction an appropriate test. However, as will be discussed in further detail below, a different test or approach should be applied to situations that lack the spatial component of the aforementioned

125. S. Pac. Co. v. Jensen, 244 U.S. 205, 217 (1917).

126. *Id.*

127. Commercial Union Ins. Co. v. Sea Harvest Seafood Co., 251 F.3d 1294, 1302 (10th Cir. 2001).

128. *Id.*

129. *Id.*

130. *Jensen*, 244 U.S. at 207.

131. Commercial Union Ins. Co., 251 F.3d at 1298.

132. *Id.* at 1301-02.

contracts.[133] As such, certain mixed contracts, such as umbrella insurance contracts or master service agreements that lack an objective, spatial, or geographic element, make the *Kirby* test somewhat inappropriate. As a result, it would be more advantageous for the Supreme Court to limit the application of *Kirby* to multi-modal transportation contracts and warehouse to warehouse marine cargo insurance contracts.

b. Master Service Agreements

Given the nature of the offshore oil industry, many contracts are what can be characterized as "master service contracts" or "blanket contracts." Generally, these contracts may involve the provision of materials and supplies to an offshore fixed platform (which is considered an extension of land for the purpose of admiralty jurisdiction)[134] by way of a vessel, and may also include a service agreement whereby the contracting party agrees to do maintenance work on the fixed platform. As a result, these contracts necessarily include maritime and non-maritime components. With regard to this particular type of mixed contract, courts' exercise of admiralty jurisdiction has serious implications regarding enforceability of these contracts or specific provisions therein.

In determining whether a master service contract or blanket contract is a maritime contract subject to a court's admiralty jurisdiction, the Fifth Circuit has taken the lead in fashioning a jurisdictional test for determining when the maritime elements of a master service agreement are "substantial" so as to comport with *Kirby*. Prior to the Fifth Circuit's 2009 decision in *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*,[135] the test for when a master service agreement was "salty" enough was that enunciated in *Davis & Sons, Inc. v. Gulf Oil Corp.*[136]

Davis & Sons involved a contract whereby Davis & Sons, Inc. would provide barges in order to transport its own employees to do maintenance work on defendant's offshore drilling rig, including: painting living quarters, cranes and other equipment; inspecting and repairing engines and cranes; and operating and navigating the barge.[137] Importantly, the contract also included an indemnity clause, whereby Davis & Sons

133. *See infra* Section III(C)(2)(c).
134. Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 360 (5th Cir. 1969).
135. 589 F.3d 778 (5th Cir. 2009).
136. Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313, 317 (5th Cir. 1990).
137. *Id.* at 314.

would be forced to indemnify Gulf Oil in the event a Davis employee was injured on a Gulf Oil rig and sued Gulf Oil.[138] In *Davis & Sons* the court fashioned a now-antiquated test for determining whether a mixed master service agreement was maritime in nature and could be decided under the exercise of the court's admiralty jurisdiction.[139] In doing so, the court created a multi-factored approach to determine whether the contract was substantially a maritime contract, holding:

> [the] [d]etermination 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 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?[140]

Based on those factors, the court found that the contract was a maritime contract despite the non-maritime elements and was thus subject to the court's admiralty jurisdiction.[141] This designation was of significant importance, and it illustrates the legal implications that result from litigating a dispute under the Fifth Circuit's admiralty jurisdiction. Here, as a result of the court's finding that the contract was a maritime contract, subject to the court's admiralty jurisdiction, federal maritime law applied, and, as a result, the indemnity provision was valid and enforceable.[142] Had the contract not been a maritime contract, Louisiana law would have applied and the indemnity clause would have been unenforceable.

Since the *Davis & Sons* decision, the Fifth Circuit has attempted to simplify their factor-based test's focus on the locale of the injury that gave rise to the contractual dispute, and in doing so, keeping with *Kirby* by focusing on the primary objective of the contract to determine the substantiality of the maritime elements.[143] Similar to *Davis & Sons*, *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC* [144] addressed whether a

138. *Id*.
139. *Id.*
140. *Id.* at 316.
141. *Id.* at 317.
142. *Id.*
143. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 23-25 (2004).
144. 589 F.3d 778 (5th Cir. 2009).

contract was a maritime contract that should be heard pursuant to the court's admiralty jurisdiction and decided according to federal maritime law, and subsequently whether the indemnity provision should be upheld as valid.[145] To find that the contracts were not maritime contracts would require the court to decide the controversy pursuant to federal question jurisdiction based on the Outer Continental Shelf Lands Act,[146] which would result in applying the adjacent state's law, here Louisiana, and find the indemnity provisions invalid.[147]

In *Grand Isle Shipyard*,[148] the Fifth Circuit modified the *Davis & Sons* test to a "focus-of-the-contract test,"[149] which looks to where the contract contemplates that most of the work will be performed, rather than where a majority of the work was actually performed.[150] The court found where most of the work called for by the contract is on stationary platforms located on the Outer Continental Shelf, the contract is considered as a non-maritime contract to be decided pursuant to the adjacent state's law,[151] because courts treat stationary platforms as extensions of land.[152] However, if a majority of the work contemplated in the contract is aboard vessels on navigable water, then the contract is a maritime contract and subject to the court's admiralty jurisdiction regardless of non-maritime elements included in the contract.[153]

Based on this new test, the Fifth Circuit found that "because the relevant contract contemplated that a majority of the contractor's work would be performed on stationary platforms on the [Outer Continental Shelf], this should be deemed the relevant 'situs' for the instant indemnity dispute and because none of the other factors lead us to apply any other law, we must apply Louisiana law."[154] Thus, the court found that the indemnity provisions in each of the contracts were invalid.[155]

As a result, when it comes to master service agreements, the Fifth Circuit has taken the lead in *Grand Isle Shipyard* on formulating jurisdictional tests, creating a "focus-of-the-contract test."[156] This "focus-

145. *Id.* at 781.
146. 43 U.S.C. § 1331-56a (2012).
147. *Grand Isle Shipyard, Inc*., 589 F.3d at 781.
148. *Id*. at 778.
149. *Id*. at 781.
150. *Id*.
151. *Id.*
152. Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 359-60 (1969).
153. *Grand Isle Shipyard, Inc.*, 589 F.3d at 781.
154. *Id*.
155. *Id*. at 781.
156. *Id*. at 787.

of-the-contract test" holistically looks at the entirety of a contract to determine where the majority of the work is contemplated, subsequently determining whether the contract is a maritime contract to justify the exercise of its admiralty jurisdiction. Moreover, given the difficulty presented in applying the *Kirby* test to determine whether the court has admiralty jurisdiction over a mixed contract such as a master service agreement—a contract that lacks the spatial or geographic elements inherent in multi-modal transportation contracts and warehouse to warehouse marine cargo insurance policies—it appears that the Fifth Circuit approach is the best test for determining admiralty jurisdiction. This is the case as the *Grand Isle Shipyard* test comports with the *Kirby* test's required focus on the substantiality of the maritime elements of the contract.[157] In doing so, the Fifth Circuit takes a holistic approach to the mixed contract to determine the "saltiness"[158] of the contract, without the benefit of a spatial or geographically measurable element.

This line of cases illustrates the difficulty presented in applying the factually specific test handed down in *Kirby* to factually dissimilar situations. On the other hand, *Grand Isle Shipyard* is exemplary of the Fifth Circuit's success in dealing with mixed contract and the *Kirby* test. In addition to the jurisdictional inquiry, *Grand Isle Shipyard* also illustrates the very significant legal implications and consequences that accompany the court's decision in hearing a dispute pursuant to its admiralty jurisdiction. As has been discussed, *Kirby* is applicable in multi-modal transportation contracts, warehouse to warehouse marine cargo insurance policies, and to some extent, master service agreements;[159] however the applicability ends there. When it comes to umbrella marine insurance policies, *Kirby* is lacking because courts have not determined the best way to determine the primary objective of the contract. Furthermore, when it comes to umbrella insurance policies, looking at the contract alone leads to potentially anomalous results, such as litigating shore-side coverage for shore-side injuries before a court sitting in admiralty. Thus, where *Kirby* may be applied in the above-discussed types of mixed contracts, the courts should apply a different and more appropriate test to determine admiralty jurisdiction for marine umbrella insurance policies.

157. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 23-25 (2004).
158. Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961).
159. *Kirby*, 543 U.S. at 27.

c. Marine Insurance

The Supreme Court of the United States has made it clear that marine insurance policies are contracts squarely within the purview of the Court's admiralty jurisdiction.[160] However, there is no concrete precedent as to how the Court is to treat mixed insurance contracts—those that cover both shore-side and sea-side risks under the umbrella of a single policy—when determining whether the contract is a maritime contract within the parameters of the Courts' admiralty jurisdiction. This issue was less difficult under the pre-*Kirby* test that held where the non-maritime part of the contract was (1) merely incidental or (2) could be separated from the maritime portion of the contract, the Court would exercise admiralty jurisdiction.[161] Where, however, the maritime and non-maritime claims were bound together and could not be separated, the Court would refuse to exercise admiralty jurisdiction in order to hear the dispute, even as to disputes arising out of the maritime elements of the contract.[162] The post-*Kirby* jurisdictional inquiry is significantly more arduous.

Unlike the case of other multi-modal transportation contracts and, to a lesser extent, master service agreements, the various Circuit Courts have had a universally difficult and varying approach to applying the jurisdictional test as set out in *Kirby* to bumbershoot and umbrella insurance policies.[163] Due to the difficulty the courts have encountered in implementing *Kirby* in these mixed coverage insurance policies, the several Circuit Courts have come out with various methods of application.[164] The varying methods of application present the shipping industry and the insurance industry with a lack of uniformity or predictability. This lack of uniformity or predictability is counterintuitive to the goal of uniformity to which courts have aspired, and for this reason, the courts should limit the application of *Kirby* to those types of contracts discussed above. With regard to umbrella insurance policies, courts should adhere to a test similar to that asserted in *Folksamerica*

160. New Eng. Mut. Marine Ins. Co. v. Dunham, 78 U.S. 1 (1870).

161. SCHOENBAUM, *supra* note 2, § 3-10 n.53; *see also* Flota Maritima Browning de Cuba, Sociadad Anonima v. Snobl, 363 F.2d 733 (4th Cir. 1966).

162. SCHOENBAUM, *supra* note 2, § 3-10 n.56.

163. *Compare* St. Paul Fire & Mar. Ins., Co. v. Bd. of Comm'rs, 418 F. App'x 305, 308 (2011), *with* Sentry Select Ins. Co. v. Royal Ins. Co. of Am., 481 F.3d 1208, 1219 (2007).

164. *See, e.g.*, St. Paul Fire & Mar. Ins., Co. v. Bd. of Comm'rs, 418 F. App'x 305, 308 (2011); Sentry Select Ins. Co. v. Royal Ins. Co. of Am., 481 F.3d 1208, 1219 (2007).

Reinsurance Co. v. Clean Water of New York, Inc.[165] to provide practitioners with a more predictable landscape within which to negotiate, draft umbrella insurance policies, and litigate disputes arising therefrom.

Below is an overview of the different methods with which the Circuit Courts have dealt with *Kirby* in determining whether the umbrella policy in question is a maritime contract subject to admiralty jurisdiction. A review of these several tests makes it obvious that the Second Circuit's is the best approach due to its threshold inquiry into the nature of the dispute, ensuring that anomalous disputes are not unnaturally litigated in a court sitting in admiralty. Moreover, the court's follow up examination into the scope of the coverage most closely aligns with the conceptual approach historically emphasized in American jurisprudence while also adhering to the jurisdictional test as set forth in *Kirby*.[166]

i. The Second Circuit: Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.

At issue in *Folksamerica* was a comprehensive general liability policy that contained a ship-repairer's legal liability policy that effectively provided umbrella coverage for Clean Water's operations. In this case, an employee who worked for a company with whom Clean Water had subcontracted was injured while cleaning the oil tanks of a barge.[167] The employee brought a negligence claim in state court against Clean Water.[168] Following the initiation of the suit, Clean Water notified its insurer of the action, and the insurer's successor in interest, Folksamerica, filed suit in the Eastern District of New York seeking a declaration that it had no duty to indemnify or defend Clean Water.[169] Clean Water moved for dismissal for lack of subject matter jurisdiction arguing that the CGL section of the Policy was a standard "all risk policy" and contended that the maritime risks covered by the Policy were "merely incidental" at best.[170] The District Court agreed that the maritime portions of the contract were merely incidental to the non-maritime elements and dismissed the case for lack of subject matter jurisdiction, holding that the policy was neither wholly nor primarily

165. 413 F.3d 307 (2d Cir. 2005).

166. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 23-25 (2004).

167. Folksamerica Reinsurance Co. v. Clean Water of N.Y., Inc., 413 F.3d 307, 310 (2d Cir. 2005).

168. *Id.*

169. *Id.*

170. *Id.* at 311.

maritime in nature, and that the court only had admiralty jurisdiction where "the non-maritime elements were merely incidental in an otherwise maritime contract,"[171] and the CGL section was not incidental. Following the District Court's dismissal, Folksamerica appealed.[172]

On appeal, the Second Circuit Court of Appeals recognized the District Court had failed to apply *Kirby*. However, in doing its own jurisdictional analysis by applying *Kirby*, the court went beyond *Kirby's* "primary objective" inquiry and held that before it could inquire into the subject matter of the contract, it must first make a "threshold inquiry" into the subject matter of the dispute."[173] The Court held that "[b]efore attempting to categorize contractual rights as maritime or non-maritime, a federal court must first consider whether an issue related to maritime interests has been raised."[174] In so holding, rather than focusing directly on the nature and subject matter of the contract itself to determine if the contract was substantially a maritime contract, the court chose as a threshold inquiry to focus on the nature of the dispute and to only then look at the subject matter of the contract by analyzing the terms of coverage in the policy to determine if the policy's "primary objective" was maritime in nature. In its threshold inquiry regarding the subject matter of the dispute, the court held that the parties' dispute concerned "an insurance claim based on a ship-maintenance-related injury sustained by a ship oil-tank cleaner aboard an ocean-going vessel in navigable waters. The business of ship maintenance has long been recognized as maritime, and the insurance claim arising out of a related onboard injury has more than a 'speculative and attenuated' connection with maritime commerce."[175]After satisfying its threshold inquiry, the court went on to examine the subject matter of the contract itself by "examining the scope of policy coverage to determine whether primary objective is to accomplish the transportation of goods by sea," as required by *Kirby*. [176]

In order to examine the subject matter of the contract, the court focused on the actual coverage and risks assumed by the insurer in the

171. *Id.* (citing Folksamerica Reinsurance Co. v. Clean Water of New York, Inc., 281 F. Supp. 2d 530, 533 (E.D.N.Y. 2003)).

172. *Id.*

173. *Id.* at 312 (citing *In re* Balfour MacLaine Int'l Ltd., 85 F.3d 68, 74 (2d Cir. 1996)).

174. *Id.* (citing Atl. Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd., 968 F.2d 196, 199 (2d Cir. 1992)); *see* Balfour, 85 F.3d at 74-75; *cf.* Thypin Steel Co. v. Asoma Corp., 215 F.3d 273, 278-79 (2d Cir. 2000); Sirius Ins. Co. (UK) Ltd. v. Collins, 16 F.3d 34, 37 (2d Cir. 1994).

175. *Folksamerica Reinsurance Co.*, 413 F.3d at 313.

176. *Id.* at 314.

policy. In looking at risks covered, the Court noted that the "operations hazards" and "products hazards" were maritime in nature because they could encompass personal injury or property damage arising out of defective or faulty repair of a vessel or other hazards that could be associated with maritime activity.[177] Additionally, the court noted that the CGL policy also covered pollution.[178] Given the above coverages, taken with ship-repairers' legal liability coverage that included a "travelling workmen clause" extending coverage to work "on board the Vessel and/or Drilling Rig at sea or in any port for the purpose of effecting repairs and/or other work entrusted to the Assured . . . .[179] the court found that the policy was a maritime contract and, therefore, exercised admiralty jurisdiction over the dispute.[180] As a result of the court's holding that the umbrella policy was a maritime contract, it vacated the District Court's dismissal.[181]

As can be seen, in reconciling the Supreme Court's holding in *Kirby* with umbrella insurance policies, the Second Circuit used a threshold inquiry regarding the subject matter of the dispute prior to even examining the subject matter of the contract in order to determine whether the maritime elements of the contract were "substantial." Only after satisfying itself that the dispute was a maritime dispute did the court turn its attention to the terms of the contract by focusing on the scope of the coverage, to determine if the mixed contract's maritime elements were substantial enough to justify the court's exercise of admiralty jurisdiction. This is clearly a better approach to a jurisdictional test, especially when it comes to umbrella insurance policies. This approach ensures that anomalous disputes are not litigated before a court sitting in admiralty, and the subsequent inquiry into the policy coverages of the contract ensures that the jurisdictional requirements of *Kirby* are satisfied.

Due to the fact that the jurisdictional test handed down in *Kirby* only applies neatly to situations that have an objective geographic measure by which to determine the substantiality of the maritime portions of the contract, such as multi-modal transportation contracts and warehouse to warehouse open cargo policies, a different test or approach should be applied to situations that lack the spatial component of the aforementioned contracts. Given this fact, the Second Circuit approach

177. *Id*. at 320.
178. *Id*. at 321.
179. *Id.* at 323.
180. *Id.*
181. *Id.* at 324.

discussed above, or some derivative version of this approach, (like that which the Fifth Circuit has employed), is the most appropriate approach for determining whether a court has admiralty jurisdiction in disputes arising out of umbrella coverage insurance policies. Under this approach, a court first inquires whether there are maritime issues, and then it determines whether it has admiralty jurisdiction by analyzing the nature of the contract by way of the broad coverages expressed in the policy.

ii. The Sixth Circuit: New Hampshire Insurance Co. v. Home Savings & Loan Co. of Youngstown, Ohio[182]

Unlike the Second Circuit's approach of engaging in an initial inquiry as to the subject matter of the dispute, followed by an examination of the policy coverage to determine if the policy was primarily a maritime contract, the Sixth Circuit Court of Appeals instead chose to dispense with the threshold inquiry regarding the "saltiness"[183] of the dispute and instead skip straight to focusing on the "interests insured" to determine if the policy was enough of a maritime contract to justify admiralty jurisdiction.[184] While this approach determines whether a particular umbrella insurance policy is "salty"[185] enough to justify admiralty jurisdiction better than a pure *Kirby* approach, it is not as effective as the Second Circuit's approach previously discussed. This is because the Sixth Circuit approach lacks the practicality and predictability of the Second Circuit's approach. As such, while the Sixth Circuit approach is better than a purist application of *Kirby*, the Second Circuit's initial inquiry into the nature of the dispute more effectively keeps maritime matters within the courts admiralty jurisdiction and keeps shore-side matters on the land-side of the court's jurisdiction.

In *New Hampshire Insurance Co. v. Home Savings & Loan Co. of Youngstown, Ohio*, the Sixth Circuit Court of Appeals grappled with how best to determine the maritime nature of a "Yacht Dealer/Marina Operator's" general liability insurance policy in order to determine whether it could hear the case pursuant to its admiralty jurisdiction.[186] The policy was purchased by National Marine, Inc. ("National Marine") from New Hampshire Insurance Co. ("NHIC").[187] The policy covered

182. N.H. Ins. Co. v. Home Sav. & Loan Co. of Youngstown, Ohio, 581 F.3d 420 (6th Cir. 2009).

183. Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961).

184. *N.H. Ins. Co.,* 581 F.3d at 427.

185. *Kossick*, 365 U.S. at 742.

186. *N.H. Ins. Co.*, 581 F.3d at 423, 427.

187. *Id.* at 422.

National Marine for both "Yacht Dealer Operations" and "Marina Operations" covering loss or damage to its inventory, loss or damage to third-party property while in its custody, personal injury or property damage occurring on its boats or at its marina, and loss or damage to its tools and equipment, but expressly excluding coverage for "owned watercraft."[188] The policy also included $300,000 in "Truth in Lending Errors and Omissions Liability Coverage" to insure against any damage due to "the unintentional violation of any Federal or State Consumer Credit Act, or similar statute, law or ordinance."[189] Several of National Marine's customers and two banks sued, alleging that National Marine made fraudulent misrepresentations and failed to deliver certain boats with clean title.[190] In response, National Marine filed a claim with NHIC under the "Truth in Lending" provision of the policy, requesting legal defense and indemnification from the charges.[191] NHIC initially paid the claim but reserved its right to contest. It filed suit designating the case as one falling under the court's admiralty jurisdiction and asked the district court to rescind the policy (on misrepresentation grounds) or declare that it did not cover these charges.[192] The defendants then made a motion to dismiss pursuant to the Declaratory Judgment Act, arguing that, because prior state court proceedings would resolve the same factual and legal disputes between the same parties, the federal court could abstain from the exercise of jurisdiction.[193] After a three-year stay in litigation due to an ongoing bankruptcy proceeding, the district court dismissed the case without prejudice.[194] As a basis for its dismissal the court held that, because Declaratory Judgment Act did not provide for its own federal subject matter jurisdiction, "it would *assume* subject matter jurisdiction pursuant to 28 U.S.C. § 1333(1) because the insurance policy at issue was a 'marine insurance policy,'" and dismiss the claim without prejudice because the facts and law of the case supported discretionary abstention.[195]

On appeal, the Sixth Circuit Court of Appeals determined it would examine the basis for admiralty jurisdiction *sua sponte* before it could adequately review the legal basis for the lower court's dismissal.[196] The

188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 422-23.
194. *Id*. at 423.
195. *Id.*
196. *Id.*

Court immediately recognized that if the dispute were to be heard under its admiralty jurisdiction, it would have to be determined to be a maritime contract.[197] Furthermore, given that the policy was an umbrella policy that covered seemingly maritime risks and apparently non-maritime risks, it determined it would have to do a mixed contracts inquiry to determine whether the case could be heard under its admiralty jurisdiction pursuant to the rule handed down in *Kirby*.[198] In doing so, rather than following the Second Circuit's approach and engaging in an initial inquiry as to the subject matter of the dispute, followed by an examination of the policy coverage to determine if the policy is primarily a maritime contract, the court chose to disregard the initial inquiry into the subject matter of the dispute. Rather than focus on the policy coverage, it focused instead on the "interests insured" to determine if the policy was enough of a maritime contract to justify admiralty jurisdiction.[199] In focusing its inquiry on the interests insured to determine if the contract was one in which the primary objective was maritime commerce, the court cited that, with regard to the yacht-dealer provisions of the policy, the interests insured only included boats as objects of commerce, treated as "stock for sale," not as agents of maritime commerce and, as a result, did "not relate to maritime commerce.[200] The Court went on to hold that with regard to the Marina Operator's coverage, the policy really only covered fixed structures and the operation of the marina rather than vessels in it.[201] Based on the above analysis, the court held that the contract was not one for which the primary objective was maritime commerce and consequently dismissed the claim for lack of subject matter jurisdiction.[202]

While this is a correct outcome, the process and analysis were unnecessary and convoluted. In this case, rather than go through a drawn out analysis of "interests insured," the Court could have very quickly dispensed with the issue of whether it could exercise its admiralty jurisdiction in the matter by utilizing the threshold inquiry into the "nature of the dispute" approach. If this were done, the Court could have skipped any other legal determination. This case was about a truth in lending insurance claim and had very little to do with admiralty jurisdiction or law, and it could have been quickly dispensed with as such. Whereas this case provides an excellent example of a different

197. *Id*.
198. *Id.*
199. *Id.* at 424-25, 427.
200. *Id.* at 427.
201. *Id.* at 431. Owned vessels were expressly excluded from coverage. *Id.* at 422.
202. *Id.*

approach to applying the *Kirby* jurisdictional test to an umbrella insurance policy, it makes for a better argument in favor of the application of the Second Circuit approach as a way of simplifying jurisdictional determinations in situations involving mixed contracts, as was illustrated in the above discussion. Moreover, determining the "salty flavor"[203] of an insurance policy by focusing on the "interests insured" is not substantially different from the Second Circuit's focus on policy coverage and should not yield different results, but it does require drawn out and convoluted analyses which degrade uniformity and predictability. As such, the utilization of a Second Circuit threshold inquiry into the nature of the dispute would not only relieve courts of the necessity of doing convoluted and abstract jurisdictional analyses where the dispute itself has no ties to the water, but it would also provide a more common sense application of admiralty jurisdiction.

iii. The Fifth Circuit: St. Paul Fire & Marine Insurance Co. v. Board of Commissioners of Port of New Orleans[204]

In determining whether a court may exercise admiralty jurisdiction in order to hear a dispute arising out of an umbrella insurance policy providing both shore-side and sea-side coverage, the Fifth Circuit Court of Appeals utilizes a hybrid of the Second Circuit and the Sixth Circuit Courts of Appeals approaches. In doing so, like the Second Circuit, the Fifth Circuit first examines the terms of coverage to determine if the primary objective of the contract was maritime commerce; but then, like the Sixth Circuit, the Fifth Circuit determines the focus of the contract by examining the "interests insured."[205] While this approach certainly does focus on the contract itself and those interests involved in the contract, almost to a fault, the Fifth Circuit's failure to engage in a Second Circuit threshold inquiry into the nature of the dispute removes any common sense from a supposed jurisdictional test. As the below discussion illustrates, failure to engage in a threshold dispute inquiry results in odd jurisdictional consequences, such as litigation over shore-side insurance coverage for damages for a shore-side injury.

St. Paul Fire & Marine Insurance Co. v. Board of Commissioners of Port of New Orleans involved a "bumbershoot" policy, which is

203. Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961).

204. St. Paul Fire & Marine Ins. Co. v. Bd. of Comm'rs of Port of New Orleans, 646 F. Supp. 2d 813 (E.D. La. 2009) *aff'd* 418 F. App'x 305 (5th Cir. 2011).

205. *Id*. at 819.

essentially an umbrella policy.[206] Here the policy was issued by St. Paul Fire and Marine Insurance Co. ("St. Paul") to the Board of Commissioners of the Port of New Orleans ("the Port") and provided excess coverage for liabilities that exceeded the specific underlying policies, and filled the liability gaps where the underlying policies failed to cover other liabilities.[207] The underlying policies included coverage for: 1) comprehensive general liability, 2) auto liability, 3) worker's compensation, 4) employer's liability, 5) maritime employer's liability, 6) Jones Act coverage, 7) protection and indemnity (P&I) for crew and employees, as well as, collision and towers, 8) vessel pollution, and 9) public official's liability.[208] In addition to the above coverages, the policy also included a notice of occurrence provision, whereby the Port was to give notice to St. Paul as "'soon as practicable' whenever the Port 'may reasonably conclude that an occurrence covered [under the policy] involve[d] an event likely to involve [the] Policy'" (judgment/settlement in excess of USD 1,000,000.00).[209] In addition to the notice provision, the policy also contained a New York choice of law provision.[210]

The coverage dispute arose when a port worker was injured when the large lift truck (commonly known as a "top loader") that he was operating fell into a pothole in an open area of the France Road Terminal (known as the "marshaling yard") in July of 2001.[211] In 2002, the worker filed suit against the Port.[212] The Louisiana court held that, while the area in which the worker was operating the vehicle was leased to his employer, P&O Ports of Louisiana, it was owned by the Port. As a result of the Port's ownership of the area and the Louisiana statute, La. Rev. Stat. Ann. § 9:3221 (2005), that maintains the owner's liability for injuries that occur due to a known defect, the court held the Port liable for the worker's injuries. As a result, the trial court entered a judgment for $2.6 million in favor of the injured worker, as well as $50,000 for a loss of consortium claim by the worker's wife, on February 28, 2007, which was then amended on March 23, 2007.[213] The Louisiana Court of Appeals then affirmed this judgment on May 14, 2008.[214] However, the

206. *Id*. at 818.
207. *Id.* at 816.
208. St. Paul Fire and Marine Ins. Co. v. Bd. of Comm'rs of Port of New Orleans, 2009 WL 1718225, at *4 (E.D. La. May 29, 2009).
209. *St. Paul Fire & Marine Ins. Co*., 646 F. Supp. 2d at 816.
210. *Id.* at 817.
211. *St. Paul Fire and Marine Ins. Co.*, 2009 WL 1718225, at *2.
212. *St. Paul Fire & Marine Ins. Co.*, 646 F. Supp. 2d at 816.
213. *Id.* at 816.
214. *Id.*

Port had failed to give St. Paul the required notice of occurrence until March 28, 2007, one month after the initial judgment, and five days following the amended judgment.[215] Based on the Port's failure to give the required notice until after the amended judgment, St. Paul brought suit under the Fifth Circuit's admiralty jurisdiction seeking a declaration "that that the Port was not entitled to coverage based on a policy provision requiring that the insured send notice 'as soon as practicable' whenever it 'may reasonably conclude that an occurrence covered [under the policy] involves an event likely to involve [the] Policy.'"[216]

With regard to admiralty jurisdiction, the Port argued that the bumbershoot policy was not a maritime contract because it was a mixed contract and covered several shore-side risks and was meant only as an excess and gap-filling policy. In analyzing whether its admiralty subject matter jurisdictional requirements were met, the Court utilized a Second Circuit/Sixth Circuit hybrid approach. In the first prong of the Fifth Circuit's jurisdictional test, the court utilized the second prong of the Second Circuit's test and did a "policy coverage analysis." In doing so, the Court held that, "[t]he terms of the bumbershoot policy here provided excess coverage to other maritime insurance contracts and specifically included traditional marine coverages. The fact that the coverage also included some land-based operations of the Port [was] not dispositive because the functioning and purpose of the Port show that the conceptual focus of the policy is maritime commerce."[217] Having satisfied itself that the coverage provided by the policy was primarily maritime, the Court then engaged in a Sixth Circuit "interests insured" analysis. In doing so, the Court recognized that the interests insured encompassed the port and its operation as such. The Court stated that "the Port is specifically charged with the statutory duty to 'regulate the *commerce and traffic* of the port and harbor of New Orleans.'"[218] The Court went on to recite that "[t]he Port's operations, although partially land-based, are thus inextricably related to maritime commerce."[219] The Court concluded by stating, "[g]iven the type of policy, the marine coverages and inclusion of specific vessels, and the statutory duty of the Port to regulate the commerce at the harbor and port of New Orleans . . . the nature and character of the contract focused on maritime commerce,"[220] and the exercise of admiralty jurisdiction was appropriate as a result.

215. *Id.*
216. *Id.*
217. St. Paul Fire & Marine Ins. Co., 418 F. App'x 305, 308 (5th Cir. 2011).
218. *Id.*
219. *Id.*
220. *Id.*

This case is a good example of the Fifth Circuit's attempt to hybridize existing approaches in order to both: one, mold a jurisdictional test that determines the "saltiness"[221] of a marine insurance umbrella policy and; two, to comply with the test handed down in *Kirby*. More importantly, this case illustrates the significance of the legal implications associated with litigating a contractual dispute before a court sitting in admiralty. In this case, the Port contested admiralty jurisdiction in order to avoid admiralty choice of law rules. This is the case as "under admiralty law, where the parties have included a choice of law clause, [the named] state's law will govern unless the state has no substantial relationship to the parties or the transaction or the state's law conflicts with the fundamental purposes of maritime law."[222] In the event the court did not have admiralty jurisdiction and was only sitting in diversity, the law of the state with the most significant contacts would have applied. In this case, Louisiana had the most significant contacts and would have applied, and, because Louisiana law prohibited the inclusion of choice-of-law clauses that apply non-Louisiana law to an insurance policy issued or delivered in the state, the New York choice of law clause would have been invalid. In short, had the court not exercised admiralty jurisdiction, the notice of occurrence provision would have been interpreted according to Louisiana law, which requires a showing of prejudice, rather than New York law, which does not require a showing of prejudice, to hold a policy void for late notice of occurrence. This difference would have changed the entire outcome of the case. Finally, in addition to illustrating the Fifth Circuit's jurisdictional approach to mixed contracts and further illustrating the implications of such a designation, this case is an excellent display of the virtue of the Second Circuit's threshold inquiry into the subject matter of the dispute. Here a court sitting in admiralty decided a case involving insurance coverage for a land-based injury. This is anomalous and inappropriate. Had the Court utilized the Second Circuit approach, this anomalous result would not have been the case. So, while this does not necessarily present any new doctrine, this is a didactic case insofar as it illustrates the consequences of litigating a coverage dispute over an umbrella policy before a court sitting in admiralty.

iv. The Ninth Circuit: Sentry Select Insurance Co. v. Royal

221. Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961).

222. St. Paul Fire & Marine Ins. Co. v. Bd. of Comm'rs of Port of New Orleans, 646 F. Supp. 2d 813, 819 (E.D. La. 2009) (quoting Stoot v. Fluor Drilling Servs., Inc., 851 F.2d 1514, 1517 (5th Cir. 1988)).

Insurance Co. of America

Unlike the Second Circuit, the Sixth Circuit, or the Fifth Circuit, the Ninth Circuit utilizes a holistic "all encompassing"-type approach; rather than focusing on the policy coverage or the interests insured, the Court looks at the entire policy to determine if the primary or "principal objective of [the] contract [was] maritime commerce."[223] This approach is surprisingly similar to the Fifth Circuit's approach to determining the "saltiness"[224] of a master service agreement as embodied in *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*. However, when applied to marine insurance umbrella policies, this approach is untenable and essentially makes the court's admiralty jurisdiction discretionary in that it allows the court to look at the entire contract (without enunciating factors or specific waypoints) and decide whether it *feels* "salty" enough to exercise admiralty jurisdiction.

The dispute in *Sentry Select Insurance Co. v. Royal Insurance Co. of America*, came about as a result of a coverage dispute regarding an excess/umbrella policy and a shore-side injury.[225] The insurance coverage dispute involved an accident, which happened on land during the transfer of a prefabricated house to a remote construction site.[226] Kelly-Ryan, a Seattle, Washington based construction company, was in the business of shipping prefabricated houses from Washington to Alaska, where Kelly-Ryan then installed the houses in Native Alaskan villages pursuant to a contract with the federal government.[227] Kelly-Ryan transported the prefabricated houses from Washington to Alaska by barge, and upon arrival to Alaska, Kelly-Ryan then transferred the houses from the barges to "house movers," which were used to transport the houses to their final construction site, where Kelly-Ryan would install the houses.[228] On one shipment, "a maritime employee of Kelly-Ryan working on the tugboat . . . was electrocuted while he was helping a Kelly-Ryan shore-based crew deliver a prefabricated house to a building site located approximately one and a half miles from the shore."[229]

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223. Sentry Select Ins. Co. v. Royal Ins. Co. of Am., 481 F.3d 1208, 1218 (9th Cir. 2007) (citations omitted).
224. *Kossick*, 365 U.S. at 742.
225. *Sentry Select Ins. Co.*, 481 F.3d at 1219.
226. *Id.* at 1212.
227. *Id.*
228. *Id.*
229. *Id.*

At the time of the accident, Kelly-Ryan had insurance coverage for its crewmembers and other vessel operations by way of a protection and indemnity (P&I) policy subscribed to by Sentry Select and Lloyd's.[230] In addition to the P&I coverage, Kelly-Ryan also had a shore-side employee-related injury liability coverage policy issued by Alaska National.[231] The Alaska National Policy was split into two parts. Part One included coverage for "Washington and Alaska State workers' compensation, unemployment, and disability claims, as well as claims under the Longshore and Harbor Workers' Compensation Act. . . . Part Two of the Alaska National policy, the employers' liability portion, provide[d] coverage for bodily injuries arising out of and in the course of employment, but exclude[d] 'any obligation imposed by workers compensation . . . law.'"[232] In addition to the above coverages, Kelly-Ryan had also obtained excess/umbrella coverage from Royal Insurance Company of America ("Royal") by way of Royal's "Big Shield" policy.[233] The "Big Shield policy provided excess coverage over Part Two of the Alaska National policy, Kelly-Ryan's automobile insurance, and Kelly-Ryan's Commercial General Liability ('CGL') policy with Alaska National."[234] However, the Big Shield policy did not provide excess coverage for claims covered "under Part One of the Alaska National policy or the P&I policies," nor did the policy cover workers' compensation due to an exclusion "excepting from coverage '[a]ny obligation of the insured under a workers compensation . . . law.'"[235] In addition to the "Big Shield" policy, Kelly-Ryan also

> obtained from Royal an Marine Employer's Liability (MEL) endorsement to Part Two of the Alaska National policy (employers' liability) and the Royal Big Shield policy. The MEL endorsement extended coverage for bodily injuries suffered by a 'master or member of the crew of any vessel' performing work 'necessary or incidental' to the following tasks: 'Painting and/or scraping of decks of tugs or barges, and loading and unloading as applicable in Washington and Alaska.'[236]

The MEL endorsement provided coverage for losses in excess of one million dollars.

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230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.* at 1212-13.

Following the accident and a failed attempt to file for workers compensation, the maritime employee filed suit under the Jones Act, and Kelly-Ryan and its P&I insurers ended up settling the maritime employee's claim for $5,276,630.47.[237]Kelly-Ryan and its P&I underwriters then brought action against Alaska National and later Royal, pursuant to the court's admiralty jurisdiction, seeking a declaration of coverage. Royal eventually moved for summary judgment arguing that, since the policy in controversy was a marine insurance contract and the suit was brought under the court's admiralty jurisdiction, general maritime law applied, and based on the doctrine of "*uberrimea fidei*,"[238] "the policy was void *ab inito* because Kelly-Ryan had failed to disclose that employees would be handling high-voltage power lines."[239] The District Court granted Royal's motion for summary judgment. On appeal, Kelly-Ryan challenged the court's admiralty jurisdiction and the applicability of *uberrimea fidei*.[240]

Prior to analyzing whether the contractual dispute satisfied the jurisdictional requirements for admiralty jurisdiction, the Court made it clear that either party (including the plaintiff) may attack subject matter jurisdiction at any point in the litigation as subject matter jurisdiction may not be waived nor may a party be estopped from raising it as an issue.[241] Having dispensed with the issue of whether Kelly-Ryan had waived subject matter jurisdiction or was estopped from raising it as an issue, the Court went onto do a mixed contract admiralty jurisdiction analysis. In regards to the ability of the Court to exercise admiralty jurisdiction over the contractual dispute itself, the Court noted that the umbrella policy was a mixed contract insofar as it provided some maritime and non-maritime coverage. In determining whether the court could exercise admiralty jurisdiction to hear the dispute, the Ninth Circuit Court of Appeals used an approach unlike any of the other Circuit Courts of Appeal. Unlike either the Second Circuit, the Sixth Circuit, or the Fifth Circuit, the Ninth Circuit Court of Appeals took an "all encompassing" view of the contract, and, rather than focusing on the

237. *Id.* at 1214.

238. Unlike the Fifth Circuit Court of Appeals, the First and Ninth Circuit Courts of Appeals have held that the doctrine of *uberrimea fidei* is a well-entrenched federal precedent, and failure to disclose material facts may have the effect of causing a marine insurance policy to be void. *See Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing and Marine Services, Inc.,* 974 F. Supp. 2d 64, 75 (1st Cir. 2015); *see also* Certain Underwriters at Lloyds, London v. Inlet Fisheries Inc., 518 F.3d 645 (9th Cir. 2008).

239. *Sentry Select Ins. Co.*, 481 F.3d at 1216.

240. *Id.*

241. *Id.* at 1216-17.

policy coverage or the interests insured, the Court looked at the entire policy holistically to determine if the "primary or principal objective of the contract is the establishment of policies of marine insurance."[242] In utilizing this holistic approach, the Court noted that the only maritime portion of the excess coverage provided by the "Big Shield" policy was that contained in the MEL endorsement.[243] The Court went on to explain that, while the MEL endorsement provided coverage for "bodily injury to a master or member of the crew of a vessel, the description of the work covered under the MEL" was "confined to the typical shore-side activities of '[p]ainting and/or scrubbing of decks of tugs or barges, and loading and unloading as applicable in Washington and Alaska.'"[244] As a result, given the totality of the contract, the excess policy's primary objective was not maritime commerce, and, as a result, the court did not have original admiralty jurisdiction to hear the dispute over the excess policy's coverage.[245]

As can be seen by the above brief explanation of *Sentry Select Insurance Co.*,[246] the Ninth Circuit lacks a definable test. Whereas the Ninth Circuit *sort of* determines the saltiness[247] of the contract using a "primary objective"-type test which *sort of* seeks to determine the scope of the contract by looking at coverages, the Court does not actually come up with a distinctive test that looks at concrete factors such as 1) the nature of the dispute, 2) the scope of coverage as is specified on the four corners of the policy, or even 3) interests insured. This is an altogether undesirable methodology because this approach makes it impossible to predict whether or not a court will exercise its admiralty jurisdiction.

V. CONCLUSION

The jurisdictional test handed down by the Supreme Court in *Norfolk Southern Railway v. Kirby*[248] should be limited in its application to mixed contracts involving multi-modal transportation and/or warehouse-to-warehouse marine open cargo policies. This is the case as these sorts of mixed contracts have objective geographically definable elements to them and the significance of maritime elements are apparent. Thus, the *Kirby* test is viable and provides practitioners and commercial men a

242. *Id.* at 1219.
243. *Id.* at 1219-20.
244. *Id.*
245. *Id.* at 1220.
246. *See also id.* at 1208.
247. *See* Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961).
248. Norfolk S. Ry. v. Kirby, 543 U.S. 14 (2004).

level of uniformity and predictability that is desirable in maritime commerce.

Moreover, *Kirby* may even be applied to a certain extent in determining whether a dispute over a master service agreement meets the jurisdictional requirements for admiralty jurisdiction. This is the case as the Fifth Circuit's "focus-of-the-contract test"[249] holistically looks to the gist of the contract to determine where a majority of the work was contemplated, and based on this finding, the court determines whether the contract is or is not a maritime contract justifying the exercise of its admiralty jurisdiction. Given the difficulty presented in applying the *Kirby* test to determine whether the court has admiralty jurisdiction over a mixed contract such as a master service agreement, a contract that lacks the spatial or geographic elements inherent in multi-modal transportation contracts and warehouse to warehouse marine cargo insurance policies, it appears that the Fifth Circuit approach is the best test for determining admiralty jurisdiction because the test focuses on the four corners of the contract to determine whether the maritime elements are significant enough to justify the exercise of admiralty jurisdiction by looking at where a majority of the work to be completed is contemplated. With this particular test, parties to the contract may very easily forecast whether a dispute will be subject to the court's admiralty jurisdiction and whether or not the parties to the contract will have access to, or must deal with, substantive law and procedural rules unique to admiralty.

Whereas the Fifth Circuit basically occupies the field with regard to admiralty jurisdictional analysis with regard to master service agreements, the jurisprudence regarding marine insurance umbrella policies is all over the map. This is the case because the *Kirby* jurisdictional test is completely inappropriate for more amorphous mixed contracts that lack an objective, geographically-definable element or some other overt objective element on which to focus, such as marine insurance umbrella policies. When it comes to marine insurance umbrella policies, it seems as though each circuit has its own jurisdictional test. Given this fact, the Courts have done an altogether inadequate job in formulating a cohesive and predictable rule or set of rules with which it determines what marine insurance contracts, that provide both sea-side and shore-side risk coverage, are sufficiently "salty"[250] to justify the exercise of admiralty jurisdiction for resolving controversies arising from such policies. Moreover, given the magnitude of the implications

249. Grand Isle Shipyard, Inc. v. Seacor Marine, LLC., 589 F.3d 778, 787 (5th Cir. 2009).

250. *Kossick*, 365 U.S. at 742.

associated with the exercise of admiralty jurisdiction in resolution contractual disputes, such as the use of general maritime law or the availability of procedural devices, the court has done the maritime industry a great disservice in its failure of the aforementioned.

When looking at the different approaches employed by the different circuits, it seems as though the Second Circuit approach makes the most sense. As a recap, the Second Circuit employs a two prong test, first inquiring into the nature of the dispute as a threshold inquiry, and then, only after satisfying itself that the underlying dispute was maritime, the court next determines the significance of the maritime elements of the policy by examining the actual coverages specified in the policy. This approach is arguably the best post-*Kirby* test employed by any of the Circuits because all insurance coverage disputes involve an underlying dispute, and the Second Circuit's threshold inquiry into the nature of the dispute ensures maritime issues are properly adjudicated as such. This threshold inquiry prevents odd and anomalous results. Moreover, even after the underlying dispute has been determined to be maritime, the court's second prong goes even further to ensure that the court accurately designates a particular policy as maritime or not by examining the policy coverage on the four corners of the document. So, as can be seen, the Second Circuit approach provides predictability through common sense and consequently also uniformity in the application of federal maritime law. This two prong jurisdictional test ensures maritime matters remain before a court sitting in admiralty and vice versa.

In summation, in pursuit of the overarching goal of uniformity in the application of admiralty jurisdiction and maritime law, the *Kirby* test should be limited in application to only those mixed contracts that have some definite and objective element upon which courts are able to focus, such as multi-modal transportation contracts, warehouse to warehouse marine cargo insurance policies, or master service agreements. Moreover, with regard to master service agreements or blanket contracts, if given the opportunity, the other circuits should adopt a test similar to that of *Grand Isle Shipyard, Inc.* as propagated by the Fifth Circuit. Finally, the multiplicity of jurisdictional tests associated with whether the courts may exercise admiralty jurisdiction in order to hear disputes arising out of marine insurance umbrella policies covering sea-side and shore-side risks is an undesirable result of *Kirby*, and the Supreme Court should resolve the disparate circuit split in favor of a test that is similar to that employed by the Second Circuit Court of Appeals.