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Rather than survey numerous recent maritime personal injury decisions, this article focuses on two recent cases that address the validity of contractual indemnity agreements covering personal injuries sustained by Outer Continental Shelf Lands Act (OCSLA) workers on "special purpose" vessels.

I. "SPECIAL PURPOSE" VESSELS AS OCSLA SITUSES

During 2002, the United States Court of Appeals for the Fifth Circuit rendered two important decisions regarding contractual indemnity claims related to maritime personal injuries sustained by offshore oilfield workers: *Demette v. Falcon Drilling Co., Inc.*[1] and *Diamond Offshore Co. v. A&B Builders, Inc.*[2]

In an attempt to clarify this complex area of the law, the *Demette* majority panel opinion interpreted the 1978 amendments to the OCSLA and established a new test to determine when a "special purpose" vessel, used by the oil and gas industry to develop and

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1. 280 F.3d 492, (5th Cir. 2002), *rehearing and rehearing en banc denied*, 2002 WL 1022097 (5th Cir. 2002). The panel vacated its earlier decision, *Demette v. Falcon Drilling Co., Inc.*, 253 F.3d 840 (5th Cir. 2001). The only difference in the new panel majority opinion was the deletion of footnote 52, which had provided:

> We do not imply that if Louisiana law did apply to this contract, it could invalidate the indemnity agreement. State law is incorporated as surrogate federal law by OCSLA only to the extent that it does not conflict with federal law. State law therefore could not invalidate indemnity agreements declared valid by the LHWCA. *See* 33 U.S.C.A. § 905(c); H.R. Conf. Rep. No. 98-1027, at 23 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2771, 2773 (stating that Section 905(c) "would preempt the application of state laws prohibiting such indemnity agreements").

Judge DeMoss also issued a new dissenting opinion, in which he added notes 1–4 and note 8, along with minor language changes material to support his argument that jacked-up rigs lose their vessel status. *Demette*, 280 F.3d at 516-17.

2. 302 F.3d 531 (5th Cir. 2002). The district court decision, rendered before *Demette*, relied upon the earlier en banc Fifth Circuit decision in *Mills v. Department of Labor*, 877 F.2d 356 (5th Cir. 1989). The Fifth Circuit remanded *Diamond Offshore* to the district court because the record contained no evidence indicating whether the semi-submersible rig was floating or attached to the OCS at the time of the underlying personal injury. *Diamond Offshore*, 302 F.3d at 551.

If *Diamond Offshore* returns to the Fifth Circuit, the opportunity to correct the flawed application of the *Demette* test may be presented to the en banc court.

produce mineral resources from beneath the Outer Continental Shelf of the United States (OCS), constitutes an OCSLA situs. It concluded that when a jack-up rig is jacked-up over the floor of the OCS, it has a dual status—it remains a vessel pursuant to the general maritime law, but it also constitutes an OCSLA situs.[3]

The effect of this conclusion is that while a special purpose vessel is "temporarily attached" to the seabed, reciprocal indemnity agreements between the vessel owner and a Longshore and Harbor Workers' Compensation Act (LHWCA) maritime employer are enforceable, pursuant to 33 U.S.C. § 905 (b).[4]

The dissenting judge in *Demette* issued a spirited opinion, arguing that a jack-up rig or any other "special purpose" oilfield vessel loses its status as a vessel while it is "attached" to the seabed of the OCS (during which time it would be legally identical to OCS fixed platforms). Presumably, the special purpose vessel would regain its vessel status when it is jacked-down and again floating on navigable waters. The dissenting judge's call for an en banc rehearing of *Demette* to adopt this position was not accepted.

The *Demette* majority panel decision has been subjected to scholarly criticism.[5] Despite the questionable statutory support for

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3. According to the Conference Committee report, the 1978 amendments were "technical and perfecting and meant to restate and clarify and not change existing law." H.R. Conf. Rep. 95–1474, 1978 U.S.C.C.A.N. 1674, Section 203—Laws Applicable to the Outer Continental Shelf.

4. 33 U.S.C. § 905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void . . . .

33 U.S.C. § 905(c) (1972):

> In the event that the negligence of a vessel causes injury to a person entitled to receive benefits under this Act by virtue of section 1333 of Title 43, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel in accordance with the provisions of subsection (b) of this section. Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this chapter by virtue of section 1333 of Title 43 and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

5. *See* David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits, Winter 2001*, 26 Tul. Mar. L. J. 193, 244–47 (2001) [hereinafter Robertson & Sturley, Winter]; *see also* David & Michael F. Sturley, *Recent Developments in*

the *Demette* reasoning, another Fifth Circuit panel in *Diamond Offshore* felt obliged to follow the *Demette* OCSLA situs test, following the rule that one panel cannot overrule or ignore an earlier panel's decision.[6]

In *Diamond Offshore*, the injured worker was aboard a semi-submersible drilling rig in navigable waters over the Outer Continental Shelf of the United States. The Fifth Circuit applied the new *Demette* OCSLA situs test but remanded the case to the district court for a hearing to obtain evidence about whether the semi-submersible drilling rig was anchored or was in transit at the time of the underlying personal injury. Presumably, if the semi-submersible drilling rig was anchored or otherwise simply in contact with the seabed, the Fifth Circuit will hold this vessel to be an OCSLA situs, if it applies the *Demette* OCSLA situs test without serious analysis.

The premise of this article is that the *Demette* OCSLA situs test for special purpose vessels is fundamentally flawed. Both the published criticisms of the *Demette* test, as well as this author's separate statutory objection, are discussed in greater detail later in this article. They suggest that the en banc Fifth Circuit may wish to review the *Demette* OCSLA situs test, if the *Diamond Offshore* case returns to it.

II. BACKGROUND OF THE OSCLA

To understand the context in which this issue arose, some background information is necessary. Near the end of World War II, oil production moved offshore into shallow water adjacent to several states. With rapidly improving technology, the oil industry developed the ability to locate and obtain oil and gas from beneath the seabed in deeper water, beyond the adjacent states' territorial boundaries. Initially, access to these subsurface oil and gas reserves was from fixed platforms erected on the seabed.

At that time, the United States had not established sovereignty over the seabed and the buried resources beyond state territorial waters. A Presidential Proclamation and U.S. Supreme Court rulings initially established federal sovereignty over the Outer Continental Shelf and the subsurface mineral resources.[7]

Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits, Summer 2003, 27 Tul. Mar. L .J. 495, 574 (2003) [hereinafter Robertson & Sturley, Summer].

6. *Diamond Offshore*, 302 F.3d at 551 (citing United States v. Ruiz, 180 F.3d at 676 (5th Cir.1999).

7. H.R. Rep. No. 95–570, 56–57 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1463–64.

In 1953, Congress enacted the OCSLA to establish the law governing conduct on the Outer Continental Shelf, which by then was an area of intense activity that lacked an established legal system because it was beyond state territorial boundaries. Congress enacted the OCSLA "to define a body of law applicable to the seabed, the subsoil, and the fixed structures . . . on the Outer Continental Shelf."[8] Congress made non-maritime federal law applicable to the subsoil, seabed, and platforms.[9] In the event no federal law existed on a particular issue, Congress elected to borrow the adjacent state's law as surrogate federal law.[10] It considered, and specifically rejected, the idea that federal maritime law would be adequate for those needs.

Thus, the OCSLA is a gap-filling statute, initially designed to apply federal law to fixed structures that were erected on the OCS for the purpose of developing and producing oil and gas and that were not covered by either maritime law or state law.[11]

Between 1953 and 1978, the oil and gas industry created a variety of "special purpose" vessels, including jack-up rigs[12] and semi-submersible rigs,[13] from which the exploration, development and production of oil and gas from the OCS could be performed. The courts have consistently treated these floating special purpose drilling rigs as vessels in navigation, governed by the general maritime law, even though only a small portion of their time is spent moving from location to location.[14]

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8. Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 355, 89 S. Ct. 1835, 1837 (1969); 43 U.S.C. § 1333(a) (1984).

9. *Id.* at 355–56, 89 S. Ct. at 1837.

10. *Id.*, 89 S. Ct. at 1837; 43 U.S.C. § 1333(a)(2)(A) (1984).

11. Mills v. Dir., Office of Workers' Comp., 877 F.2d 356, 358 (5th Cir. 1989) (en banc).

12. A jack-up rig has long legs that are lowered to the seabed. The drilling floor (and hull) are "jacked-up" on those legs high above the storm height of cresting waves. Ron Baker, A Primer of Oilwell Drilling 166 (Petroleum Extension Service, University of Texas 5th ed. 1996).

13. A semi-submersible drilling rig is a movable floating rig. Typically, it is towed to a location, where it is submerged about fifty feet and then anchored in place to complete the mooring of the rig. The rig's platform deck is supported on columns which are attached to large underwater displacement hulls, large vertical caissons, or some combination of both. The columns, displacement hulls, or caissons are flooded on location. Thomas J. Schoenbaum, 1 Admiralty and Maritime Law § 3–9, at 108 n.8 (3d ed. 2001) (describing semi-submersible rigs and other rigs); Howard R. Williams & Charles J. Meyers, Manual of Oil and Gas Terms 996 (11th ed. 2000) (defining semi-submersible rig).

14. *See* Offshore v. Robison, 266 F.2d 769 (5th Cir.1959) (approved in principle by the Supreme Court in McDermott Int'l v. Wilander, 498 U.S. 337, 111 S. Ct. 807 (1991)). *See also* Colomb v. Texaco, 736 F.2d 218, 221 (5th Cir. 1984), collecting cases holding that crew members aboard drilling and other special purpose vessels are seamen as a matter of law.

For a variety of reasons, the OCSLA was amended in 1978.[15] These amendments form the basis of the controversy concerning the status of "special purpose" vessels as OCSLA situses. The applicable portion of the OCSLA, as amended, provides:

> 43 U.S.C. § 1333. Laws and regulations governing lands
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> (a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction.
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> (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however*, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.
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> (2) (A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by

15. *See* H.R. Conf. Rep. 95–1474 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1674.

> the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.
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> * * *
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> (b) Longshore and Harbor Workers' Compensation Act applicable; definitions
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> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act [33 U.S.C.A. § 901 et seq.]. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section–
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> (1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;
> (2) the term "employer" means an employer any of whose employees are employed in such operations; and
> (3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

The 1978 amendments to the OCSLA changed § 203(a), by substituting "and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources," for "and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom." § 203(b) was not amended.[16]

In general, the OCSLA: (1) applies federal law to certain structures and devices located on the Outer Continental Shelf; (2) applies the LHWCA as the worker's compensation law applicable to covered OCSLA workers; (3) when not in conflict with federal law,

16. 43 U.S.C. §§ 1333, 203(a), 203(b).

incorporates the laws of the state adjacent to the OCSLA situs as surrogate federal law; and (4) exempts Jones Act seamen from its coverage.[17]

III. UNITED STATES SUPREME COURT DECISIONS

The United States Supreme Court has rendered two key opinions addressing the substantive law applicable to OCSLA workers killed or injured on, or while in transit to or from, fixed platforms on the OCS.[18] In *Rodrigue,* the Court held that for federal law to oust the adopted adjacent state law as surrogate federal law, the federal law must first apply.[19] Congress expressly decided that OCSLA fixed platforms constitute "artificial islands," as to which admiralty jurisdiction and substantive maritime law do not apply.[20] Thus, the OCSLA ousts maritime law. In *Rodrigue*, Louisiana law, as the adjacent state's law, was applied as surrogate federal law pursuant to 43 U.S.C. §1333(a)(2).

In *Offshore Logistics v. Tallentire,*[21] the Court held that OCSLA coverage is primarily based on the location of the injury-producing event and that the OCSLA does not provide a non-maritime remedy for fatal accidents that occur on the high seas while OCSLA workers were being transported to shore.[22]

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17. 43 U.S.C. § 1333 (1984).

18. *Rodrigue,* 395 U.S. 352, 89 S. Ct. 1835; *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 106 S. Ct. 2485 (1986).

19. *Id.* at 359–66, 89 S. Ct. at 1839–42.

20. Accidents on the artificial islands covered by OCSLA "had no more connection with the ordinary stuff of admiralty than do accidents on piers." *Rodrigue,* 395 U.S. at 360, 89 S. Ct. 1839. *See also* Herb's Welding, Inc. v. Gray, 470 U.S. 414, 422, 105 S. Ct. 1421, 1426, (1985).

21. 477 U.S. 207, 217–18, 106 S. Ct. 2870, 2491–92 (1986).

22. In *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S. Ct. 2870 (1981), the Court considered and rejected the claim that federal courts had exclusive jurisdiction over a personal injury claim arising from an incident, not on the fixed platform, but on boats in the waters immediately adjacent to the platforms.

In *Tallentire*, the Court explained that the "character of the decedents as platform workers who have a special relationship with the shore community simply has no special relevance to the resolution of the question of the application of OCSLA to this case." Neither *Rodrigue* nor *Gulf Offshore* endorsed:

> the proposition that it is the decedent's status or his special relationship with the shore that required the application of OCSLA, regardless of the location of the accident. Indeed, no question was even raised in *Gulf Offshore* regarding whether OCSLA applied to an accident aboard a vessel adjacent to the platform. Moreover, the facts of these cases make clear that OCSLA was presumed applicable not because of the status of the decedents but because of the proximity of the workers' accidents to the platforms and the fact that the fatalities were intimately connected with the decedents' work on the platforms.

The new *Demette* OCSLA situs test arose out of a claim for contractual indemnity for a personal injury sustained by a non-seaman OCSLA worker aboard a "jacked-up" Falcon drilling rig. Further background information is necessary before the contractual indemnity issues present in *Demette* are examined.

IV. RESTRICTIONS ON THE VALIDITY OF CONTRACTUAL INDEMNITY PROVISIONS

To determine the validity of contractual indemnity claims arising out of personal injuries sustained by offshore workers, courts must determine what substantive law applies to the contract. Of the potentially applicable laws that may affect the validity of indemnity provisions in oilfield contracts for work performed on the OCS, conflicts exist between (1) the general maritime law, (2) the Longshore and Harbor Workers' Compensation Act (LHWCA), and (3) the laws of some states adjacent to the offshore situs of the personal injury. The general maritime law applies to vessels operating in navigable waters. It has no blanket prohibition against indemnity agreements.[23]

The LHWCA has two provisions applicable to contractual indemnity claims, 33 U.S.C. § 905(b) and 33 U.S.C. § 905(c).[24] The 1972 amendments to the LHWCA added § 905(b), which, among other things, invalidates any direct or indirect indemnity agreement from a covered maritime employer to a vessel owner or operator. The 1984 amendments to the LHWCA added § 905(c), which provides that notwithstanding § 905(b), when the injured worker is entitled to receive LHWCA benefits "by virtue of the OCSLA," a reciprocal indemnity agreement between the maritime employer and a vessel owner or operator is valid.

Most of the OCS exploration, development, and production of oil and gas in the United States occurs off the coasts of Texas and Louisiana. Both of these states are in the jurisdiction of the Fifth

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> We do not interpret § 4 of OCSLA, 43 U.S.C. § 1333, to require or permit us to extend the coverage of the statute to the platform workers in this case who were killed miles away from the platform and on the high seas simply because they were platform workers. Congress determined that the general scope of OCSLA's coverage, like the operation of DOHSA's remedies, would be determined principally by locale, not by the status of the individual injured or killed.

Tallentire, 477 U.S. at 218–20, 106 S. Ct. at 2492–93.

23. Indemnity agreements are valid under maritime law. *See* Lefler v. Atlantic Richfield Co., 785 F.2d 1341, 1343 (5th Cir.1986); Angelina Cas. Co. v. Exxon Corp., 876 F.2d 40 (5th Cir. 1989).

24. 33 U.S.C. 905(b), 33 U.S.C. § 905(c) (for the text of these sections see *supra* note 4).

Circuit.[25] Each state has enacted legislation that invalidates certain contractual provisions that otherwise would allow an oil company to be indemnified by its contractors.[26]

The task of determining which body of substantive law applies to determine the validity of a contractual indemnity provision in a contract for oilfield work performed on the OCS can be daunting. While the substantive law regulating the tort liability for the underlying personal injury claim is primarily determined by the location of the injury-producing incident,[27] the applicable law regarding the validity of contractual indemnity provisions turns in part on whether the contract is a maritime contract, a mixed contract or a non-maritime contract. That determination is based on the subject matter of the contract, not necessarily by the place of its performance.[28]

A contract falls within the admiralty jurisdiction (and thus is regulated by the substantive maritime law) if the nature and character of the contract are maritime, meaning that the contract relates to a maritime service or a maritime transaction.[29] However, many oilfield contracts contain both maritime and non-maritime elements. These "mixed contracts" require additional analysis.

As a general rule, a contract "will not be within the admiralty jurisdiction unless it is wholly maritime."[30] There are two judicially-recognized exceptions to this rule. First, if the non-maritime elements of the contract are incidental to, and not separable from, the maritime elements, admiralty jurisdiction will apply to the entire claim.[31] Second, if the non-maritime elements are separable from the maritime elements, so that they may be litigated separately without

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25. *See* Thomas M. Kratochvil, *The Hypothetical Treatment of a Wrongful Death Claim in the Demise of an Oil Service Company Worker Aboard a Drilling Vessel on the United States Outer Continental Shelf,* 48 Loy. L. Rev. 755, 778 n.96.

26. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 127.001–127.007 (Vernon 1997); La. R.S. § 9:2780(B).

27. Whether a personal injury claim falls within the admiralty jurisdiction depends in part on the location of the injury-producing incident on navigable waters or whether injury suffered on land was caused by a vessel on navigable waters and the incident's connection with maritime activity. The connection test has two components. Using an intermediate level of possible generality, the court must determine: whether the general features of the type of incident has a potentially disruptive impact on maritime commerce and whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 538, 540, 115 S. Ct. 1043, 1050–51 (1995).

28. *See* Schoenbaum, *supra* note 13, at § 3–10.

29. *See* 1 Steven F. Friedell, Benedict on Admiralty § 182, n.33, § 181, at 12–2. (7th ed. 2002).

30. *Id.* § 183 at 12–10, n.33.

31. *Id.*

prejudice to either party, admiralty jurisdiction will apply to the separable maritime element.[32] However, if the non-maritime elements of the contract are both significant and inseparable, federal courts will not exercise admiralty jurisdiction.[33]

To summarize, a maritime contractual indemnity provision is valid and enforceable if it is not barred by some other statutory provision. The only two potentially applicable statutory provisions that could invalidate a contractual indemnity obligation in the context of offshore oilfield workers are § 905(b) of the LHWCA [which invalidates any indemnity agreement from a covered maritime employer in favor of a vessel owner or operator] or the law of an adjacent state, as surrogate federal law under the OCSLA. However, § 905(c) of the LHWCA provides that when a worker is entitled to LHWCA benefits by virtue of the OCSLA (33 U.S.C. §1333(b)), § 905(b) of the LHWCA does not invalidate a reciprocal indemnity agreement between a maritime employer and a vessel owner or operator.

V. *DEMETTE V. R.B. FALCON USA, INC.*

Demette v. R.B. Falcon USA, Inc. involved the validity of a reciprocal indemnity agreement between a maritime employer and a vessel owner.[34] The underlying personal injury occurred aboard a jack-up drilling rig owned by Falcon, while the rig was jacked-up on the OCS off the coast of Louisiana.[35]

A reciprocal indemnity agreement existed between Falcon (the rig operator) and the maritime employer, Frank's Casing & Crew Rental Tools (Frank's), by which each agreed to be responsible for damages resulting from negligent injuries to their own employees.[36]

The injured plaintiff (Kermit Demette), a Frank's employee, sued the rig operator, Falcon, pursuant to § 905(b) of the LHWCA.[37] The rig operator filed a third-party demand against the maritime employer (Frank's) to enforce the contractual indemnity agreement. After the district court granted summary judgment to the rig operator, upholding the indemnity and defense agreement, Frank's agreed to fund a settlement with Demette and to pay the rig operator's costs of defense. However, Frank's reserved its appeal rights.[38] Frank's challenged the validity of its contractual indemnity obligations, based

32. *Id.*
33. *Id.*
34. Demette v. Falcon Drilling Co., 280 F.3d 492, 495 (5th Cir. 2002).
35. *Id.*
36. *Id.*
37. *Id.* at 494.
38. *Id.* at 495.

on the Louisiana oilfield anti-indemnity statute, La. Rev. Stat. 9:2780(B), and on the anti-indemnity provision of § 905(b) of the LHWCA.[39]

Purporting to apply the 1978 amendments to the Outer Continental Shelf Lands Act, the Fifth Circuit established a new procedure for determining when the OCSLA applies to contractual indemnity claims arising out of personal injuries sustained by workers aboard "special purpose vessels."[40] The *Demette* panel majority concluded that the jacked-up drilling rig maintained its status as a vessel.[41] As such, general maritime law applied of its own force, precluding the applicability of La. Rev. Stat. 9:2780(B), pursuant to 43 U.S.C. § 1333(a)(2)(A), which precludes the adoption of state law that is "inconsistent . . . with Federal laws."[42] The panel majority opinion held that maritime law was the "Federal law" that prevented the application of the Louisiana Oil Anti-Indemnity Statute.[43]

In an unusual twist, based on the fact that the jacked-up drilling rig was "temporarily attached to the seabed of the OCS," the panel majority determined that the 1978 amendments to the OCSLA compelled the conclusion that the jacked-up rig was simultaneously a "vessel" governed by maritime law and an OCSLA situs.[44] This "dual capacity" legal status for a single "artificial island, and installation or and other device" is unique to this case and cannot easily be reconciled with the language of the OCSLA or the jurisprudence interpreting that statute (either before or after the 1978 amendments).

The panel majority rejected the maritime employer's claim that the contractual indemnity provision was invalid pursuant to § 905(b) of the LHWCA, holding that as the jacked-up rig was an OCSLA situs, § 905(c) of the LHWCA was the applicable provision.[45] It also rejected the maritime employer's contentions that § 905(c) could only apply when the sole basis for LHWCA coverage was 33

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39. *Id.* at 494.
40. *See supra* note 4.
41. *Demette*, 280 F.3d at 498.
42. *Id.* at 502.
43. Recall that in *Rodrigue*, the U. S. Supreme Court held that maritime law has no application to OCSLA fixed platforms, therefore maritime law could not oust the contrary provisions of an adjacent state's law that was adopted as surrogate federal law, pursuant to 43 U.S.C. § 1333(a)(2)(A). Contrary to the panel majority opinion's assertion that the 1978 amendment to § 1333(a)(1) "creates a 'situs' requirement for the application of other sections of the OCSLA," *Id.* at 496, neither the language of the 1978 amendments, the cases cited in notes 9 and 10 (*Tallentire* and *Mills v. Director, OWCP*, 877 F.2d 356, 361–62 (5th Cir. 1989) (en banc), nor the legislative history support that statement.
44. *Id.* at 500–02.
45. *Id.* at 502–03.

U.S.C. § 1333(b) and that as Demette was also covered by the LHWCA by its own force, § 905(b) of the LHWCA voided its contractual indemnity obligation.[46]

A. Analysis of the Demette *Opinion*

It is respectfully submitted that both the panel majority opinion and the dissent in *Demette* improperly interpreted the 1978 amendments to the OCSLA. The panel majority could have upheld the reciprocal indemnity agreement pursuant to § 905(c) of the LHWCA, without the necessity of creating the flawed conclusion that the jacked-up vessel simultaneously can be a vessel governed by the general maritime law and an OCSLA situs governed by the OCSLA.

Section 905(c) of the LHWCA validates reciprocal indemnity agreements between vessel owners and maritime employers, when the injured employee is entitled to recover LHWCA benefits pursuant to §1333(b) of the OCSLA. As noted by Professors Robertson and Sturley,[47] the 1978 amendments to the OCSLA did not amend §1333(b) of the OCSLA to impose a situs requirement:

> The notion that §1333(b)—allowing OCSLA workers who are not seamen to receive benefits according to the LHWCA—has the same 'situs' criteria as §1333(a)(1) is challenged by the language of §1333(b)—as to 'situs.' It is far broader than that of §1333(a)(1). 43 U.S.C. §1333(b) provides in pertinent part:
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> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the [LHWCA].

The notion that §1333(b) is limited by the 'situs' description in §1333(a)(1) is also challenged by *Offshore Logistics, Inc. v. Tallentire*[48] and by *Green v. Industrial Helicopters, Inc.*[49]

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46. *Id.* This point has been followed in *Sumrall v. Ensco Offshore Co.*, 291 F.3d 316 (5th Cir. 2002) and in *Diamond Offshore*, 302 F.3d 531.

47. *See* Robertson & Sturley, Winter, *supra* note 5, at 245–49.

48. 477 U.S. 207, 219 n.2, 106 S. Ct. 2485, 2493 n.2 (indicating, obliquely, that the decedents in that case, who fell outside the coverage of § 1333(a)(1) and § 1333(a)(2) because they died miles from any platform or other outer continental

The dissenting judge in *Demette* argued that, pursuant to the 1978 amendments to the OCSLA, jacked-up rigs temporarily attached to the seabed lose their status as "vessels" and must be treated in the same fashion as the fixed platforms discussed in *Rodrigue v. Aetna*.[50] Under that theory, the contractual indemnity provision would have been invalidated by Louisiana Revised Statutes § 9:2780(B). The dissenting opinion was justifiably criticized for its failure to recognize that the statutory basis for the *Rodrigue* decision was 33 U.S.C. § 1333(a)(2) (which was not amended in 1978), rather than 33 U.S.C. § 1333(a)(1).[51]

The strongest support for the dissent's position lies in the quoted portions of the House Committee Report.[52] However, that quoted language from that 1977 House Committee Report conflicted with the language of a later House Conference Report.[53] The panel majority opinion correctly rejected the dissent's attempt to use legislative history to counter the statute's plain language.[54]

B. Statutory Flaw in the Demette *OCSLA Situs Test for "Special Purpose" Vessels*

In addition to the scholarly disagreements with the *Demette* OCSLA situs test discussed above, the author of this article submits that an additional flaw exists in the Fifth Circuit's application of its

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shelf (OCS) fixture were nevertheless covered by § 1333(b)).

49. 593 So. 2d 634, n.5 (La. 1992) (indicating that OCS workers who died in a helicopter crash on the shelf, but distant from any platform or other OCS fixture, were covered by § 1333(b)).

50. 395 U.S. 352, 89 S. Ct. 1835.

51. Robertson & Sturley, Winter, *supra* note 5, at 245–46.

52. House Committee Report No. 95–590 on this legislation states the following in the section-by-section analysis:

> *Section 203.—Laws Applicable to Outer Continental Shelf*
> Section (a) amends section 4(a)(1) of the OCS Act of 1953 by changing the term "fixed structures" to "and all installations and other devices permanently or temporarily attached to the seabed" and making other technical changes. It is thus made clear that Federal law is to be applicable to all activities on all devices in contact with the seabed for exploration, development, and production. *The committee intends that Federal law is, therefore, to be applicable to activities on drilling ships, semi-submersible drilling rigs, and other watercraft, when they are connected to the seabed by drillstring, pipes, or other appurtenances, on the OCS for exploration, development, or production purposes.* Ships and vessels are specifically not covered when they are being used for the purpose of transporting OCS mineral resources.

H.R. Rep. No. 95–590 (1978) (emphasis added).

53. H.R. Rep. No. 95–1474, at 80–82, 1978 U.S.C.C.A.N.1674, at 1679–81.

54. *Demette*, 28 F.3d 492, 503–04 (5th Cir. 2002). *See* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450, 122 S. Ct. 941, 950 (2002).

new *Demette* OCSLA situs test. In establishing a test for determining which installations and devices constitute OCSLA situses, the *Demette* panel majority opinion improperly limited its focus on whether the special purpose vessel was "permanently or temporarily 'attached'" to the seabed at the time of the underlying injury that produced the contractual indemnity claim.[55]

Demette restated this statutory provision into the following test:

> The OCSLA applies to all of the following locations:
> (1) the subsoil and seabed of the OCS;
> (2) any artificial island, installation, or other device if
> (a) it is permanently or temporarily attached to the seabed of the OCS, and
> *(b) it has been erected on the seabed of the OCS, and*
> (c) its presence on the OCS is to explore for, develop, or produce resources from the OCS;
> (3) any artificial island, installation, or other device if
> (a) it is permanently or temporarily attached to the seabed of the OCS, and
> (b) it is not a ship or vessel, and
> (c) its presence on the OCS is to transport resources from the OCS.[56]

As applied by the *Demette* court, this OCSLA situs test fails to accord a different meaning to the statutory requirement that, in addition to an artificial island, installation or other device being permanently or temporarily *attached* to the seabed, the artificial island, installation or device must have been "*erected* [on the seabed] for the purpose of exploring for, developing, or producing resources."[57]

The clear language of 33 U.S.C. § 1333(a)(1) demonstrates that the "erected"clause is a separate OCSLA situs requirement. That

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55. 43 U.S.C. § 1333(a)(1) provides:

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the Outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however*, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(emphasis added).

56. *Demette*, 280 F.3d 492, 497 (emphasis added).

57. *Id.*

"erected" requirement was not affected by the 1978 amendments to that section of the OCSLA.

VI. *DIAMOND OFFSHORE V. A&B BUILDERS*

As noted above, *Diamond Offshore v. A & B Builders,* another contractual indemnity claim arising out of the use of a different type of "special purpose" vessel, reached the Fifth Circuit in 2002.[58] This case constitutes the most recent discussion by the Fifth Circuit concerning contractual indemnity provisions in OCSLA oilfield contracts.

The injured worker, an employee of A&B Builders, Inc. claimed that he sustained personal injuries while he was performing repair services on a semi-submersible drilling rig[59] owned by Diamond. Like *Demette,* both companies had entered into contracts containing reciprocal indemnity provisions. The issue as presented to the court is whether the semi-submersible drilling rig constitutes an OCSLA situs.

The district court decision, rendered before *Demette,* relied upon the earlier en banc Fifth Circuit decision in *Mills v. Department of Labor.*[60] The Fifth Circuit reversed and remanded the *Diamond Offshore* case to the district court because the record contained no evidence indicating whether the semi-submersible rig was floating or attached to the OCS at the time of the underlying personal injury.[61]

As noted in this article, the proper inquiry should be whether the injured worker is entitled to receive LHWCA benefits from his employer pursuant to § 1333(b) of the OCSLA. If so, § 905(c) of the LHWCA will permit enforcement of the reciprocal indemnity agreement as a matter of law. It should be unnecessary to have to introduce evidence concerning whether the semi-submersible drilling rig was a *Demette* OCSLA situs in order to obtain the benefit of § 905(c) of the LHWCA.

However, if all panels in the Fifth Circuit must attempt to apply the *Demette* test in cases involving reciprocal indemnity agreements in contracts for oilfield work over the OCS, it is difficult to anticipate how a floating semi-submersible drilling rig can be "erected" on the seabed of the OCS.

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58. 302 F.3d 531.
59. Described in note 13, *supra.*
60. 877 F.2d 356 (5th Cir. 1989).
61. *Diamond Offshore,* 302 F.3d at 551.

VII. CONCLUSION

Applying the OCSLA to a jacked-up drilling rig whose legs are temporarily attached to the seabed of the OCS and/or to anchored, floating semi-submersible drilling rigs is inconsistent with the second prong of the current OCSLA situs provision, *i.e.*,: (1) that the installation or device be permanently or temporarily "attached" to the seabed; and (2) that the installation or device be "erected" on the seabed for the purpose of exploring for, developing or producing reserves. Moreover, such a factual determination should not be necessary in order to trigger the § 905(c) provision of the LHWCA, which allows reciprocal indemnity agreements to be enforced. The Fifth Circuit should jettison the *Demette* test at its earliest convenience.