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ADMIRALTY & MARITIME BRIEF

FIFTH CIRCUIT CLARIFIES AND REITERATES ITS STANDARD FOR "COURSE AND SCOPE OF EMPLOYMENT" UNDER JONES ACT

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The U.S. Fifth Circuit recently issued its ruling in *Beech v. Hercules Drilling Co.*, No. 11-30415, 2012 WL 3324283 (5th Cir. Aug. 14, 2012), clarifying its standard for finding an employer vicariously liable for the actions of its employees under the Jones Act. In doing so, the Fifth Circuit reversed a ruling by Judge Carl Barbier of the U.S. District Court for the Eastern District of Louisiana which found that the co-employee of a Jones Act plaintiff was acting in the course and scope of his employment when he accidentally shot and killed the plaintiff on the Jones Act employer's jack-up rig.

Michael Cosenza and Keith Beech were both Hercules employees working aboard the HERCULES 101, a jack-up drilling rig. When Cosenza boarded the rig, he realized that he "accidentally" brought a firearm with him, which was a direct breach of company policy. He hid the firearm from sight and did not report it to anyone, which constituted another breach of company policy. On December 13, 2009, Cosenza was assigned to work the night shift and was the only crewman on duty. His duties that night were to monitor the rig's generator, to check certain equipment, and to report any suspicious activity or problems. Hercules encouraged Consenza to stay in the break room while he performed these duties, watching television and commiserating with fellow crew members. Beech, who was "on call" but not "on duty," was talking and watching television with Cosenza in the break room at the time of the accident. At some point during the night shift, thinking Beech would be interested, Consenza retrieved the gun to show to Beech, who inspected the gun, but did not handle it. As Consenza sat back down in the break room, the gun accidentally discharged when Consenza's arm bumped a part of the couch. The bullet struck Beech, fatally wounding him.

Beech's surviving spouse and son brought a wrongful death suit against Hercules under the Jones Act. After a bench trial, Judge Barbier rendered a verdict in favor of the plaintiffs, awarding $1.2MM. *See Beech v. Hercules Drilling Co.*, 786 F.Supp.2d 1140 (E.D. La. 2011). Hercules appealed, arguing that Consenza was not in the course of scope of his employment. The Fifth Circuit reversed and entered a judgment in favor of Hercules.

The case turned on the meaning of "in the course of employment" and whether the standard for making that determination included a consideration of the employer's business interests. On appeal, Hercules argued that Consenza's act of showing off his gun did not further Hercules' business interests, and because it was in no way related to his job duties, he was not acting within the course and scope of his employment at the time of the accident. The plaintiffs urged that Consenza's actions at the time that the gun discharged, *i.e.*, the act of sitting on the couch, were within the course of scope of his employment because Hercules encouraged its employees working the night shift to sit on the couch and watch T.V.

First, the Fifth Circuit reviewed and compared its previous ruling in *Stoot v. D & D Catering Serv., Inc.*, 807 F.2d 1197, 1199 (5th Cir. 1987) (incorporating the employer's business interests in the standard) and the Sixth Circuit's more expansive ruling in *Baker v. Baltimore & Ohio R.R. Co.*, 502 F.2d 638 (6th Cir. 1974) (finding it unnecessary to show that the negligent employee was acting in furtherance of the employer's business). Plaintiffs argued - as Judge Barbier had ruled - that *Stoot* is distinguishable because it involved an intentional tort. The Fifth Circuit disagreed and clarified "that regardless of whether the underlying injurious conduct was negligent or intentional, the test for whether a Jones Act employee was acting within the course and scope of his employment is **whether his actions at the time of the injury were in furtherance of his employer's business interests**." (emphasis added). A review of the employer's safety policy "gives guidance regarding what employee conduct furthers [the employer's] business interests." The Circuit Court then reevaluated the facts of the case and found that Consenza was not within the course and scope of his employment and consequently, entered a judgment in favor of Hercules.

This ruling, if nothing else, clarified the Fifth Circuit's standard for the determination of "course and scope of employment" under the Jones Act. The standard adopted by the Court also reaffirmed its holding in *Stoot* and pointed out that the majority of other Federal Circuits have similar standards.

DOES THE DEEP WATER ROYALTY RELIEF ACT AFFECT THE CALCULATION OF OVERRIDING ROYALTIES? THE U.S. FIFTH CIRCUIT MAY DECIDE THIS ISSUE SOON

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The overriding royalty interest (commonly known as "ORRI") is prevalent in the oil and gas industry. A party who obtains an ORRI in a lease will receive a set percentage of the production that is obtained from the lease. The lease between the landowner and the lessee usually reserves an ORRI to the landowner as compensation for granting the lease, and the lease also specifically describes how that ORRI will be calculated.

Since the Outer Continental Shelf ("OCS") off the coast of the United States is owned by the U.S. government, parties wishing to drill for oil and gas on the OCS are required to obtain those leasing rights from the U.S. government. Pursuant to federal regulation, the U.S. government, as lessor, receives a set royalty on all production that is obtained from an OCS lease.

Other parties besides the landowner can obtain ORRI's. For instance, an investor may contribute funds towards the project in the hopes that the lease will be productive. Also, a geologist may perform surveys of a lease and receive an ORRI as compensation. Or, the lessee may wish to reduce its risk and capital outlay by sub-letting the drilling operation to another entity. In these instances, the ORRI is created by way of an agreement separate and apart from the lease between the landowner and the lessee. Oftentimes those ORRI agreements will state that the ORRI it grants "shall be calculated and paid in the same manner and subject to the same terms and conditions as the landowner's royalty under the lease." Ordinarily, that language makes calculating *everyone's* (the landowner and any investors) ORRI a matter of simple mathematics.

However, if the lease is on the OCS, *depending upon when the lease was issued,* the Deep Water Royalty Relief Act ("DWRRA") can reduce or limit the U.S. government's royalty on the lease's production. If a party obtains an ORRI in an OCS lease pursuant to an ORRI agreement that states that the ORRI is calculated in the "same manner and subject to the same terms and conditions as the landowner's royalty," does this mean that the party's ORRI is also subject to the DWRRA?

In *Total E&P USA, Inc. v. Kerr-McGee Oil & Gas Corp.*, 2010 WL 5207591 (E.D. La. Dec. 14, 2010), that was the issue before the Court. In that case, the U.S. government granted Total a lease covering a specified portion of the OCS.[1] Total then granted Kerr-McGee an ORRI of 4% in the lease which stated that Kerr-McGee's ORRI would be calculated "in the same manner and subject to the same terms and conditions as the landowners' royalty under the lease."[2] Per the DWRRA, Total was not obligated to pay the U.S. government its ORRI on the lease's first 87.5 million barrels of production (the lease's "first production").

Since the U.S. government (*i.e.*, the "landowner") was not entitled to receive an ORRI on the lease's first production, Total argued that this limitation also applied to Kerr-McGee's ORRI. Kerr-McGee disagreed, and cited other provisions of the Total/Kerr-McGee agreement as support for their contention that the ORRI it owned was not subject to suspension under the DWRAA.

The district court rejected Kerr-McGee's arguments and found that Total was entitled to use the DWRAA to avoid paying Kerr-McGee an ORRI on the lease's first production. Kerr-McGee has appealed the district court's decision – which is not surprising since the value of the ORRI at issue was in excess of $230 million. Oral argument was heard on February 7, 2012, and a decision could be issued very soon.

Regardless of how the U.S. Fifth Circuit rules, this case illustrates that it is important for the recipients of ORRIs to carefully scrutinize the manner in which the agreement states that the ORRI will be calculated. Relying upon general assumption language like that used in the *Total* case can lead to unintended consequences – consequences that can greatly affect the monetary value of the ORRI.

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1. The lease was technically issued to Total's predecessor-in-title.
2. The ORRI was technically issued by Total's predecessor-in-title to Kerr-McGee's predecessor-in-title.

RECENT DEVELOPMENTS IN MEDICARE SET ASIDE

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The question of whether a Medicare Set Aside (MSA) is required in a Jones Act and/or personal injury case continues to be without a definitive answer. However, in *Sippler v. Trans Am Trucking, Inc.*, 10-CV-03550, the United States District Court for the District of New Jersey ruled in an unpublished opinion that a MSA is not necessary in a personal injury matter.

To recap: the Medicare Secondary Payer Statute (MSP) assigns primary responsibility for medical bills of Medicare recipients to private health plans when a Medicare recipient is also covered by private insurance. These private plans are therefore considered primary under the MSP. Medicare acts as the secondary payer responsible only for paying amounts not covered by the primary plan. The MSP bars Medicare payments where a payment has already been made or can reasonably be expected to be made by a primary plan[1].

Medicare payments are subject to reimbursement to the appropriate Medicare Trust Fund once the U.S. government receives notice that a third party payment has been or could be made with respect to the same item or service. If an MSP reimbursement is not made, the MSP authorizes the government to bring an action against any entity which is required or responsible to make payment under primary plan and against any other entity that has received payment from that entity. Note that "any entity" includes the parties to a lawsuit and their legal counsel.

On September 29, 2011, the Centers for Medicare and Medicaid Services (CMMS) advised that all parties have significant responsibilities under the MSP to protect Medicare's interest

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1. A primary plan is defined by the MSP as a workman's compensation law or plan, an automobile or insurance liability policy or plan (including a self insured plan) or no fault insurance.

when resolving cases that include future medical expenses. A *recommended* method to protect Medicare's interest is a set aside arrangement (MSA) that allocates a portion of the settlement for future medical expenses. The amount of the set aside is determined on a case by case basis

This brings us to the *Sippler* matter. In *Sippler* the parties litigated the matter until they agreed to a settlement. The settlement terms specifically provided for a MSA as well as other provisions to protect the rights of Medicare. Ultimately, Sipler's counsel refused to accept the provisions related to Medicare and argued that Medicare's rights did not need to be protected. The District Court agreed.

Specifically, the District Court held that no federal law requires an MSA in personal injury settlements for future medical expenses. The District Court held that while MSA's are prudent in settlements for future medical expenditures in the workers' compensation context, they are not required outside that context. The District Court further commented that to require personal injury settlements to specifically apportion future medical expenses would prove burdensome to the settlement process and, in turn, discourage personal injury settlements. Finally, the District Court dismissed the September 29, 2011 advices of the CMMS described above by pointing out that "interpretation such as those in opinion letters, like interpretations containing policy statements, agency manuals, and enforcement guidelines lack the force of law." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).