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CLAIMS CATEGORIES: WHAT COULD GO WRONG

- I. MARINE INSURANCE COVERAGE
- II. PROPERTY DAMAGE
- III. PERSONAL INJURY/WRONGFUL DEATH
- IV. JONES ACT SEAMAN CLAIM ISSUES
- V. OUTER CONTINENTAL SHELF LANDS ACT APPLICATION
- VI. FORM CONTRACTS
- VII. OTHER MARITIME LAW CONSIDERATIONS

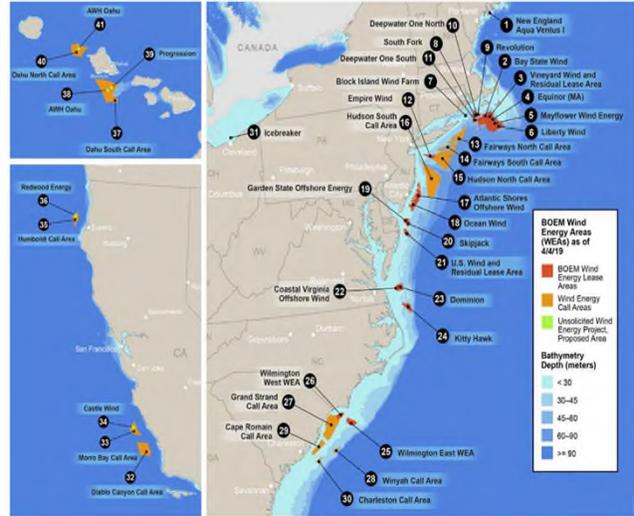
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OVERVIEW GROWTH OF U.S. OFFSHORE WIND ENERGY

- **European Head-Start:**
 - In comparison to Europe's decades of wind energy experience, the U.S. offshore wind energy industry is embryonic.
- **Increasing Development:**
 - The U.S. Department of Energy reported more than 25 offshore wind projects with a generating capacity of 24 gigawatts planned off the U.S. Northeast and mid-Atlantic coasts.
 - Given the number of projects in the pipeline, the offshore wind energy industry is poised to take off in the U.S.



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MARINE INSURANCE POLICIES

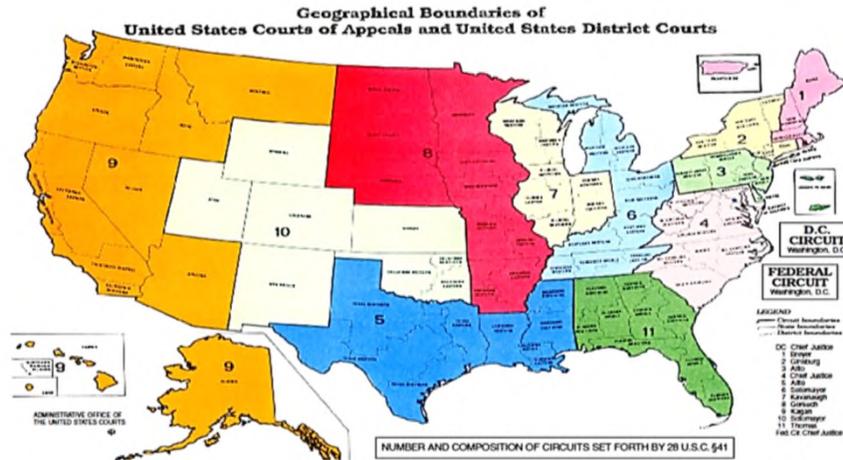
- Commercial General Liability (note marine risk and watercraft exclusions)
- Cargo Insurance
- Hull & Machinery
- Maritime Employer's Liability
- Protection & Indemnity
- LHWCA
- Builders Risk

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OVERVIEW
U.S. FEDERAL COURT ORGANIZATION



See Supreme Court of the United States, *Circuit Map*, <https://www.supremecourt.gov/about/Circuit%20Map.pdf> (last accessed Sept. 24, 2020).

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BASIC GENERAL MARITIME LAW PRINCIPLES

- Pure Comparative Fault
- Joint and Several Liability
- Economic Loss Rule
- Maritime Products Liability
- Contribution Among Joint Tortfeasors
- Contractual Indemnity Enforceable
- Towage Contracts
 - Indemnity and exculpatory clauses in favor of tug are not enforceable.

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PROPERTY DAMAGE CLAIMS

- Vessel Collisions and Allisions
 - *Collisions*
 - Pennsylvania Rule: If a ship is in violation of a statute or regulation intended to prevent collisions, the burden is on that ship to show its fault could not have been the cause of the collision.
 - This is a presumption of causation.
 - *Allisions*
 - A moving vessel is presumed negligent when it strikes a stationary object.
- Cable Damage
- Structural Damage
- Cargo Damage
 - Carriage of Goods by Sea Act
 - Bills of Lading

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JONES ACT SEAMAN CLAIMS

1. Negligence

- Statutory negligence action against employer, under the Jones Act, 46 U.S.C. § 30104.
- The injury occurs during the scope of employment.

2. Unseaworthiness of a Vessel

- Vessel owner's duty to ensure that the vessel and its equipment are reasonably fit for their intended purpose.
- Against employer or vessel owner, under general maritime law.

3. Maintenance and Cure

- The vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while in the service of the ship
- Past and future maintenance and cure; punitive damages for arbitrary and capricious failure to pay.
- Obligation for Maintenance and Cure continues until seaman is cured, the impairment is permanent, or seaman reaches "medical improvement."

4. Other Claims

- Negligence Per Se: Employer's violation of a statutory duty that causes injury or death creates liability.
- Negligence of third parties under general maritime law, Death on the High Seas Act, and state law wrongful death.

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LHWCA

LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

- Federal workers compensation scheme that covers work related injuries of maritime employees (who are not seamen) of maritime employers who are injured in course and scope of employment on or over navigable waters or on any adjoining pier, wharf, ways, dry-dock, or area customarily used for loading and unloading vessels.
- LHWCA applies to employees injured on oil and gas platforms on the U.S. outer continental shelf, under the Outer Continental Shelf Lands Act ("OCSLA"). 43 U.S.C. § 1333(b).
- Status and situs required under LHWCA. Under OCSLA, "substantial nexus" test determines whether injured employee is covered by LHWCA.
- OCSLA § 1333(b) extends LHWCA to injuries resulting from OCS operations for the purpose of extracting "natural resources . . . of the subsoil and seabed" of the OCS. **Query** whether this applies LHWCA to offshore wind farm OCS operations.
- For those covered, LHWCA benefits are the exclusive remedy against their employer.
- No-fault, relatively pre-determined remedy available in return for giving up negligence claims.

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SEAMAN STATUS TEST

- Coverage under the Jones Act and the Longshore and Harbor Workers' Compensation Act is mutually exclusive making very important the distinction between land-based and sea-based maritime workers. *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991).
- Two part test for seaman status:
 1. The employee's duties "must contribute to the function of the vessel or to the accomplishment of its mission;" and
 2. The employee must have a connection to a vessel in navigation or an identifiable group of such vessels "that is substantial in terms of both its duration and its nature." *Chandris v. Latsis*, 515 U.S. 347, 368 (1995).
- "For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea." *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 555 (1997).

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SEAMAN STATUS TEST

Sanchez v. Smart Fabricators of Tex., L.L.C., 970 F.3d 550 (5th Cir. 2020)

- Sanchez was a welder working for Smart Fabricators of Texas aboard jacked-up offshore drilling rigs. He was injured when he tripped on a pipe welded to the deck of the rig.
- In the Fifth Circuit's first opinion, the court reviewed the surface upon which Sanchez worked (jacked up drilling rigs "stable, flat, and well above the water"), his duties (as a welder, he did not operate or navigate the rig or its equipment), and whether his injury was related to the "*perils of the sea*" (tripped on a pipe welded to the deck of the vessel).
- The original Fifth Circuit opinion held that Sanchez was not a seaman, but the court withdrew that opinion.

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SEAMAN STATUS TEST

Sanchez v. Smart Fabricators of Tex., L.L.C., (continued)

- The Fifth Circuit's August 2020 opinion reached the opposite result.
- Seaman status was found where a person's duties were on a vessel jacked up next to a dockside pier; he was performing any type of ship's work on the vessel; the vessel was jacked up out of the water; and the worker returned home to sleep every evening.
- *En banc reconsideration very likely.*
- The Second Circuit held that a "barge maintainer" for barges moored on the Hudson River is not a seaman. *Matter of Buchanan Marine, L.P.*, 874 F.3d 356 (2nd Cir. 2017) (applying *Chandris v. Latsis* seaman status test).

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THE OUTER CONTINENTAL SHELF LANDS ACT

THE OUTER CONTINENTAL SHELF LANDS ACT (OCSLA)

- Extends federal law to the Outer Continental Shelf (“OCS”). The OCS is the submerged lands that are beyond the boundaries of the states, and applies to land leased by the federal government.
- OCSLA defines "Outer Continental Shelf" as:

subsoil and seabed of the Outer Continental Shelf and [. . .] 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...

43 U.S.C.A. § 1333(a)(1).



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FEDERAL V. STATE LAW ON THE OCS

- Most US offshore wind energy projects are on federal lands on the OCS.
- The OCSLA extends federal law to structures that are temporarily or permanently affixed to the OCS, which generally extends 200 miles offshore.
- While federal law generally applies, the adjacent State’s laws shall apply “[t]o the extent they are applicable and not inconsistent with” OCSLA or other federal law.
- If federal law addresses the issue at hand, then state law cannot be adopted as federal law on the OCS. *Parker Drilling Management Services, Ltd. v. Newton*, 139 S.Ct. 1881 (2019).



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FEDERAL V. STATE LAW ON THE OCS

- Whether maritime or state law controls significantly impacts whether contractual indemnity and insuring provisions are enforceable.
 - State Construction Anti-Indemnity Statutes
- Offshore wind projects often involve "mixed" services contracts that may involve the use of a vessel.
- To be maritime, a contract:
 - (1) must be for services to facilitate activity *on navigable waters* and
 - (2) must provide, or the parties must expect, that *a vessel will play a substantial role* in the completion of the contract.

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FEDERAL V. STATE LAW ON THE OCS

***Barrios v. Centaur, L.L.C.*, 942 F.3d 670 (5th Cir. 2019)**

- Dock contract for construction of a concrete containment rail necessary to prevent coal and petroleum coke from spilling onto a dock and into the Mississippi River.
- A worker was injured while offloading a generator from a crew boat to a barge, which was used to perform construction work on the dock.
- District court held that the contract was a Louisiana state law construction contract and voided the indemnities.
- The Fifth Circuit reversed and focused on the use of a vessel to hold that the contract was a maritime contract.
- Therefore, the indemnity provision is enforceable.

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DAMAGE CONTROL

FORM CONTRACTS

- Is your contract fit for purpose?
- Is a FIDIC form the right choice for an OCS Wind Farm ECP Project?
- Is a BIMCO form charter the correct choice under the general maritime law?

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DAMAGE CONTROL

LEGAL

- The Economic Loss Rule
 - For a tort claim, recovery for economic loss (such as lost profits, loss of use of a vessel) is limited to owners of physically damaged property. Purely economic loss is not recoverable unless the claimant suffered damage to property in which it has a proprietary interest.
 - It is a well-entrenched admiralty and common law rule that is employed to cut off liability for remote claims.
- Robins Dry Dock Rule
 - The U.S. Supreme Court's decision in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927) set out the economic loss rule, requiring physical damage to a proprietary interest in order to recover damages for economic loss.
- The Shipowner's Limitation of Liability Act (46 U.S.C. § 30505)
 - The Act provides a procedure for a vessel owner, whether American or foreign, to limit liability for certain claims.
 - The liability limit is the value of the vessel (after the casualty or other event) plus its pending freight.

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A photograph of an offshore wind farm at sunset. The sky is a warm orange-brown color, and the sea is dark. Several wind turbines are visible, with one in the foreground and others in the distance. A large offshore platform or vessel is also visible in the water.

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**AIMU MARINE
INSURANCE DAY 2020
VIRTUAL SEMINAR**

WIND 101 FOR MARINE AND ENERGY SECTOR
“MARITIME CLAIMS ON OFFSHORE WIND FARMS”

OCTOBER 2, 2020

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