RESPONSIBLE PARTIES UNDER OPA '90: WHO IS LEFT HOLDING THE BAG?

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The Oil Pollution Act of 1990 (OPA '90)[1] was enacted in response to the 1989 Exxon Valdez spill and was intended to "streamline federal law so as to provide quick and efficient cleanup of oil spills, compensate victims of such spills, and internalize the costs of spills within the petroleum industry."[2] OPA '90 achieves these goals by holding "responsible parties" liable for pollution cleanup costs and damages "that result" from the spill.[3] "Responsible party" is defined to include owners and operators of vessels and facilities, as well as, in the case of an offshore facility, the lessee or permittee of the area involved.[4]

Two recent decisions from the U.S. Court of Appeals for the Fifth Circuit provide interpretation of OPA '90 and the rights of statutorily designated responsible parties. In the first case, *In re Settoon Towing LLC*,[5] the responsible party—who was partially at fault in causing the underlying accident—carried out its statutory responsibilities related to cleanup, remediation, and third-party claims for damages and was later entitled to recover a portion of costs incurred from a partially liable third party. In the second case, *United States v. American Commercial Lines LLC*,[6] a responsible party—who was found to be completely free from fault in the liability trial for the underlying accident—was not entitled to limit its liability under OPA '90 for cleanup costs incurred by the U.S. government and was left holding the bag.

The Fifth Circuit held for the first time in *Settoon* that a responsible party has a statutory claim for contribution to recover purely economic damages from a partially liable third party.

Settoon arose out of a February 2014 collision on the Mississippi River near Convent, La., when a Marquette-owned tug attempted to overtake a barge flotilla and collided with an oil-carrying barge owned by Settoon, resulting in the discharge of roughly 750 barrels of light crude oil. Following the spill, the U.S. Coast Guard designated Settoon as the OPA '90 responsible party because its oil-carrying barge was the source of the spill, and as such Settoon became strictly liable under OPA '90 for cleanup costs regardless of fault in causing the spill. It is up to the responsible party to seek recovery after the cleanup from other potentially liable parties in contribution. Settoon did not seek to be subrogated to the United States in order to be reimbursed for all of its payments; rather it sought contribution toward what it paid based on the percentage of fault allocated to Marquette. The target and scope of this contribution action formed the subject of the *Settoon* appeal.[7]

During limitation of liability proceedings filed by Settoon, Marquette was found to be 65 percent at fault in the spill-causing collision, while Settoon was 35 percent at fault.[8] The issue on appeal concerned whether this finding of partial liability permitted Settoon to seek contribution from Marquette for purely economic damages paid to third parties. Under the familiar *Robins Dry Dock* rule[9] handed down well before the enactment of OPA '90, purely economic losses have been prohibited under general maritime law. However, in *Settoon*, the Fifth Circuit held that Settoon could recover economic damages in contribution from Marquette if OPA '90 created its own statutory right to contribution rather than merely incorporating by reference the default right to contribution under general maritime law. The Fifth Circuit engaged in an extensive statutory analysis of OPA '90 and related federal strict liability schemes to conclude that OPA '90 does create a statutory right to contribution for a responsible party to recover against other potentially liable parties.[10]

Settoon provided significant relief to responsible parties under

OPA '90 who may now recoup a broader array of costs associated with a spill. It also increases the scope of potential damages to third parties targeted in contribution actions by the initial OPA '90 responsible party tasked with the cleanup.

The Fifth Circuit in *American Commercial Lines* recently reminded vessel owners who charter or otherwise turn over the control of their vessels that they potentially remain liable under OPA '90 for the negligent, and even illegal, acts of a bareboat charterer/operator that becomes insolvent.

American Commercial Lines arose out of a July 2008 oil spill of nearly 300,000 gallons into the Mississippi River in New Orleans caused by a tugboat towing an oil-filled barge veering across the river into the path of an ocean-going tanker. American Commercial Lines (ACL) owned the tug Mel Oliver, which was bareboat chartered to DRD Towing. DRD then operated the Mel Oliver under a time charter to ACL. At the time of the collision, the Mel Oliver was pushing ACL's barge DM-932, which was fully laden with oil, and was operating without a captain (the captain had effectively abandoned the vessel several days earlier). The steersman left in charge was allegedly sound asleep at the wheel at the time of the collision since he had been working for nearly 36 straight hours. The Tintomara, a tanker, collided with DM-932, causing the barge to break away, ultimately sink in the Mississippi River, and spill approximately 300,000 gallons of oil into the river. As owner of the leaking barge, ACL was deemed the responsible party under OPA '90.

In the liability trial between the vessel interests, the judge held that DRD was 100 percent responsible for the collision and that ACL and Tintomara interests were free from fault. DRD was also prosecuted and convicted of violating federal laws in connection with its operation of vessels and the destruction of evidence. The U.S. government filed suit against ACL and DRD under OPA '90 seeking to recover the $20 million in cleanup costs incurred in connection with the spill, which was in addition to the $70 million ACL had already paid. DRD filed for bankruptcy, and a judgment was ultimately issued in favor of the government and against ACL for $20 million. ACL appealed, arguing two things: (1) it was entitled to a complete defense to OPA '90 liability under 33 U.S.C. § 2703(a), or (2) it was entitled to limit its liability pursuant to 33 U.S.C. § 2704(a). The Fifth Circuit rejected both arguments and affirmed the $20 million judgment against ACL.[11]

First, ACL was not entitled to the 33 U.S.C. § 2703(a)(3) third-party defense from OPA '90 liability because the third-party defense is not available "where a spill is caused by third-party acts or omissions that would not have occurred but for the contractual relationship between the third party and the responsible party." In this case, it was clear that DRD's conduct caused the spill (i.e., negligent operation, including leaving the Mel Oliver in control of an unlicensed steersman who became unconscious while in command of the vessel) and that the spill would not have occurred "but for the contractual relationship between" ACL and DRD; absent the charter agreements, DRD would not have been operating the Mel Oliver and the spill would not have occurred.[12]

Second, the Fifth Circuit also rejected ACL's argument that it was entitled to OPA '90's general limit on liability pursuant to 33 U.S.C. § 2704(a), which allows a responsible party to generally limit liability to a specified dollar amount based on the tonnage of the vessel from which oil was discharged. The court noted that the § 2704(a) limitations do not apply if the incident was proximately caused by "gross negligence," "willful misconduct," or federal regulatory violations committed by "a person acting pursuant to a contractual relationship with the responsible party."[13] DRD's conduct clearly constituted gross negligence or willful misconduct, thus the issue turned on whether DRD was acting "pursuant to the contractual relationship with" ACL. The court found that DRD's gross negligence/willful misconduct was committed in the course of carrying out the terms of the contractual relationship with ACL (i.e., the time charter party obligating DRD to tow the ACL barge and deliver the oil cargo). Therefore, the Fifth Circuit held that ACL, even though without fault factually, was not entitled to limitation of liability.[14]

While it is not altogether surprising that the Fifth Circuit court declined to stick the government with $20 million in cleanup costs, it is significant to note that ACL was essentially held accountable for DRD's illegal conduct that expressly violated the terms of the charters. The clear takeaway from this case is that Congress (and the courts) have gone to great lengths to impose liability on the "responsible party" under OPA '90. This opinion is also significant for its interpretation of the limitation provision of OPA '90 and, indeed, highlights the need for vessel owners to carefully vet their charterers/operators from operation, solvency, and insurance points of view. With respect to the time charter party, which required DRD to tow ACL's barge and carry the oil cargo, the spill would not have occurred but for that contract. Despite DRD's breach of this charter party, ACL was still saddled with the gross negligence of DRD and was not entitled to limitation. Although the Fifth Circuit's opinion does not differentiate between the two charter parties between ACL and DRD, the time charter and the bareboat charter, the bareboat charter to DRD likewise did not reduce ACL's exposure for pollution risks in the circumstances of this case. ⊙

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Endnotes

[1]Oil Pollution Act of 1990, 101 H.R.1465, P.L. 101-380 (Aug. 18, 1990) (codified at 33 U.S.C. §§ 2701-2762).

[2]*Rice v. Harken Exploration Co.*, 250 F.3d 264, 266 (5th Cir. 2011).

[3]33 U.S.C. § 2702(a).

[4]33 U.S.C. § 2701(32).

[5]*In re Settoon Towing LLC*, 859 F.3d 340 (5th Cir. 2017).

[6]*United States v. American Commercial Lines LLC*, 875 F.3d 170 (5th Cir. 2017).

[7]*Id.*, 859 F.3d at 343-44, 346, 350.

[8]The limitation proceedings were filed pursuant to 46 U.S.C. §§ 30501-30512.

[9]*See Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307-09 (1927).

[10]*In re Settoon Towing*, 859 F.3d at 352.

[11]*American Commercial Lines*, 875 F.3d at 171-72.

[12]*Id.* at 176-77.

[13]33 U.S.C. § 2704(c)(1).

[14]*American Commercial Lines*, 875 F.3d at 175, 178-79.