US vessel owners cannot contract out of liability under OPA 90 for oil spill clean-up and compensation

The US Fifth Circuit Court of Appeal reminds US 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 the bareboat charterer/operator. We thank US lawyer, David Reisman a shareholder in the Liskow & Lewis New Orleans office for his summary of the United States v. American Commercial Lines decision.

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Background

In July of 2008, nearly 300,000 gallons of oil spilled into the Mississippi River in New Orleans when a tugboat towing an oil-filled barge veered across the river into the path of an ocean-going tanker. American Commercial Lines (ACL) owned the tug MEL OLIVER, which it bareboat chartered to DRD Towing Company (DRD) for one US dollar a day. ACL then time chartered the MEL OLIVER from DRD. At the time of the collision, the MEL OLIVER was pushing ACL's barge DM-932 which was fully laden with oil. The Master of the MEL OLIVER had abandoned the vessel several days earlier, leaving the steersman (who was not licenced to operate the vessel without the direct supervision of a Master) in charge. At the time of the incident, the steersman was allegedly asleep at the wheel, as he had been working for nearly 36 straight hours. The tanker TINTOMARA collided with barge DM-932, causing it to break away and ultimately sink in the Mississippi River. As the owner of the barge, ACL was deemed a responsible party under the Oil Pollution Act of 1990 (OPA 90).

In the liability trial between the vessel interests, the judge held that DRD was 100 per cent responsible for the collision and that ACL and the TINTOMARA were free from fault. DRD was also prosecuted and convicted of violating federal laws in connection with its operation of vessels, and destruction of evidence. The US government filed suit against ACL and DRD under OPA 90 seeking to recover the USD 20 million in cleanup costs incurred in connection with the spill. The USD 20 million was in addition to the USD 70 million that ACL had already paid. DRD filed for bankruptcy, and a judgment was ultimately issued in favor of the government and against ACL for the additional USD 20 million. ACL appealed, arguing it was entitled to a complete defense to OPA 90 liability due to "third-party fault", 33 U.S.C. § 2703(a). ACL alternatively argued that it was entitled to limit its liability pursuant to 33 U.S.C. § 2704(a). The Fifth Circuit rejected both arguments and affirmed the USD 20 million judgment against ACL (*United States v. American Commercial Lines, L.L.C.*, No. 16-31150, ___ F.3d ___ (5th Cir. 11/7/17)).

OPA 90

OPA 90 was enacted in response to the 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.*" *Rice v. Harken Exploration Co.,* 250 F.3d 264, 266 (5th Cir. 2001). OPA 90 achieves those goals by holding 'responsible parties' liable for pollution clean-up costs and damages "that result" from the spill. 33 U.S.C. §2702(a). In the context of a spill from a vessel, the 'responsible party' is "any person owning, operating, or demise chartering the vessel." 33 U.S.C. §2701(32)(A).

Analysis

*1) * *ACL not entitled to the 33 U.S.C. §2703(a)(3) "third-party" defense from OPA 90 liability*

ACL as the vessel owner qualified as a 'responsible party'. Although OPA 90 is thought of as a 'strict liability' scheme, a responsible party can avoid liability by establishing *"by a preponderance of the evidence, that the discharge … of oil and the resulting damages or removal costs were caused solely by*—(1) an act of God; (2) an act of war; (3) *an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party …* or (4) any combination of paragraphs (1), (2), and (3)." 33 U.S.C. §2703(a) (emphasis added). ACL argued that the spill was the result of an act or omission of a third party (DRD) and that the spill did not occur "in connection with" ACL's contractual relationship with DRD. After noting that "in connection with" must be interpreted in the context of OPA 90's policy of broad liability for the responsible party, the Fifth Circuit concluded that 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." (Emphasis added). In the instant case, it was clear that DRD's conduct (negligent operation of the MEL OLIVER) 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. The Court was unpersuaded by ACL's argument that DRD's conduct was not "in connection with" the contractual relationship despite the fact that DRD's acts and omissions violated applicable law and directly violated the terms of the contracts. Accordingly, the Court held that ACL was NOT entitled to the third-party defense from liability under OPA 90.

*2) * *ACL not entitled to the 33 U.S.C. § 2704(a) limitation of liability*

The Court also rejected ACL's argument that it was entitled to limit its liability pursuant to 33 U.S.C. § 2704(a), which generally limits the liability of a responsible party to a specified dollar amount based on the tonnage of the vessel from which oil was discharged. The Court noted that the §2704(a) limits on liability "do not apply if the incident was proximately caused by—(A) gross negligence or willful misconduct of, or (B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party". 33 U.S.C. § 2704(c)(1). Clearly DRD's conduct constituted gross negligence or willful misconduct; the issue, therefore, was whether DRD was acting "pursuant to a contractual relationship with" ACL. While "pursuant to" is narrower than "in connection with", the Court held that the "pursuant to" requirement "is satisfied if the person who commits the gross negligence, willful misconduct, or regulatory violation does so in the course of carrying out the terms of the contractual relationship with the responsible party." Here, DRD's gross negligence/willful misconduct was committed in the course of carrying out the terms of the contractual relationship with ACL, that is the time charter party obligating DRD to tow the ACL barge and deliver the oil cargo. The Fifth Circuit therefore held that ACL, even though without fault factually, was not entitled to limitation of liability.

The Fifth Circuit therefore affirmed the district court's granting of summary judgment finding that ACL was not entitled to any defenses under OPA 90 and ordering ACL to pay the United States USD 20 million in cleanup costs in addition to the USD 70 million that ACL had already paid

Gard's concluding comments – putting the case into global context

Globally, liability and compensation for spills of persistent oil are governed by the Civil Liability Convention (CLC) (with the notable exception of the United States). The CLC channels strict liability for spills including clean-up costs to the registered owner of the spilling vessel and the channeling provision shields charterers, from claims. Furthermore, the CLC 92 Protocol allows the registered owner to limit liability unless the claimants prove that the pollution damage "resulted from a personal act or omission committed with intent to cause such damage or recklessly and with knowledge that such damage would probably result". The CLC also provides a complete defence if the registered owner can show that the spill was "wholly caused by an act or omission done with intent to cause damage by a third party." The limitation amount is secured by mandatory insurance generally provided by P&I clubs.

Please see *Gard Handbook on Protection of the Marine Environment* at 15.2.3.2-3.

In contrast to CLC channeling, OPA 90, provides for "joint and several liability" so the US statute contemplates the possibility of more than one responsible party with each individually responsible for the total of the clean-up costs and compensation. Thus, although ACL was factually without fault because it did not employ the crew, it was nonetheless liable because, as the vessel owner, it fell within the definition of "responsible party". This result would have been the same under the CLC regime which channels liability to the registered owner.

In our view the greater significance of the opinion is in the interpretation of the limitation provision. The Fifth Circuit does not differentiate between the two charter parties between ACL and DRD – the bareboat charter and the time charter. In determining that ACL could not limit, the Court may have had the time charter in mind because that is the charter party that 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 saddled with the gross negligence of DRD and its employees which meant that it could not establish a right to limit. Here the result would have been different under the CLC because the CLC does not refer to contractual relationships in the limitation provision.

The bareboat charter to DRD and the time charter back did not, in the circumstances, reduce ACL's exposure for pollution risks and may have indeed increased the exposure due to the interpretation of the limitation provision. The Fifth Circuit's ruling indeed highlights the need for vessel owners to carefully vet their charterers/operators from both operational, solvency and insurance points of view. In addition to offering mutual P&I insurance to vessel Owners, Gard also offers a comprehensive charterer's liability product that covers charterer's liability for pollution as well as other charterer's P&I and Damage to Hull risks.