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When No Privity of Contract Qualifies as “Any Contractual Relationship” under OPA

By James D. Bercaw on February 3rd, 2012

Transactions to procure supplies for vessels engaged in international trade typically involve numerous international and local brokers, agents and contractors. The vessel operator or charterer will place an order for supplies with a broker. The broker locates a seller with the best price and reputation in the vicinity of the vessel. The seller makes arrangements with one or more contractors to deliver the supplies to the vessel. At the agreed time and place, the vessel thereafter pays the broker, who ensures that the seller is paid in full less any broker's commission. The seller then compensates the delivery contractor at their agreed rate. (Of course, failure to timely pay by the vessel interests potentially gives rise to maritime liens against the vessel in favor of the suppliers.)

Under the foregoing arrangements, it is clear that there is no direct contract between the vessel interests and the delivery contractor. However, for purposes of the Oil Pollution Act, the U.S. Fifth Circuit has concluded that the typical arrangements for the sale and delivery of bunker fuel to ships can qualify as a “contractual relationship”, with the result that the vessel could not avoid strict liability for clean-up costs under OPA for a fuel spill resulting from the collision the vessel and a barge, hired by the fuel seller to deliver the fuel to that vessel. *Buffalo Marine Servs. Inc. v. United States*, No. 10-41108 (5th Cir. Nov. 22, 2011). In so holding, the Court approved the government's broad definition of “contractual relationship,” which correspondingly resulted in a very limited scope of one of OPA's affirmative defenses.

The operators/charterers of the TORM MARY had purchased fuel from Bominflot through LQM, a fuel broker. Bominflot hired Buffalo Marine, the owner/operator of a tug and barge, to deliver the fuel to the TORM MARY. As Buffalo Marine's tug was maneuvering the barge alongside the TORM MARY, the barge collided with the TORM MARY, holing the her hull and fuel tank and resulting in a spill of 27,000 gallons of heavy fuel oil into the Neches River. The fuel was never transferred from the barge to the TORM MARY.

Under OPA, the TORM MARY, as the responsible party, was strictly liable for the removal costs and damages resulting from the spill unless it established, by a preponderance of the evidence, that the spill was caused solely by an act or omission of a third party, other than a third party whose act or omission occurs in connection with any contractual relationship with the responsible party. 33 U.S.C. § 2703(a)(3). The National Pollution Funds Center (“NPFC”) denied the claim of the vessel owners and insurers for reimbursement of certain clean – up expenses, concluding that they had failed to establish as part of their affirmative defense that Buffalo Marine's acts were not in connection with any contractual relationship with the TORM MARY interests. The NPFC had interpreted the phrase “any contractual relationship” in OPA as not being limited to contractual relationships where there is



direct privity of contract. Instead, “any contractual relationship” also included indirect contractual relationships in connection with the commercial sale and delivery of fuel *via* a chain of agents and contracts between the TORM MARY interests – the fuel purchasers, and Buffalo Marine – the seller’s delivery agent. According to the NPFC, the mere fact that the bunkers were not ultimately delivered did not affect the contractual nature of the relationship between the TORM MARY interests and Buffalo Marine.

Accordingly, Buffalo Marine’s acts or omissions in causing the collision were by a third party who had a contractual relationship with the TORM MARY interests. As a result, the NPFC rejected the TORM MARY’s affirmative defense under OPA that the spill was solely caused by Buffalo Marine.

The district court denied *via* summary judgment Buffalo Marine’s suit for agency review under the Administrative Procedure Act. On appeal, the Fifth Circuit concluded that the NPFC’s interpretation of OPA, more particularly, the phrase “any contractual relationship with the responsible party” was entitled to substantial deference, and was a permissible construction of the statute. Additionally, the NPFC’s interpretation was consistent with a similar affirmative defense appearing in the Comprehensive Environmental Response, Compensation and Liability Act. Lastly, the Fifth Court concluded that there was substantial evidence to support the NPFC’s denial of the claim. Accordingly, the Fifth Circuit affirmed the district court’s summary judgment in favor of the NPFC.