Maritime Law Association – Spring Meeting

Continuing Legal Education Program

Joint Meeting of Committee on Uniformity of U.S. Maritime Law and Salvage law

**The Right to a Jury Trial in Cases under the Oil Pollution Act of 1990**

Proposed Length: 30 minutes

LCDR Benjamin Robinson, U.S. Coast Guard[[1]](#footnote-1)

**Introduction**

The Oil Pollution Act of 1990 established a liability regime for oil removal costs and property loss, economic, and natural resources damages associated with oil discharges into the navigable waters of the United States. Section 2702 of the statute creates liability for vessel or facility responsible parties that discharge oil for costs and damages resulting from the discharge. OPA also established process whereby other parties can bring claims to the Oil Spill Liability Trust Fund for the reimbursement of oil removal costs that were not paid by responsible parties but should have been under OPA.[[2]](#footnote-2) When removal costs are paid in response to these claims, the Fund obtains a subrogated right to recover the oil removal costs from the liable responsible party.[[3]](#footnote-3)

In *United States v. ERR, LLC*, the Fifth Circuit Court of Appeals reversed a judgement that followed a four-day bench trial on the grounds that OPA removal costs are analogous to restitution at law and thus fall within the Seventh Amendment right to a jury trial.[[4]](#footnote-4) Prior to the decision in *ERR*, two prior cases at the district court level in the Fifth Circuit had reached different answers to this question.[[5]](#footnote-5) Although the *ERR* decision helps settle this split within the Fifth Circuit, it raises new questions for OPA cases subject to admiralty jurisdiction and the analogous cost recovery actions under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

**Oil Spill Liability Prior to OPA 90**.

Prior to the enactment of OPA 90, liability for oil removal costs oil spill damages were governed by the CWA and FWPCA. The CWA and FWPCA lacked two key features of OPA. First, oil spill clean-up was often funded directly by federal agency funds; the Oil Spil Liability Trust Fund, funded by an oil tax and replenished through cost recovery billing and litigation did not exist. Second, the damages associated with oil spills were governed by general maritime and state tort law. Both of these aspects of the OPA statute were present in the *ERR* case.

**Seventh Amendment analysis in *Viking Resources***

The litigation in *United States v. Viking Resources* originated with an oil discharge from a tank farm into a tributary of Galveston Bay. The Coast Guard and EPA incurred $376,262.96 in removal costs responding to the incident and determined that the spill resulted in $271,179.82 in natural resource damages.[[6]](#footnote-6) Following the incident, the NPFC billed Viking Resources, who had been the last lessee of the oil and gas wells served by the tank farm. Viking did not respond to the bill and the United States brought suit under OPA, 33 U.S.C. § 2702. Viking’s answer included a demand for jury trial under F.R.C.P. 38, which the government moved to strike.

The right to a jury trial under OPA was, in the assessment of the *Viking* court, an issue of first impression.[[7]](#footnote-7) The Court applied the widely-used two factor analysis for statutory causes of action set out in *Granfinanciera, S.A. v. Nordberg*.[[8]](#footnote-8) It considered (1) how the statutory cause of action compares with actions in 18th Century English law courts before the merger with equity and (2) whether the remedy sought in the action was legal or equitable in nature.

The *Viking* court asserted that the character of the remedy was the predominating factor of the two and analyzed the two remedies sought—oil removal costs and natural resource damages—separately. The court looked to decisions in the Third and Eighth Circuits that had concluded that CERCLA response costs were a form of restitution, an equitable remedy. Based on the close similarity between CERCLA response costs and OPA removal costs and the weight of the authority under CERCLA, which it characterized as an “avalanche of authority,” the *Viking* court concluded that oil removal costs too were restitutionary in nature and, therefore, an equitable remedy.[[9]](#footnote-9)

The court also found a close similarity between OPA natural resource damages (NRD) and those under CERCLA. Precedent on the character of NRD under CERCLA was less unanimous. In some cases courts had held that NRD are also a form of restitution, while in others they were held to be a form of money damages recoverable in tort for injury to property under nuisance or trespass theories. Noting that OPA NRD includes a variety of costs, all slightly different in character as legal or equitable, the court concluded that at least one—money damages for lost value of the natural resources until they could be restored—was a legal remedy. Consequently, NRD, in contrast to oil recover costs, was subject to the Seventh Amendment jury right.

The defendants in *Viking* had also moved for a bifurcated trial a request. The Court denied the request on the grounds that doing so would require two juries in these circumstances and would not be consistent with the reasons for ordering bifurcation under F.R.C.P. 42.

**Seventh Amendment analysis in *In re Deepwater Horizon***.

Litigation following the Deepwater Horizon incident presented an opportunity for the Seven Amendment issue to be considered by the Eastern District of Louisiana, this time in a case involving a vessel and admiralty jurisdiction. The availability of a jury trial in the *Deepwater Horizon* case was raised by the state of Alabama in its amended complaint. The litigation was multi-phase: Phase One being a bench trial on Limitation of Liability. The Court then scheduled a trial to hear Alabama’s claims against BP for oil removal costs and NRD.

In moving against the jury trial request, BP argued that OPA was an admiralty statute and as such did not provide a right to jury trial. The court rejected this argument based on the absence of any reference to admiralty in the jurisdictional section of OPA, with a footnoted qualification:

the conclusion that OPA creates federal question jurisdiction independent of admiralty or diversity jurisdiction does not mean that a claim under OPA is exclusively within federal question jurisdiction. As a final note, the Court makes clear that the present discussion concerns jurisdiction and the related right vel non to a jury, not the substantive law that will apply to a case or claim, conflicts of law, preemption., displacement, etc. These are separate issues that may or may not depend on jurisdiction.[[10]](#footnote-10)

The court then considered the issue under the Seventh Amendment. Like the *Viking* court, it applied the two *Granfinanciera, S.A. v. Nordberg* factors, starting with the character of the remedy. It then parted ways with the *Viking* court’s analysis and concluded that remedy sought “is largely, if not entirely, legal.”[[11]](#footnote-11) It recognized that the Viking court had reached the opposite conclusion, and justified its departure on the grounds that historically, not all restitution was equitable in nature. Relying on the Supreme Courts discussion of restitution in *Great-W. Life & Annuity Ins. Co. v. Knudson*,[[12]](#footnote-12) it explained that equitable restitution involved cases that sought to “recapture something… wrongfully possess[ed].”[[13]](#footnote-13) The oil recovery costs incurred by Alabama lacked this character; rather, they were a “personal liability on the defendant.”[[14]](#footnote-14)

The *Deepwater* court then turned to the character of the action, giving this factor considerably more attention than the *Viking* court. In doing so, it returned to the question of admiralty jurisdiction, now to consider whether an action such as Alabama’s would have been heard in admiralty historically. Considering both English and early American precedents, it concluded that prior to the 1948 Admiralty Extension Act, the actions would have been pled to common law courts in a writ of trespass or trespass on the case.[[15]](#footnote-15) Consequently, Alabama’s claim to a jury trial under the Seventh Amendment were supported by historic practice.[[16]](#footnote-16)

**United States v. ERR: Procedural Posture.**

The United States as plaintiff moved to strike E.R.R.’s demand for jury trial based on the absence of a statutory right to jury trial under OPA and the alleged equitable nature of the government’s cost recovery suit.[[17]](#footnote-17) The trial court agreed and the case proceeded to a bench trial where the Court entered a verdict for the government and awarded removal costs, administrative-adjudication costs, and attorney's fees. ERR appealed under 28 U.S.C. § 1291, alleging insufficient evidence of the path of discharge, error in the court's denial of the jury-trial, claiming that the removal costs were arbitrary and capricious. The government’s brief does not appear to raise the issue of waiver. The Court reversed solely on the jury-trial trial issue.

**United States v. ERR: tunnelling out of the avalanche.**

The Fifth Circuit began its analysis by discussing the history of the Seventh Amendment and the debate over the right to a jury trial during the framing of the Constitution. Perhaps foreshadowing the outcome of the decision in the case, which originated with the Coast Guard, the court announced that in the debate over the jury trial, “Hamilton lost.”[[18]](#footnote-18)

The Court then moved on to the *Granfinanciera* factors, beginning by characterizing the oil removal costs as a “recoupment claim.”[[19]](#footnote-19) The court analogizes the OPA oil removal cost claim to common law trespass, trespass on the case, or assumpsit quasi-contract claims. “The OPA mimics these common-law options. The statute first creates a legal duty and then provides a right of action to compensate the injured party for a breach of that duty.”[[20]](#footnote-20) The analogy goes further, “OPA even provides the same two options as the common law to get money: (1) an action for damages (akin to a writ of trespass or trespass on the case) or (2) an action for monetary restitution (akin to writ of assumpsit/quasi-contract).”[[21]](#footnote-21)

Next, it addressed the character of this remedy, which it too treated as the more important factor. Parting ways with the *Deepwater Horizon* decision, the court did characterize the remedy as restitutionary. Carrying forward the discussion of actions under a writ of assumpsit, the Court concluded that oil removal costs are a personal liability not a property interest akin to those addressed by equitable restitution:

The removal costs are most analogous to restitution at law. The Government isn't seeking particular property or funds in the defendant's possession caused by the wrongdoing. Nor is the Government seeking ERR's “net profits” caused by the oil spill. So the unjust-enrichment remedy here is akin to restitution at law.[[22]](#footnote-22)

The court addressed the subrogation claim in a single sentence, concluding that because it is intertwined with the “recoupment” claim, the right to a jury trial reaches both.

**Concluding Thoughts**

The Fifth Circuits decision in ERR on the availability of a jury trial in actions under OPA, like many Seventh Amendment cases, rests on an analysis of a modern statutory liability scheme in a counter-factual world where law and equity did not merge. As the 1938 merger recedes ever farther over the horizon of the past, attempts by practitioners and judges to describe modern law in antiquated terms becomes an increasing speculative endeavor.[[23]](#footnote-23) The decision in *ERR* raises the possibility that the “avalanche” of authority characterizing CERCLA cost actions as equitable in nature may be melting as a new generation considers the historical question.

1. The views expressed in these materials are those of the author and do not reflect the position of the United States, Commandant of the Coast Guard or the National Pollution Funds Center. [↑](#footnote-ref-1)
2. 33 U.S.C. § 2712(a)(4) and § 2713(e). [↑](#footnote-ref-2)
3. 33 U.S.C. § 2713(f). [↑](#footnote-ref-3)
4. 35 F.4th 405, 413 (5th Cir. 2022) [↑](#footnote-ref-4)
5. *See In re Deepwater Horizon*, 98 F. Supp. 3d at 877–83; *and Viking Resources, Inc.*, 607 F. Supp. 2d at 828–30. [↑](#footnote-ref-5)
6. *United States v. Viking Res., Inc.*, 607 F. Supp. 2d 808, 813 (S.D. Tex. 2009) [↑](#footnote-ref-6)
7. Two earlier cases had addressed distinguishable requests for jury trials under OPA. *South Port Marine v. Gulf Oil*, 234 F.3d 58, 65 (1st Cir.2000) and *Clausen v. M/V NEW CARISSA*, 171 F. Supp. 2d 1127, 1133 (D. Or. 2001). [↑](#footnote-ref-7)
8. 492 U.S. 33 (1989). [↑](#footnote-ref-8)
9. *United States v. Viking Res., Inc.*, 607 F. Supp. 2d 808, 830 (S.D. Tex. 2009) [↑](#footnote-ref-9)
10. *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on Apr. 20, 2010*, 98 F. Supp. 3d 872, FN 14 (E.D. La. 2015). [↑](#footnote-ref-10)
11. *Id. at* 880. [↑](#footnote-ref-11)
12. 534 U.S. 204 (2002). [↑](#footnote-ref-12)
13. *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on Apr. 20, 2010*, 98 F. Supp. 3d 872, 881 (E.D. La. 2015) [↑](#footnote-ref-13)
14. *Id*. [↑](#footnote-ref-14)
15. *Id. at* 882. [↑](#footnote-ref-15)
16. The Court also declined to adopt BPs argument that the action brought by a sovereign is akin to one for lost taxes and did not merit jury trial on those grounds. *Id.* [↑](#footnote-ref-16)
17. *United States v. E.R.R. LLC*, 417 F. Supp. 3d 789, 792 (E.D. La. 2019*), rev'd in part, vacated in part sub nom. United States v. ERR, LLC*, 35 F.4th 405 (5th Cir. 2022). [↑](#footnote-ref-17)
18. *United States v. ERR*, LLC, 35 F.4th 405, 410 (5th Cir. 2022) [↑](#footnote-ref-18)
19. This is an interesting choice of terminology because historically “recoupment” referred to claims under a negotiable instrument, not in tort law. *Claim in Recoupment*, Black's Law Dictionary (11th ed. 2019). [↑](#footnote-ref-19)
20. *United States v. ERR, LLC*, 35 F.4th 405, 412 (5th Cir. 2022) [↑](#footnote-ref-20)
21. *Id.* [↑](#footnote-ref-21)
22. *Id.* at 413. [↑](#footnote-ref-22)
23. Delaware, the one of the few states that maintained distinct courts of chancery, characterizes oil removal costs as “damages.” 7 Del. C. § 6207. [↑](#footnote-ref-23)