2019 Odds and Ends Case Update

Committee on Inland Waters and Towing
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Palla v. L M Sports., dba Lakeside Marina and Action Sports of Tahoe, 2018 AMC 2464 , U.S.D.C., Eastern Dist. of Calif, (Oct. 2018).

This case is a good continuation of our May, 2018 Inland Waters and Towing discussion on enforceability of limitation of liability and indemnity clauses in maritime contracts. See *One Beacon the Insurance Co .v, Crowley Marine Services, Inc*., 648 F.3d 258, 2011 AMC 2113 (5th Cir.). (Online contract indemnity clause enforced); *In re Moran Philadelphia*, 175 F. Supp.3d 508, 2016 AMC 1260 (ED Pa.) (Online limitation of liability clause enforced

L M Sports rented a ski boat and tubing equipment to five individuals ("Renters") who signed a rental agreement containing an indemnity clause stating that the Renters would indemnify L M Sports for claims arising out of the boat's use, even if based on L M Sports' ordinary negligence or gross negligence. Palla, a co-worker of the Renters, was injured and sued L M Sports for claims arising out of ordinary negligence. L M Sports filed a limitation of liability action, and claimed against Renters to enforce the indemnity agreement. On cross-motions for summary judgment, the Renters claimed that the indemnity agreement was invalid as against public policy because it was broad enough to cover gross negligence of L M Sports.

The court cited to Judge Barbier's decision in one of the Deepwater Horizon cases between BP and Transocean, *In re Oil Spill*, 2012 AMC 982, 841 F2d. F. Supp. 2d 988 (E. D. LA 2012), for the proposition that while gross negligence may invalidate contractual *releases*, *indemnity* clauses can cover gross negligence for compensatory damages. Exculpatory clauses serve as a complete release of liability; they keep the claimant from coming to court and being made whole. In contrast, indemnity clauses merely reallocate financial responsibility, determining which party to a contract will ultimately bear the risk of injury to a third party.

The Palla court held the indemnity clause enforceable. Principles of freedom of contract favoring enforcing the indemnity outweighed a reluctance to encourage grossly negligent behavior, because the injured party was not without recourse, the contract merely shifted the source of compensation.

(The case proceeded to trial on the issue of limitation only. Trial concluded on March 11, 2019 followed by posttrial briefing. No decision has been issued. LM Sports agreed to reserve indemnity issues for a separate trial to occur later.)

U.S. v. Nature's Way Marine, LLC, 904 F.3d 416 (5th Cir. 2018). In January 2013 a Nature's Way tug was moving two oil barges owned by Third Coast Towing, LLC ("TCT") when the barges allided with a bridge over the Mississippi River, releasing 7,000 gallons of oil. The USCG designated both Nature's Way and TCT as "responsible parties" under the OPA. Nature's Way and its insurers spent nearly $3 million in clean-up costs and the federal government incurred another $792,000.

Nature's Way claimed to the NPFC for reimbursement of over $2.13 million cleanup expenses on the grounds that its liability should be limited to the tonnage of the tug alone, and not the tonnage of the barges. OPA limits liability of a "responsible party" based on tonnage of the vessel it was *operating*. Nature's Way admitted it operated the tugboat but contested its status as operator of the oil-discharging barge. The NPFC rejected the request to decrease the limit of liability, concluding instead that Nature's Way was the "operator" of the barges and thus both barges were properly included in the limitation assessment. This lawsuit and appeal followed.

Nature's Way argued that TCT was actually the "operator" of the barge as it was responsible for instructing when the barge would be loaded, unloaded, and moved. The district court, holding that a "common sense" interpretation of "operator" as used in the OPA was that a "dominant mind" tug moving "dumb" barges is "operating" those barges.

On appeal, the 5th Circuit focused on the express language of the statute, which defines an "operator" as "any person … operating" a vessel and a "responsible party" as "any person owing, operating, or demise chartering the vessel." The word "operating," is not defined in the OPA. The US Supreme Court had earlier defined "operator" under CERCLA as any person "who directs the workings of, manages, or conducts the affairs of" the facility/equipment in question." *U.S. v. Bestfoods*, 524 U.S. 51, 66 (1998). The 5th Circuit found the parallel language between the statutes significant. The Fifth Circuit concluded that the ordinary and natural meaning of "operating" a vessel under OPA would include the act of moving a "dumb" barge. "Nature's Way had exclusive navigational control over the barge at the time of the collision, and, as such… was a party whose direction (or lack thereof) caused the barge to collide with the bridge," Nature's Way was the "operator" of the barges under OPA.

After this decision, Kent Roberts responded to a government lawyer who inquired about this decision: "The case demonstrates the problem with judges reading things too literally. It makes sense under the OPA and I have always assumed that this would be the result if the question ever arose. But as a practical matter, no tugboat operator thinks they are the "operator" of a vessel or object they are towing. For example, the tug carries no licensed tankermen or barge loaders who are qualified to do anything that a barge does in terms of its cargo carrying function. Indeed, it would be illegal for the tug crew to try to "operate" the tank barge in anything that the barge is supposed to do other than being pushed or pulled around.

All that being said, the case has little impact on us on the US West Coast, and not just because it's a Fifth Circuit decision. The tugboat business out here is simply different. On the Mississippi system, it is not uncommon for barge companies to own barge fleets and hire the towing out to independent tugboat operating companies. Some of those tugboat companies are smaller operations with insurance suitable to the expected tug liabilities, but not the liabilities of a tank barge operator. However, on the West Coast the barges are generally owned by the tugboat

companies who tow their own barges. This means that if a company is in the oil trade, the same pollution liability insurance will cover both the barges and tugs. And because of state laws in all of the West Coast states, to be in the oil trade the tug company must be entered in a P & I Club in order to get the $1 billion in pollution liability insurance needed to meet state law.

But query: what happens when one of my clients tows a Navy missile cruiser from the shipyard back to its regular berth in Bremerton as a "dead ship" tow (because the Navy does not want to crew the ship for the short 30 mile transit)? Does that mean my client is the "operator" of the missile cruiser? I hope so, because if my client causes an accident resulting in an oil spill from the cruiser, my client can enjoy the "public vessel" immunity afforded by the OPA. Sweet!"

Continental Insurance Company v. L & L Marine Transportation, Inc., 2018 AMC 333, 882 F2d 566 (5th Cir. 2018). Three tugs towing a barge, one designated as the "lead" tug and the other two as "assisting" tugs. The lead tug was thus the "dominant mind". During the operation, one of the assisting tugs allided with a bridge fender and sank, becoming a total loss. The running down clause provision of the lead tug's hull and machinery policy covered damage to the "tow." At issue was whether the assisting tugs could be considered part of the "tow" and thus covered by the lead tug's hull policy (rather than the tower's liability component of the P & I policy).

The Fifth Circuit looked at common definitions of "tow": "some ship or boat that is being provided extra motive power from another ship or boat by being pushed or pulled." It ruled that a vessel being the "dominant mind" does not mean that all other vessels in a towing operation are part of the tow. Assist tugs can have an independent basis of liability based on the assist tug's own operations. The "dominant mind" concept helps courts allocate fault, determining which of several vessels was more negligent. Because liabilities flowing from the dominant mind doctrine are a matter of degree rather than kind, "it seems odd to use the doctrine as an ontological on/off switch when defining the 'tow'." Since the assist tug was not being provided auxiliary motive power, it was not part of the "tow" for purposes of the insurance coverage.