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BARGE OWNER LIABLE FOR OIL SPILLS OCCURRING WHILE BARGE IS UNDER THE CONTROL OF THIRD PARTY TUGBOAT OPERATOR

ENVIRONMENTAL LAW—FEDERAL WATER POLLUTION CONTROL ACT: A barge owner who contracts with a tugboat operator to tow oil barges may not assert a third party defense under the Federal Water Pollution Control Act against claims resulting from an oil spill. *United States v. Hollywood Marine, Inc.*, 625 F.2d 524 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 2336 (1981).

The Department of Justice instituted a civil action in the Southern District of Texas seeking recovery under § 1321(b)(3) of the Federal Water Pollution Control Act Amendments of 1972¹ for the costs of cleaning up the oil spilled from a barge owned by Hollywood Marine, Inc.² Hollywood Marine engaged in the business of transporting petroleum by barge in the coastal and inland waterways of southern Texas. It contracted with Three Jack Towing, Inc. to perform the towing of its barges. Under the terms of the contract, Three Jack retained exclusive control of the towing operations and agreed to indemnify Hollywood Marine against all claims for damage arising out of those operations. On August 5, 1976, a Hollywood Marine barge in tow behind a Three Jack tug sustained damage while in the Texas intra-coastal waterway. As a result, approximately two thousand gallons of oil spilled into the waterway. The United States Coast Guard cleaned the spill at a cost of \$61,816.85. The government sued Hollywood Marine and its insurer, Water Quality Insurance Syndicate, to recover the cost of clean-up.

The district court found no liability. Although § 1321(b)(3) of the Act provides that owners of vessels which discharge oil or hazardous substances shall be liable without fault for the costs of clean-up, § 1321(f)(1) provides a defense to liability “where the discharge was solely caused by an act or omission of a third party without regard to whether such act or omission was or was not negligent.” The district court found that the Hollywood Marine barge had been turned over to Three Jack in a seaworthy condition.³ The court also found that the spill had occurred when Three Jack had exclusive control of the towing operation and barge personnel.⁴ Hence, the court concluded that Hollywood Marine’s third party defense barred recovery by the government under § 1321(b)(3).⁵

1. 33 U.S.C. §§ 1251–1376 (1976).

2. *United States v. Hollywood Marine, Inc.*, 487 F.Supp. 1211 (S.D. Tex. 1980).

3. *Id.* at 1212.

4. *Id.*

5. *Id.* at 1213.

The government appealed to the United States court of appeals for the Fifth Circuit.⁶ The government relied on *United States v. LeBeouf Bros. Towing Co.*,⁷ which was decided by the Fifth Circuit subsequent to the district court's decision for Hollywood Marine.⁸ *LeBeouf* involved the same issue: whether an independent contractor who operated a tugboat constituted a third party for the purposes of a defense under § 1321(f)(1). The court in *LeBeouf* narrowly construed the statute and held that the tugboat operator was not a third party. The court of appeals found *LeBeouf* controlling and therefore reversed the district court.⁹

Hollywood Marine filed a petition for certiorari which the United States Supreme Court denied on May 18, 1981.¹⁰ Justice Rehnquist alone dissented. Although Rehnquist did not find the court of appeals' construction of § 1321(f)(1) to be "wholly unreasonable," neither did he find that such a narrow construction was warranted by the plain language of the statute.¹¹ Rehnquist, moreover, noted a division in the circuits on the interpretation of § 1321(f)(1).¹² Given such a division and the importance of the economic and environmental interests implicated, he concluded that the matter was ripe for the Court's "plenary consideration."¹³

Since the balance of the Court did not concur in Rehnquist's reasoning, the Fifth Circuit's interpretation of § 1321(f)(1) remains intact. No "third party" defense will lie where a spill occurs as a result of the acts or omissions of independent contractors engaged by barge owners for towing operations. Only the acts of vandals¹⁴ or pilots of other colliding vessels¹⁵ will be likely to provide such a defense.

The Fifth Circuit's narrow construction of the third party defense, however, has distinct merit. Barge owners will not be able to escape liability by using independent contractors. Moreover, barge owners will be encouraged to select those contractors with the best safety records. Fewer spills may result and, hence, water quality will be better maintained. The goals of the Federal Water Pollution Control Act are therefore promoted by holding barge owners liable for the costs of cleaning up oil spills.

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6. *United States v. Hollywood Marine, Inc.*, 625 F.2d 524 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 2336 (1981).

7. 621 F.2d 787 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 3031 (1981).

8. *LeBeouf* was decided July 18, 1980; the district court's decision in *Hollywood Marine* was rendered April 15, 1980.

9. *United States v. Hollywood Marine, Inc.*, 625 F.2d 524 (5th Cir. 1980).

10. 101 S. Ct. 2336 (1981).

11. *Id.* at 2337.

12. *Id.*

13. *Id.* at 2338.

14. See *Tug Ocean Prince, Inc. v. United States*, 436 F.Supp. 907 (S.D.N.Y. 1977), *aff'd in part and rev'd in part on other grounds*, 584 F.2d 1151 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979) (dicta).

15. S. REP. NO. 91-351, 91st Cong., 1st Sess. 6 (1969).