Litigating Contribution Claims Under the Oil Pollution Act

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In the aftermath of an oil spill, operators must focus on rapid environmental cleanup, restoration of natural resources, and compensation of affected parties – all under intense public and regulatory scrutiny with costs accumulating in the tens of millions of dollars or more. Under the federal Oil Pollution Act ("OPA"), this heightened response is the responsibility of the operator regardless of what caused the oil spill. This statutory scheme serves the purpose of ensuring a quick and comprehensive oil spill response, but can also have the unintended consequence of allowing tortfeasors that may have caused or contributed to the spill to escape or significantly delay liability. Although OPA provides statutory mechanisms for recovering costs incurred, case law addressing these provisions is not well developed. A handful of more recent court decisions have directly addressed the contours of OPA's statutory contribution provision, providing guidance to operators on future recovery of costs but leaving some issues unresolved.

A. Oil Pollution Act Contribution Provision

OPA, originally enacted as an amendment to the Clean Water Act, sets forth a comprehensive federal statutory scheme for oil spill response, imposing liability on responsible parties – defined as anyone who owns, leases or operates the source of the oil – for the costs of an oil spill. 33 U.S.C. § 2701 *et seq.*; §§ 2702(a), 2701(32). To that end, "OPA sets forth a comprehensive list of recoverable damages, including: removal costs; damage to natural resources and real or personal property; loss of government revenues, lost profits and earning capacity; and costs of increased or additional public services occasioned by the unlawful act." *South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, 234 F.3d 58, 64 (1st Cir. 2000).

"Responsible parties are strictly liable for cleanup costs and damages and are first in line to pay for damages that may arise under OPA." *Nguyen v. American Commercial Lines, L.L.C.*, 805 F.3d 134, 138 (5th Cir. 2015); *see also* 33 U.S.C. § 2702(a). "While responsible parties may be held strictly liable, these parties may later seek contribution and indemnification from other parties whose actions contributed to the oil spill." *Nguyen*, 805 F.3d at 138 n.2 (citing 33 U.S.C. § 2709-2710, 2713). Similarly, "when faced with claims by a third party, the responsible party can either establish that a third party was the sole cause and liable for any removal costs and damages pursuant to § 2702(d)(1)(A) or allege that a third party was the sole cause, pay the claims properly presented in accordance with § 2713 and be subrogated to the rights of those claimants paid pursuant to § 2702(d)(1)(B)." *Marathon Pipe Line Co. v. LaRoche Industries, Inc.*, 944 F.Supp. 476, 479 (E.D. La. 1996) (emphases in original). "Should the responsible party not be able to establish that a third party was the sole cause of the discharge, OPA provides for an action in contribution." *Id.* (citing 33 U.S.C. § 2709).

Section 1009 of OPA addressing contribution claims simply provides:

> A person may bring a civil action *for contribution* against any other person *who is liable or potentially liable under this Act or another law*. The action shall be brought in accordance with section 2717 of this title

33 U.S.C. § 2709 (emphasis added).

Two other provisions of OPA frame § 1009. First, § 1002 provides that a "responsible party" is strictly liable for "removal costs" and specific "damages" following an oil spill. *See* 33 U.S.C. § 2702(a). OPA defines a "responsible party" broadly, to include anyone who owns, leases or operates the source of an oil spill. *See id*. at § 2701(32). Consequently, under § 1002(a), entities that own, lease or operate potential sources of an oil spill, including pipelines, vessels, or storage tanks, are initially strictly liable for millions of dollars in cleanup costs and damages even if they did not cause the oil spill.

Second, § 1002(d) of OPA provides that if the oil spill's cleanup costs were "caused *solely* by an act or omission of one or more third parties," then the third party may be treated as the "responsible party" under § 1002(a). In other words, under § 1002(d), facility owners have a right to indemnity against third parties who are the "sole cause" of the expenses incurred under OPA in cleaning up an oil spill. In many cases, given the complicated facts and circumstances that may lead up to an oil spill and the costs of response, combined with the ambiguity in the statutory language, it may be difficult to definitively prove "sole cause." Thus, responsible parties must often pursue § 1009 contribution claims to ensure at least partial recovery of costs. Yet unlike contribution claims under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), there is not a well-developed body of case law to guide litigants in pursuing and defending claims under § 1009.

Some defendants whose actions have contributed to, but may not have been the sole cause of, oil spills have sought to exploit a perceived ambiguity in the language of these three sections. They argue that § 1009's "under this Act" clause means that a right to contribution arises only against parties who are found "liable or potentially liable" under another provision of OPA. They argue the only provision that applies to non-contracting third parties is § 1002(d), which is titled "liability of third parties." Thus, the argument goes, third parties are only liable for contribution if they are the "sole cause" of the oil spill, or if they are liable under "another law," which typically means "state law." Because many states have severely limited or altogether eliminated contribution claims through liability reform acts, defendants have sought to avoid any liability for an oil spill even if their acts or omissions accounts for ninety-nine percent (99%) of the cause of the oil spill. Only four courts have addressed this issue.

B. Recent Court Decisions

In *In re Settoon Towing*, the Fifth Circuit held that OPA creates a federal statutory right to contribution for removal costs and damages resulting from an oil spill independent of state or other law. *In re Settoon Towing*, 859 F.3d 340 (5th Cir. June 9, 2017). More specifically, the

court held that § 1009 of OPA creates a right to contribution against third parties even if they are not the "sole cause" of the oil spill or resulting expenses. The court addressed whether the owner of a tug that was designated as a "responsible party" under OPA could pursue a contribution claim under § 1009 against the operator of another towing barge that collided with the barge carrying the oil. The trial court had determined that the "responsible party" was 35% at fault for the oil spill, and the barge owner bore the remaining 65% fault. The case turned on whether OPA provides a separate right of contribution because no other law provided a right to recovery. The court held that interpreting § 1009 to require sole-cause liability "would wholly eliminate contribution *under the Act* and restrict a Responsible Party to seek reimbursement for cleanup expenses only from a later-designated solely-at-fault entity." Thus, the court concluded that "the most reasonable interpretation of the language of the OPA, . . . grants to an OPA Responsible Party the right to receive contribution from other entities who were partially at fault for a discharge of oil."

Prior to *Settoon*, only two other courts had addressed the issue in passing. In *Maytag Corp. v. Navistar Int'l Transp. Corp.*, 219 F.3d 587, 590 (7th Cir. 2000), the Seventh Circuit opined in a footnote that "contribution under the [OPA] is available only from a person liable under some other provision of the [OPA] or another statute." But the court in *Maytag* expressly refused to "resolv[e] any issue about the potential scope of recovery under the [OPA]." *See Maytag*, 219 F.3d at 579. Thus, while litigants wishing to limit the scope of § 1009 often rely on *Maytag*, that opinion is not entirely apposite.

A district court in Illinois almost provided support for those wishing to limit § 1009 to "sole cause" third parties. *See United States v. Egan Marine Corp.*, 808 F.Supp.2d 1065, 1082 (N.D. Ill. 2011) ("*Egan I*"). In *Egan I*, EMC was designated as the "responsible party" following an oil spill, and sought contribution from Exxon. The court dismissed the claim, reasoning that "EMC has not produced a genuine issue of material fact that Exxon solely caused the oil spill. As such, OPA does not provide grounds for contribution." But on a motion to reconsider, that court acknowledged that it had misstated the law. *See United States v. Egan Marine Corp.*, Case No. 1:08-cv-03160, Dkt. No. 303 (N.D. Ill. Aug. 30, 2011) ("*Egan II*"). Instead, the court recognized in *Egan II* that "the proper statement of the law" is that a party may seek contribution under § 1009 of OPA where the defendant has either solely "or partially" caused the oil spill.

Most recently, a district court in Utah adopted *Settoon*'s interpretation of § 1009 in holding that Chevron Pipe Line Company could pursue a contribution claim against a power company that it alleged caused a pipeline rupture. The court rejected a claim that a Utah law eliminating pure comparative fault abrogated a § 1009 claim against a party that was not the sole cause of the oil spill. Instead, the court held that section §1009 "does create an independent statutory right to pursue contribution, as that term is traditionally defined (i.e., allocation of proportionate fault), against a liable, or potentially liable, third-party who may have been a partial cause of the spill." *Chevron Pipe Line Co. v. Pacificorp*, 2017 WL 3382065, at * 6 (Utah D. Aug. 4, 2017).

Thus, the courts that have analyzed the issue directly have unanimously held that § 1009 entitles a "responsible party" a federal statutory right to contribution against non-sole cause third parties.

C. Unresolved Questions

Although future courts are likely to follow the Fifth Circuit in *Settoon* in addressing whether § 1009 creates a right to contribution, a handful of other unresolved issues may pose hurdles to litigating claims under this section. These include the following:

- The Scope of Recoverable Expenses: OPA applies explicitly to "removal costs" and "damages." While both terms are broadly defined under OPA, they do not include significant expenses that virtually every "responsible party" incurs when complying with OPA's strict liability regime. This raises some questions ripe for litigation. For example, may a "responsible party" recover for payments made to a state agency acting as a "natural resources" trustee under delegated authority? What about payments made to third parties for personal injuries sustained as a result of the oil spill – or while removing the oil?

- Court or Jury: A related question is whether a court or jury gets to decide the amount of compensable removal costs or damages recoverable under OPA. One court has held that "removal costs" under OPA are claims for restitution under "an avalanche of authorities" interpreting CERCLA. *See United States v. Viking Resources, Inc.*, 607 F.Supp.2d 808 (S.T. Texas 2009). Generally, restitution is an equitable remedy tried to the court. Moreover, § 1002(b) prescribes that recoverable removal costs are only those for acts that are "consistent with the National Contingency Plan," and at least one court has pointed out that "consistency with the NCP" is a determined by the court as a matter of law. *See City of Tulsa v. Tyson Foods, Inc.*, 2003 WL 26098561 at *2 (N.D. Okl. March 13, 2003). Thus, it appears that there may be no right to a jury trial at least with respect to "removal costs."

- Liability Standard: Another unresolved issue is the standard of liability used in apportioning causal fault to joint tortfeasors. In other words, is a non-sole cause third party strictly liable for the expenses incurred in cleaning up an oil spill? Or is the third party liable only to the extent of its negligence? If the latter, what defenses may the third party raise? As noted above, the responsible party is initially "strictly liable" and thus it would seem appropriate to extend the same standard to joint tortfeasors. On the other hand, applying different standards to responsible parties may be justifiable because presumably they can insure against the risk of loss of oil spills.