

CLAIM SUMMARY / DETERMINATION FORM

Date	: 8/8/2006
Claim Number	: 906017-001
Claimant	: Great American Insurance
Type of Claimant	: Corporate (US)
Type of Claim	: Affirmative Defense
Claim Manager	: (b) (6)
Amount Requested	: \$210,014.23

Facts:

On March 23, 2005, the M/V CONCEPTION, owned by Truth Aquatics Inc., was allegedly stolen from its dock at Sea Landing in Santa Barbara Harbor in Santa Barbara, CA. The suspect allegedly broke into the boat, started it, and drove the boat out of the harbor striking three boats, of which one sank. The suspect was later taken into custody. The CONCEPTION grounded hard near Point Arguello on Vandenberg Air Force Base. The boat contained nearly 2,000 gallons of diesel. The responder, Clean Harbors, removed approximately 1,600 gallons of the diesel from the vessel before it had to cease operations, due to a conflict with Union Pacific and its railroad tracks. With approximately 400 gallons still remaining in the vessel, it was then towed away and taken to the nearest safe harbor; Port Hueneme, where it was lifted and put in dry dock.

The only oil discharge in this incident was from the vessel SLICK CHICK, which sank when it was struck by the M/V CONCEPTION (CONCEPTION). This oil discharged into the Santa Barbara Harbor, a navigable water of the United States. Given that the sinking and subsequent discharge was caused by the Conception, the claimant, Great American Insurance (GAI), as insurer of the Conception, assumed responsibility for the response. GAI does not allege that the vessel discharged oil, but rather that there was a substantial threat of an oil spill onto navigable waters off the coast of California, specifically on the waters immediately adjacent to Vandenberg Air Force Base.

Claimant:

The claimant is Great American Insurance (GAI) as the subrogated insurer of the vessel M/V CONCEPTION. GAI insured the vessel's owner, Truth Aquatics Inc. for vessel pollution under OPA 90. Truth Aquatics is a company that owns and operates the charter scuba diving boat, the CONCEPTION.

Claim:

GAI seeks an entitlement to a defense to liability based on the sole fault of a third party defense to liability with an underlying claim for costs totaling \$210,014.23. Specifically, GAI seeks reimbursement of:

- costs and expenses for removing the substantial threat the CONCEPTION allegedly presented;
- its relocation from Point Arguello to Port Hueneme, the nearest safe port; and

- the costs related to the sinking of the vessel SLICK CHICK, which sank at the dock because it was struck by the CONCEPTION.

These costs represent the removal costs for lightering the Conception of oil; which represented a serious threat of pollution to an environmentally sensitive area.

GAI alleges that Truth Aquatics was an innocent party in the incident and for this reason should be entitled to a defense to liability.

APPLICABLE LAW:

“[E]ach responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines ...[of the U.S.] is liable for the removal costs and damages...that result from such incident.” 33 U.S.C. 2702

OPA section 1003(a) states that, “*A responsible party is not liable for removal costs or damages under section 1002 if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by-*...

- (3) *an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party..., if the responsible party establishes, by a preponderance of the evidence, that the responsible party-*
 - (A) *exercised due care with respect to the oil concerned, ... in light of all relevant facts and circumstances; and*
 - (B) *took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions.”* 33 USC 2703(a)

If proven, the third party defense is a complete defense to liability for the responsible party (RP). To succeed in asserting this defense to liability, The RP must show that the discharge was caused solely by an independent third party and that The RP satisfied (A) and (B) above.

In addition, there are limitations on the defense. The defense could not be granted if The RP failed or refused to-

1. report the incident as required by law,
2. provide reasonable cooperation in removal activities, or
3. without sufficient cause, comply with an order issued under section 311 of the Federal Water Pollution Control Act (FWPCA). 33 USC 2703(c)

“*The responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 1013 only if the responsible party demonstrates that –*

- (1) *the responsible party is entitled to a defense to liability under section 1003.”* 33 U.S.C. 2708

A responsible party may present a claim directly to the Oil Spill Liability Trust Fund. 33 U.S.C. 2713

Defense Entitlement:

Scope of Determination

Under the claimant's theory of recovery, the M/V CONCEPTION posed a substantial threat of discharge after she grounded. The claimant further acknowledges that its insured, Truth Aquatics, owned the M/V CONCEPTION. As it owned a vessel posing a substantial threat of discharge, Truth Aquatics was a responsible party for this incident. Moreover, because the claimant brings this claim based on its subrogation rights, the claimant can assert no rights greater than those held by Truth Aquatics. As a result, the claimant will only be entitled to compensation by the OSLTF upon showing that Truth Aquatics would have been entitled to compensation for the amounts claimed under 33 U.S.C. § 2708. Because the defenses of an act of god and an act of war do not apply here, 33 U.S.C. § 2708 requires the claimant to show that Truth Aquatics was entitled to assert a third-party defense under 33 U.S.C. § 2703(a)(3) before NPFC can consider which claimed costs, if any, could be reimbursed by the OSLTF under OPA. As discussed in more detail below, the claimant has failed to show that Truth Aquatics is entitled to a third-party defense under OPA and this claim must be denied outright without considering whether each individual claimed cost should be compensable under OPA.

Third Party Causation

OPA requires the third party to be completely independent of the RP for the third party defense to be applicable. See 33 USC 2703. The claimant stated that the thief is a former employee of the RP. (See claimant's letter dated 7/11/06, Exhibit 2) However, we found no evidence that the alleged thief was a current employee or in a contractual relationship with the RP. The claimant provided a copy of the police report from the Santa Barbara Police Department to show that a third party caused the incident. (See Police Report dated 3/23/05, Exhibit 3) The NPFC finds sufficient evidence that a third party did steal the vessel and ran it aground at Vandenberg Air Force Base.

Exercise of Due Care and Taking Precautions

Because the alleged thief is the RP's former employee, it would have been reasonable to protect the vessel from the acts of a former employee who would have intimate knowledge of the vessel, its location, and the RP. Therefore, it is reasonable to assume that a former employer would take precautions against the theft of the vessel by a former employee. Even if the alleged thief were not a former employee, there are several reasons why this vessel owner should have taken more precautions to protect its vessel from theft which would subsequently prevent the discharge of oil or threat of discharge of oil from it.

- First, the police report provided by the claimant states that the vessel was potentially worth more than \$1 million. We would expect a wide array of security measures to protect such a valuable asset.
- Second, since the vessel is a key part of the owner's scuba diving business (one of three vessels, see police report, Exhibit 3), he stood to lose potentially substantial

business without his vessel. Given the impact of a loss due to theft, we expect that precautions would have been taken to prevent a quick and easy steal by a thief.

The claimant does not argue that the RP exercised due care with respect to the oil on board and does not argue that the RP took reasonable precautions against the acts or omissions of third parties and the consequences of those actions or omissions. The claimant merely points out the measures in place at the time of the incident. In its letter of May 4, 2006, the claimant states that the security involved included the fact that the marina is owned by the city of Santa Barbara and there is a police substation on the premises, there was a private security guard service, and the vessel was locked and has a keyless ignition. (See Exhibit 4) The claimant states that the thief broke in through a window. This statement is corroborated by the marine surveyor's report dated March 31, 2005, in which the surveyor states that there were detached window clips at the forward galley window and a wheelhouse window and both windows were still open when the vessel was recovered. (See Exhibit 5) The claimant also states that to its knowledge no prior thefts occurred at the marina.

The NPFC finds that the claimant has not satisfied its burden of proving that the RP took reasonable precautions to protect its vessel from theft and potential oil discharges caused by theft of the vessel as required by 33 U.S.C. § 2703 (a)(3). When interviewed by the police, the owner and the vessel's captain stated that the vessel was "somewhat secured, [and] it would not be difficult to break into the area where the wheel and various controls are located...All it would take is someone with some general knowledge as to how to operate the vessel in order to get the vessel started and running." (See SB police report, Exhibit 3) We find this statement to be evidence that the vessel was not properly protected from thieves. We found no proof that the vessel was actually locked the night it was stolen, though the fact that the thief broke in through a window leads us to believe that the vessel may have been locked. Even so, our resident vessel expert and licensed marine surveyor provided a list of the minimum security features that should have been in place to protect such a valuable vessel from theft. The following is the list:

1. A cabin alarm system with sensors on the doors, hatches and windows that was activated prior to the theft.
2. An ignition kill switch.
3. Window slider key locks.
4. Fuel shutoff valves with padlocks that were locked when the vessel was secured for the night.

Limit on a Defense

We found no evidence that Truth Aquatics reported a discharge for the CONCEPTION to the National Response Center as required by 33 U.S.C. § 2703 (c)(1). The only NRC report for the time period is for the SLICK CHICK. This is likely because the CONCEPTION did not discharge any oil, whereas the SLICK CHICK actually did discharge oil into the water. We also found no evidence showing that the claimed costs were either directed by the Federal On Scene Coordinator ("FOSC") or found to be consistent with the National Contingency Plan by the FOSC as required by 33 C.F.R. § 136.205.

Also, generally, once the threat of oil pollution is eliminated, subsequent activities don't qualify for compensation from the OSLTF. Given this, and though we have not closely examined

everything in detail within the cost submission, it is apparent to us that a number of the costs or issues associated with this entitlement fall outside those that would be compensable from the OSLTF, if we granted an entitlement to a defense to liability.

Conclusion

The claimant has not met its burden of proving by a preponderance of evidence that the incident was caused solely by the act of a third party, that the claimant took reasonable precautions to prevent against the foreseeable acts of third parties, and that the claimant exercised due care with respect to the oil in the vessel. Additionally, there is no evidence of proper notification as required by 33 U.S.C. § 2703 (c)(1) or FOSC approval of the costs as required by 33 C.F.R. § 136.205. Therefore, the RP is not entitled to a defense to liability, and through subrogation the claimant is also not entitled to a defense or reimbursement of the underlying claimed costs.

DETERMINATION:

Based on the facts and analysis above, I recommend that the claimant, who is the insurer of the responsible party for the incident, be denied its request to an entitlement for a defense to liability based on the alleged sole fault of a third party and the underlying claim for costs and expenses incurred.

Claim Supervisor:	(b) (6)
Date of Supervisor's Review:	19 March 2007
Supervisor Action:	The claim is approved as presented.
Supervisor's Comments:	claimant failed to prove all the elements in a defense to liability, based on the sole fault of a third party.