Strict Liability Under Section 311 of the Clean Water Act: Cleaning Up *Respondeat Superior* and Negligence

INTRODUCTION

The Clean Water Act

Congress passed the Water Quality Improvement Act of 1970 (commonly known as the Clean Water Act ("CWA"))[1] in response to major oil spills off United States' and foreign coasts[2] and in recognition of the increasing environmental damage caused by oil pollution.[3] Congress adopted a far-reaching goal for the CWA, that "there should be no discharges of oil" into United States' waters.[4] To achieve this goal, Congress prohibited discharges[5] of

1. Pub. L. No. 91-224, §§ 101-205, 84 Stat. 91 (1970), 33 U.S.C. §§ 1151-1175 (1970) (amended and recodified at 33 U.S.C. §§ 1251-1376 (1982)).

2. H.R. REP. No. 127, 91st Cong., 1st Sess. 2 (1969), *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 2691, 2692-94; S. REP. No. 351, 91st Cong., 1st Sess. 3, 6 (1969).

3. Frequent oil spills from vessels and from on- and off-shore facilities have ruined beaches and lowered the quality of our rivers and shore waters and have jeopardized animal and vegetable life. The spills from the *Torrey Canyon* and the *Ocean Eagle* have been spectacular examples of this danger, but the damage from repeated but unpublicized lesser incidents and intentional dumping is steadily increasing. This can no longer be tolerated.

S. REP. No. 351, 91st Cong., 1st Sess. 3 (1969).

"[T]he increasing volume of oil being handled by an increasing number of vessels and facilities enhances the risk of major disaster, and . . . the protection of our vital water resources and shorelines is more and more imperative." *Id.* at 7.

For a history of the events leading up to Congress' adoption of the Water Quality Improvement Act ("WQIA"), see Healy & Paulsen, *The Water Quality Improvement Act of 1970*, 1 J. MAR. L. & COM. 537 (1970-1971).

For a discussion of the extent and impact of oil pollution, see R. M'GONIGLE & M. ZACHER, POLLUTION, POLITICS AND INTERNATIONAL LAW 14-38 (1979); F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 3.01[1](f)(ii), at 3-18 to 3-19 (1984).

4. Pub. L. No. 91-224, § 11(b)(1), 84 Stat. 91, 92 (1970). In 1972, Congress included "hazardous substances" within the Act's purview as well as oil. Pub. L. No. 92-500, § 311(b)(2)(A), 92 Stat. 863 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)). Subsection 311(b)(2)(A) of the Act directs the Environmental Protection Agency ("EPA") to designate as "hazardous substances" those "elements and compounds which, when discharged in any quantity into or upon [United States' waters] . . . present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches." 33 U.S.C. § 1321(b)(2)(A) (1982).

The Water Quality Improvement Act will be considered in this Note only in regard to oil, unless otherwise indicated, because the Note focuses on the scheme of liability created by Congress in 1970, and on Congress' intent in creating that scheme. Because the provi-

oil in "harmful quantities"[6] from vessels and onshore and offshore facilities.[7] Owners and operators[8] of vessels and facilities which discharge oil in violation of the CWA are subject to a civil penalty, regardless of fault.[9]

sion for "hazardous substances" was grafted onto an existing scheme of liability, which has remained largely intact, much of the analysis of that scheme pertains to both oil and hazardous substances. The most current provisions of the CWA will be cited to herein if citation to the original Act is not necessary to discuss Congress' intent when it passed the Act, but where they significantly depart from the original provisions, nevertheless.

5. "Discharge" is currently defined as:

> includ[ing], but . . . not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping, but exclud[ing] (A) discharges in compliance with a permit under section 1342 of this title, (B) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 1342 of this title, and subject to a condition in such permit, and (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 1342 of this title, which are caused by events occuring within the scope of relevant operating or treatment systems.

§ 311(a)(2), 33 U.S.C. § 1321(a)(2) (1982).

6. Subsection 311(b)(4) of the CWA currently directs the President to determine by regulation "those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare of the United States, including but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches." 33 U.S.C. § 1321(b)(4) (1982).

7. § 311(b)(3), 33 U.S.C. § 1321(b)(3) (1982). This subsection currently exempts discharges "permitted under the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended." *Id.* Vessels, onshore and offshore facilities are defined in § 311(a)(3), (10) and (11), 33 U.S.C. § 1321(a)(3), (10) and (11), respectively.

8. "[O]wner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment.

§ 311(a)(6), 33 U.S.C. § 1321(a)(6) (1982). Hereinafter, "owner or operator" will be referred to simply as "owner."

9. § 311(b)(6), 33 U.S.C. § 1321(b)(6) (1982). As originally drafted, this subsection directed the Coast Guard to assess a civil penalty of up to $10,000 per offense on owners who "knowingly" discharged in violation of subsection 11(b)(2). The amount of the penalty was to be determined on the basis of the "size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation . . . ." Pub. L. No. 91-224, § 11(b)(5), 94 Stat. 91, 92 (1970).

Subsection 311(b)(6), the current analogue of subsection 11(b)(4), directs the Coast Guard to assess a civil penalty of no more than $5,000 per offense, and drops the "knowing" requirement of the earlier version. Subsection 311(b)(6) authorizes the EPA to assess a civil penalty, where none has been assessed under the prior section, of up to $50,000 per offense, and up to $250,000 for discharges resulting from willful negligence or willful misconduct within the privity and knowledge of the "owner, operator, or person in charge." In determining the amount of the penalty, the EPA is to consider the "gravity of the offense, and the standard of care manifested by the owner, operator, or person in charge." 33 U.S.C. § 1321(b)(6)(A), (B) (1982).

The CWA authorizes the United States government to clean up a discharge if the owner of the discharging vessel or facility does not do so adequately.[10] Under subsection 311(f), an owner is "liable to the United States government for the actual costs" that the government incurs in cleaning up the spill.[11] The amount of liability is limited, unless the United States can prove that the discharge was caused by "willful negligence or willful misconduct within the privity and knowledge" of the owner.[12] An owner can escape liability altogether by proving that the discharge was caused "*solely* by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States government, or (D) an act or omission of a *third party*," whether or not the third party's act or omission was negligent.[13] Subsection 311(g) provides the

10. Pub. L. No. 91-224, § 11(c)(1), 94 Stat. 91, 93 (1970). As currently drafted, subsection 311(c)(1) also authorizes the United States to remove oil and hazardous substances which have not yet been discharged, but which pose a "substantial threat" of being discharged. 33 U.S.C. § 1321(c)(1) (1982). *See* § 311(c), (d), 33 U.S.C. § 1321(c), (d) (1982), for complete set of actions which the United States is authorized to take in the event of an imminent or actual discharge.

11. Pub. L. No. 91-224, § 11(f)(1), 84 Stat. 91, 94-95 (1970) (amended and recodified at 33 U.S.C. § 1321(f)(1) (1982)).

12. *Id.* One author suggests that these standards are so difficult to prove that the United States seldom attempts to seek unlimited liability under this provision. Helfrich, *Problems in Pollution Response Liability Under Federal Law: FWPCA Section 311 and the Superfund*, 13 J. MAR. L. & COM. 455, 457 (1981-1982).

13. Pub. L. No. 91-224, § 11(f)(1)-(3), 84 Stat. 91, 94-95 (1970) (emphasis added). Subsection 11(f)(1) reads:

> Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil is discharged in violation of subsection (b)(2) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) for the removal of such oil by the United States Government in an amount not to exceed $100 per gross ton of such vessel or $14,000,000 whichever is lesser, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action *in rem* in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

Id.

Subsections 11(f)(2) and (3), applying to onshore and offshore facilities, respectively, each contain different liability limitations from that in subsection 11(f)(1). The liability

United States government with a claim against such a third party.[14]

Third Party Defense and Respondeat Superior

This Note addresses the scope of owners' liability for cleanup costs under subsection 311(f) as limited by the third party defense.[15] Without stating so explicitly, several judicial opinions and commentators have suggested that the third party exception to liability under subsection 311(f) in effect restates the common law limit of owners' liability as defined by the doctrine of *respondeat superior*.[16] According to this broad view of the defense, the relationship of a third party—whose acts are beyond the scope of

limitations in subsection 11(f)(1) have been substantially increased in a subsequent amendment. 33 U.S.C. § 1321(f) (1982).

14. Pub. L. No. 91-224, § 11(g), 84 Stat. 91, 95 (1970) (amended and recodified at 33 U.S.C. § 1321(g) (1982)).

The CWA is only one of a patchwork of domestic and international efforts to reduce marine pollution from oil and other substances. For descriptions of these efforts, see generally Healy & Paulsen, *supra* note 3, at 537; M'GONIGLE & ZACHER, *supra* note 3; Wood, *An Integrated International and Domestic Approach to Civil Liability for Vessel-Source Oil Pollution*, 7 J. MAR. L. & COM. 1 (1975-1976); THE NEW NATIONALISM AND THE USE OF COMMON SPACES 7-111 (J. Charney ed. 1982).

15. The third party defense appears in a variety of schemes of strict liability. *E.g.*, Comprehensive Environmental Response, Compensation and Liablity Act ("CERCLA"), § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1982); International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, art. III, par. 2(b), 9 I.L.M. 45, 47 ("No liability for pollution damage shall attach to the owner if he proves that the damage . . . was wholly caused by an act or omission done with intent to cause damage by a third party."); Superfund Expansion and Protection Act of 1984, H.R. 5640, 98th Cong., 2d Sess. § 202(b)(3)(C), H.R. REP. No. 890, 98th Cong., 2d Sess. 13 (1984) (third party defense in provision for compensation of persons injured from exposure to hazardous wastes; the provision was omitted from the final version of H.R. 5640 which was passed by the House). These schemes have become more prevalent as the inherent dangers to public health from the production and disposal of toxic chemicals, and the difficulty of recovery under traditional common law remedies for persons injured from exposure to such chemicals, are recognized.

For a description of several state statutes imposing strict liability, two with third party defenses, see GRAD, *supra* note 3, § 4A.05[b][ii][F], at 4A-191 to 4A-193. *See also* SUPERFUND SECTION 301(E) STUDY GROUP, REPORT TO THE CONGRESS ON VICTIM COMPENSATION PURSUANT TO SECTION 301(E) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABLITY ACT OF 1980 (P.L. 96-510) (1982) [hereinafter cited as STUDY GROUP PROPOSAL] (proposed federal and state scheme of victim compensation for injuries caused by the discharge of hazardous substances).

For a discussion of the difficulties of recovery under traditional common law doctrines of fault and causation, and under applicable state statutes of limitation, see STUDY GROUP PROPOSAL, *supra*, at 25-146; GRAD, *supra* note 3, § 4A.05, at 4A-151 to 4A-172.

16. *See infra* notes 43-52 and accompanying text.

owners' responsibility—to an owner is as close as that of an independent contractor to an employer.

Under *respondeat superior*, acts of independent contractors are also beyond the scope of owners' responsibility because, by definition, owners have no control over independent contractors' physical conduct.[17] According to the doctrine of *respondeat superior*, an employer is liable for the conduct of his or her employee only when the employer has a right to control the employee's physical conduct in performance of the employee's contractual duties.[18] Thus, vessel owners are responsible for the acts of their crew or pilot which the owners have a right to control.[19] Similarly, a barge owner would not be responsible for the conduct of a crew on a tug which the owner hired to tow the barge if the owner had no contractual right to control the manner of towage.[20]

Other courts have viewed the third party defense narrowly in holding that subsection 311(f) extends the scope of owners' responsibility beyond persons within the master/servant relation of *respondeat superior* to include independent contractors.[21] These courts state that Congress placed a standard of strict liability in

17. "An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." RESTATEMENT (SECOND) OF AGENCY § 2 (1957); *Id.* § 219(1). "For the purpose of determining liability, . . . 'independent contractors' . . . do not cause the person for whom the enterprise is undertaken to be responsible, under the rule stated in Section 219." *Id.* § 220, comment e.

18. A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service. (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.

Id. § 2. "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." *Id.* § 219(1).

19. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 7-16, at 520 (1975). "The . . . pilot is in much the same position as any other crew member. Under the ordinary rules of *respondeat superior*, the shipowner is responsible for his actions . . . ." *Id.*

20. *See, e.g.*, Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955). In *Bisso*, the respondent tug owner's crew negligently caused the sinking of petitioner's oil barge. *Id.* at 86. The Supreme Court held the tug owner liable in spite of provisions in the towage contract that the tow was at the "sole risk" of the barge, and that the tug's crew were the barge owner's "servants" during the towage. *Id.* The Court explained that the latter term was a "fiction" because the tug's crew "remained at all times subject to [the tug owner's] complete control. In contrast, the owners of the barge being towed never had a relationship of any kind or character with those who controlled and operated the towboat." *Id.* at 95.

21. *See infra* notes 29-42 and accompanying text.

the CWA, because Congress intended owners both to bear a greater burden of the costs incurred by oil pollution than under prior law,[22] and to exert more control over the conduct of their transport or storage operations. To achieve this objective, the courts state, Congress extended responsibility beyond that defined by the master/servant relation, to remove owners' incentive to relinquish control through contract in order to avoid responsibility under *respondeat superior* for the acts of independent contractors. According to this second view, acts of third parties which are beyond the scope of owners' liability are those acts over which owners could never have exerted any control to prevent spills.

Fault-based Tests for Strict Liability?

The scope of the third party defense in section 311 is significant, not only because it is a statutory issue over which there is disagreement among courts and commentators,[23] but also because the meaning of "third party" bears on the fundamental nature of liability imposed by section 311. More specifically, the third party defense and "sole cause" requirement for owners invoking the defense raise questions of the role of fault-related standards of liability in a "strict liability" statute.

One of these questions is whether the third party defense imports a scope of liability equivalent to that determined by the doctrine of *respondeat superior* in cases of common law negligence.[24] Another question is whether the statutory requirement that an owner must prove a third party cause to be the sole cause of a spill imports a no-fault test of causation for owners' conduct in addition to a test of negligence.[25] This Note rejects use of the fault-based standard of *respondeat superior* to determine who is a third party, but argues that owners' conduct should be subject only to a fault-based negligence test under the sole cause provision.

The first section of this Note details the facts of cases which have faced the third party issue and identifies the alleged third parties in the context of the master/servant relation under *respondeat superior*. The courts' decisions are discussed in subsequent sections. Section two outlines the history of applicable standards

22. *See infra* Section II(A) for a discussion of the law prior to the CWA.
23. *See infra* Section I, notes 29-52 and accompanying text.
24. *See infra* Section V, notes 103-39 and accompanying text.
25. *See infra* Section VI, notes 140-65 and accompanying text.

of liability. Section three discusses the bases for the courts' differing interpretations of the third party defense. Section four analyzes the defense in terms of the functions which Congress intended its standard of liability to serve. Section five analyzes all of the defenses in subsection 311(f)[26] in terms of the nature of the set of causes for which they exempt owners from liability, Congress' apparent intent to impose a scheme of strict liability, and the principles underlying the defenses. Section six addresses the sole cause requirement for owners invoking the third party defense.

The last section compares the third party defense and causation requirement in section 311 of the CWA with similar provisions in section 107 of the Comprehensive Environmental Response, Compensation and Liability Act.[27] Section 107 of CERCLA imposes liability for the government's costs of cleaning up hazardous substances.[28] Thus, CERCLA is functionally similar to the CWA with respect to oil, and CERCLA functionally overlaps the CWA with respect to hazardous substances. The legislative history and Congress' drafting of the former—more recent— statute avoid much of the ambiguity which exists in the third party and sole cause provisions of the CWA. The last section of this Note will also discuss the possibilities for construing section 311 of the CWA in accordance with Congress' intent in passing section 107 of CERCLA.

I. Cases

A. *Narrow Reading of "Third Party"*

The scope of the third party defense has been squarely addressed by two courts of appeals, both of which have interpreted the provision narrowly. The First Circuit in *Burgess v. M/V Tamano*[29] held that the owner of a supertanker was liable to the United States under subsection 311(f) for the cost of cleaning up 100,000 gallons of oil which spilled from the tanker when it struck an underwater ledge. The court of appeals found that the accident was caused by the negligence of a compulsory pilot, but held that the pilot was not a third party within the meaning of subsec-

26. *See supra* note 13 and accompanying text.
27. 42 U.S.C. § 9607 (1982) (commonly known as the "Superfund" statute).
28. *See infra* notes 167-78 and accompanying text.
29. 564 F.2d 964 (1st Cir. 1977), *cert. denied*, 435 U.S. 941 (1978).

tion 311(f)(1).[30] A pilot is "compulsory" when a ship is required by law to have a pilot navigate the ship into port, and when the ship's owner is subject to a fine or imprisonment for violating the law.[31] Under the common law doctrine of *respondeat superior*, if the pilotage statute removes control over navigation of the ship from the owner and places it entirely with the pilot, the pilot is not a "servant" of the owner, and the owner is not responsible for the pilot's negligence.[32] In *Tamano* the court of appeals presumed that the owner was not liable for the compulsory pilot's negligence on the basis of *respondeat superior*, but held the owner liable under section 311 of the CWA, nevertheless.[33]

In *United States v. LeBoeuf*,[34] a barge which was being unloaded spilled oil when a tug crewman accidentally opened the wrong valve. The tug and its crew had been contracted to tow the barge as well as to load and unload its cargo.[35] The Fifth Circuit reversed the district court's judgment against the United States, and held the owner liable for cleanup costs because the tugboat was not a third party within the meaning of subsection 311(f)(1). Like the First Circuit in *Tamano*, the Fifth Circuit rejected the defense while assuming the asserted third party "operated as an independent contractor,"[36] for whose acts the owner would not be liable under *respondeat superior*.

District courts in two other cases have rejected owners' assertions of a third party defense. In *United States v. Hollywood Marine, Inc.*,[37] oil leaked from a hole caused by the grounding of an unpropelled tank barge. The barge was owned *pro hac vice*[38] by the defendant, and towed by Big B. Towboat Services which was also responsible for keeping the barge "seaworthy, properly manned,

30. *Id.* at 981-82.

31. GILMORE & BLACK, *supra* note 19, § 7-16, at 520.

32. RESTATEMENT (SECOND) OF AGENCY § 223, comment c. *Cf.* GILMORE & BLACK, *supra* note 19, § 7-16, at 520. The authors suggest that compulsory pilots are never servants under *respondeat superior*. "[I]t is pretty well settled that if the pilotage is 'compulsory' the *respondeat superior* nexus is broken." *Id.*

33. 564 F.2d at 982. *Contra* Note, *Shipowner's Liability for an Oil Spill Caused Solely by the Negligence of a Compulsory Pilot*, 58 B.U.L. REV. 316 (1978) (arguing that Congress did not intend to repudiate common law principle that a shipowner is not personally liable for the negligence of a compulsory pilot); *see infra* text accompanying notes 112 and 113.

34. 621 F.2d 787 (5th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981).

35. *Id.* at 788.

36. *Id.* at 790.

37. 519 F. Supp. 688 (S.D. Tex. 1981).

38. "For this turn; for this one particular occasion." BLACK'S LAW DICTIONARY 1091 (4th ed. 1951).

equipped" and "furnish[ed with] all necessary [equipment] to safely operate and handle" the barge.[39] Without determining whether the tug was an independent contractor, the district court followed its court of appeals' decision in *LeBoeuf* and held that the United States was entitled to recover cleanup costs from the barge owner because the tug, which the court found to have caused the grounding, was not a third party within the meaning of subsection 311(f)(1).[40]

On a motion for summary judgment, the District Court for the District of Alaska held that the contractor who had built the defendant's fuel storage facility was not a third party within the meaning of subsection 311(f).[41] The district court followed the First and Fifth Circuits' narrow interpretation of the defense in holding that the contractor was not a third party, even assuming that he was an independent contractor for purposes of *respondeat superior*.[42]

B. *Broad Interpretation of Third Party Exception*

In *Tug Ocean Prince, Inc. v. United States*,[43] a barge leaked oil when it was driven onto a rock by the pilot of the tug towing the barge.[44] The district court ruled on issues relating to the existence and extent of the tug owner's liability as a presumed third party under subsection 311(g). Although the tug owner's status as a third party under subsection 311(f) was never contested, the court addressed it anyway. The court noted legislative history suggesting that the exception was intended to cover situations in which a "third party" ship caused a spill by striking an unrelated,

39. 519 F. Supp. at 690.

40. The district court had originally held that the tug was a third party. 487 F. Supp. 1211 (S.D. Tex. 1980). This decision was summarily reversed and remanded by the Fifth Circuit in a brief opinion citing the court of appeal's earlier decision in *LeBoeuf*. 625 F.2d 524 (5th Cir. 1980), *cert. denied*, 451 U.S. 994 (1981).

41. United States v. Sea-land Service, Inc., No. A79-150 (D. Ark. filed Dec. 2, 1980). *But see* Healy & Paulsen, *supra* note 3, at 564 (suggesting that a third party, in relation to an oil-carrying ship, could be the shipbuilder or repair yard).

42. Sea-land Service, No. A79-150, at 5-6. The district court did not uphold the United States' motion for summary judgment on the seemingly simpler issue of whether the oil which was discharged and cleaned up emanated from defendant-owner's facility. *Id.* at 6. The case was settled, however, before this issue was tried.

43. 436 F. Supp. 907 (S.D.N.Y. 1977), *modified*, 584 F.2d 1151 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979).

44. *Id.* at 915.

oil-carrying vessel.[45] But the court disregarded the significance of this example in defining the scope of the defense, and simply questioned whether Congress was aware that much of the oil carried on inland waterways was pushed by tugs which "are often owned by third parties."[46]

On appeal, the Second Circuit in *Tug Ocean* held that the tug owner had committed "willful misconduct" and, thus, was not eligible for the liability limitation in subsection 311(g).[47] The court justified its broad construction of "willful misconduct" as "necessary to make a tug company liable" for cleanup costs.[48] Like the district court below, and contrary to the Fifth Circuit's decision in *LeBoeuf*, the Second Circuit did not consider that section 311 may have been intended to impose liability on a tanker owner for the conduct of a tug contracted by the owner.[49]

The Supreme Court denied *certiorari* in all of the cases mentioned above which were appealed to the Court.[50] Justice Rehnquist dissented when the Court denied *certiorari* in *Hollywood Marine*, arguing that the conflicting interpretations of the third

45. *Id.* at 923. This legislative history is discussed *infra* at text accompanying note 107.

46. *Id.*

47. 584 F.2d at 1162. The scheme of third party's liability under subsection 311(g) is similar to that applicable to owners in subsection 311(f). As in subsection 311(f) with respect to owners, willful negligence or willful misconduct within the third party's privity or knowledge will expose the third party to unlimited liability. For further discussion of this scheme, see *infra* text accompanying and following note 165.

48. *Id.* at 1164.

49. Tugs' status as third parties was questioned in a case arising in the Second Circuit, but the issue became moot before any court could render a final decision on it. In *Complaint of Berkley Curtis Bay Co.*, a district court held on remand that the tug contracted to tow the barge which discharged oil was a third party within the meaning of subsection 311(h) of the CWA. 557 F. Supp. 335, 340 (S.D.N.Y. 1983). The court also held that subsection 311(h) preserved the United States' nonstatutory rights against such third parties. *Id.* at 338-39. At trial, the district court had found the tug *not* to be a third party within the meaning of subsection 311(f). But the issue was disregarded when the court found that the barge owner could not have exercised the third party defense because his negligence defeated the requirement in subsection 311(f) that the defense asserted must be the sole cause of the spill. *Id.* at 339. On remand, the court did not consider whether its holding as to the tug's status under subsection 311(h) was inconsistent with its earlier holding under subsection 311(f), because the latter was "irrelevant." *Id.* at 339-40. However, in an apparent acceptance of the First and Fifth Circuits' arguments for a narrow reading of the third party defense in subsection 311(f), the court noted that such an inconsistency would be justified. The court stated that, while a *narrow* reading of the term in subsection 311(f) served Congress' purpose of assuring the United States recovery of cleanup costs by holding vessels strictly liable, a *broad* reading of the term in subsection 311(h) also served that purpose by providing the United States with another basis for recovering its costs. *Id.* at 340.

50. *See supra* notes 29, 34, 40, 43.

party defense in *Tug Ocean*, *LeBoeuf* and *Hollywood Marine* warranted the Supreme Court's attention because oil transport and pollution were important subjects, and because contracts like those between owners and tug operators, and insurance coverage depended on how the defense was construed by the courts.[51] Justice Rehnquist doubted that the First and Fifth Circuits' narrow interpretation was valid.[52]

II. Standards of Liability Prior to CWA

A. *Pre-1967: Fault,* Respondeat Superior

Prior to the CWA, cleanup costs were recoverable on both statutory and common law grounds based on fault and traditional limits of responsibility defined by *respondeat superior*. The Oil Pollution Act of 1924[53] provided the United States with a claim against "persons discharging or permitting the discharge" of oil from ships, and for expenses "reasonably" incurred by the United States in cleaning up oil from such discharges. The Act limited the government's recovery to spills caused by dischargers' willful conduct or gross negligence.[54] Recovery of cleanup costs was also available for owners' negligent conduct under maritime tort law in the case of vessels, and common law tort in the case of facilities.[55] Maritime tort actions are subject to the Limitation of Liability Act of 1851,[56] which limits owners' liability for damages, when the cause is outside the owner's privity or knowledge, to the value of the owner's interest in the vessel and freight after the discharge.[57]

51. 451 U.S. 994, 996 (1981).

52. *Id.* Justice Rehnquist's dissent is discussed *infra* at text accompanying notes 73 and 132-39.

53. Pub. L. No. 68-238, ch. 316, §§ 2-9, 43 Stat. 604-06 (1924), *as amended by* Pub. L. No. 89-753, § 211(a), 80 Stat. 1246, 1252-53 (1966), *and repealed by* Water Quality Improvement Act of 1970, Pub. L. No. 91-224, Title I, § 108, 84 Stat. 91, 113 (1970).

54. Pub. L. No. 89-753, § 211(a), 80 Stat. 1246, 1252-53 (1966).

55. Note, *Oil Spills and Cleanup Bills: Federal Recovery of Oil Spill Cleanup Costs*, 93 Harv. L. Rev. 1761, 1763 (1980) (noting that, in practice, the United States never invoked these grounds for recovery).

56. 46 U.S.C. §§ 181-189 (1982).

57. *Id.* § 183(a). Thus, if the vessel sank, the owner's interest and corresponding liability might be negligible.

Gilmore and Black note that, while the liability limit for vessels in subsection 311(f)(1) of the CWA is greater than that in subsection 183(a) of the Limitation of Liability Act in the absence of fault within the owner's privity or knowledge, liability under the CWA could in other instances be less than that under the Limitation Act. Under subsection 183(a) liabil-

B. *Post-1967: Negligence With Reverse Burden of Proof versus No-fault With Defenses*

The grounding of the Torrey Canyon in 1967 and subsequent major spills off United States' coasts spurred legislative efforts culminating in the Water Quality Improvement Act of 1970.[58] The final House bill, H.R. 4148, imposed a limited liability based on willful or negligent conduct.[59] Two commentators argue that courts are likely to consider negligent causes of spills to be "grossly" negligent, as well.[60] If so, the House standard of negligence was for all practical purposes no more stringent than the standard of gross negligence in the Oil Pollution Act of 1924.[61] The House standard was also equivalent to the negligence standard for maritime and common law torts. The numerical liability limitation for vessels in the House bill was higher than that in the Limited Liability Act, but lower than the otherwise unlimited common law liability for facilities.[62]

ity is unlimited if the spill is caused by any fault within the owner's privity or knowledge. Under subsection 311(f)(1) of the CWA, liability is unlimited only when the spill is caused by *willful* negligence or *willful* misconduct within the owner's privity or knowledge. The authors comment that the "WQIA draftsmen seem to have lost sight of their objective," in permitting such an inconsistency. GILMORE & BLACK, *supra* note 19, § 10-4(b), at 828-29.

Congress' alleged "oversight" may actually have resulted from a conscious choice exercised from between a rock and a hard place. Healy and Paulsen point out the problem that a standard of negligence for unlimited liability, which would have been equal to that in the Limited Liability Act, and which was incorporated in the final Senate bill, creates. These authors suggest that, since most spills are due either to negligence within the owner's privity or knowledge, or to one of the causes listed as defenses, the provision for limited liability absent the owner's negligence or one of the defenses would rarely be applicable. Healy & Paulsen, *supra* note 3, at 559-60.

Subsection 311(f) has been held to provide the United States' exclusive remedy against discharging vessels, so the United States can no longer avail itself of the Limitation Act in those circumstances which would afford it a greater recovery. *See* United States v. Dixie Carriers, Inc., 627 F.2d 736 (5th Cir. 1980).

The Rivers and Harbors Act of 1849 has also been invoked in cases of oil pollution in navigable waters of the United States, but affords recovery up to only $2500 as a fine, half of which is to be paid to a person who leads the United States to the violator. § 13, 33 U.S.C. § 407 (1982). *See generally* GRAD, *supra* note 3, § 3.03(b), at 3-88 to 3-99.

58. Healy & Paulsen, *supra* note 3, at 553. For discussion of this legislative activity, see *id.* and Dix & Suna, *The Control of Pollution by Oil Under the Water Quality Improvement Act of 1970*, 27 WASH. & LEE L. REV. 278, 285-87 (1970).

59. H.R. 4148, 91st Cong., 1st Sess. § 17(e)(1), (f)(1), (2) (1969); Dix & Suna, *supra* note 58, at 286.

60. Healy & Paulsen, *supra* note 3, at 553.

61. *See supra* text accompanying note 54.

62. H.R. 4148 limited owners' liability for willful or negligent discharges to the lesser of $100 per gross registered ton or $10,000 for vessels, and to $8,000,000 for facilities. H.R. 4148, 91st Cong., 1st Sess. § 17(e)(1), (f)(3) (1969).

The House bill differed from prior standards of liability by imposing the burden on owners or operators to rebut a prima facie case of willful misconduct or negligence.[63] The bill did not, however, extend the ambit of liability, or responsibility, beyond the limit traditionally associated with negligence and defined by *respondeat superior*.

The original Senate bill, which was passed in 1967, imposed unlimited liability on owners regardless of fault, and provided only an "act of God" defense.[64] The final Senate bill[65]—S.7—most closely resembled the draft which was passed by both houses in 1970 as the WQIA, described above. Despite its resemblance to the Senate bill, the WQIA was touted as a compromise of the final Senate and House positions.[66] Part of the compromise is readily apparent. For example, the standard of willful misconduct or willful negligence within the privity or knowledge of the owner for unlimited liability in subsection 311(f) of the CWA is narrower than the standard of negligence for unlimited liability in section 102 of the Senate bill,[67] but broader than the House bill which did not provide for unlimited liability in any circumstance.[68]

It is less certain how the compromise affected the scope of liability as determined by the scope of the third party defense. The following diagram illustrates this uncertainty.

Scope of Owners' Responsibility for Causes of Discharge

A	B	C	D
act of owner	act of servant	act of independent contractor: third party? House bill, 2nd Circuit, Rehnquist dissent	third party? 1st & 5th Circuits

63. *Id.* § 17(e)(2).

64. Healy & Paulsen, *supra* note 3, at 554; S. 2760, 90th Cong., 1st Sess. § 19(e), 113 CONG. REC. 36,130 (1967).

65. S.7, 91st Cong., 1st Sess. §§ 101-301, 115 CONG. REC. 28,947-53 (1969).

66. *E.g.*, 116 CONG. REC. 9327 (1970) (statement of Rep. Cramer) ("The conference was able to work out a compromise accepting the best features of both the House and the Senate positions.").

67. S.7, 91st Cong., 1st Sess. § 102, 115 CONG. REC. 28,949 (1969). Section 102 of S.7 amends the prior Senate bill by adding certain provisions, of which subsections 12(f)(1), (i)(1), (2) deal with unlimited liability.

68. *See supra* text accompanying note 62.

Under the House bill, and maritime and common law, owners are responsible for all negligent acts in categories A and B, and for grossly negligent acts in those categories under the Oil Pollution Act. Justice Rehnquist's and the Second Circuit's presumption of a broad third party defense is, in effect, a restatement of the scope of liability as defined by the House bill and common and maritime law. In presuming that tugs hired to tow barges are third parties within the meaning of subsection 311(f), Justice Rehnquist and the Second Circuit imply that all acts of individuals who are not servants of the owner are acts of third parties, as in category C above.[69]

On the other hand, the First and Fifth Circuits' narrow interpretation of the third party defense implies that S.7 and the CWA are different from H.R. 4148 in extending owners' responsibility beyond *respondeat superior*, to virtually all human causes (column C) except a narrow range defined by the third party and the other statutory exceptions (column D).[70]

III. SOURCES OF THE CONFLICTING INTERPRETATIONS

The uncertainty over whether Congress considered S.7 and the CWA to have extended the scope of liability beyond that defined in the common law and House bill arises from a conflict in the plain meaning of different statutory provisions, and from conflicting statements in the legislative history of the CWA.[71] The "blanket" liability in subsection 311(f), with specific exceptions, suggests the broad scope of responsibility which accompanies a strict standard of liability,[72] even though the phrase "strict liability" is not written in the statute. On the other hand, the plain meaning of "third party" is also broad, and might include anyone who is not the owner or the owner's servant. In his dissent in

69. Neither Justice Rehnquist nor the Second Circuit state that the third party defense defines a scope of owner's responsibility even narrower than that in prior law by including owners' servants. It is unlikely that they would have considered the defense to have such an effect.

70. For discussion of this range, see *infra* section V(A).

71. The Act has been criticized for its lack of clarity. "Enough has been said to indicate that the Act is as soft and spineless in its drafting as it is muddle-headed in its policy. If it is destined to remain on the books, the courts have their work cut out for them in making some sort of sense out of its vague, ambiguous and contradictory provisions." GILMORE & BLACK, *supra* note 19, § 10-4(b), at 827-28. "The language of Sec. 311 is ambiguous in some places, overbroad in other areas, and contradictory in still other instances." Helfrich, *supra* note 12, at 460.

72. *See infra* note 115 and accompanying text.

Hollywood Marine, Justice Rehnquist questioned the Fifth Circuit's interpretation of the third party defense because it was "not supported by the plain language of the statute, which in its express terms provides a defense whenever the discharge is the result of an act of a third party."[73]

The CWA was described in the House as "plac[ing] strict features of liability on those who would ship oil,"[74] and in the Senate, as "very close, if not equivalent to the standard that can be referred to as strict liability."[75] However, Senator Muskie explained that his Committee on Public Works, which wrote the Senate bill, viewed the Senate and House standards as "similar in practical application."[76] Representative Cramer indicated that the Senate and House bills "came to the same result."[77]

These seemingly basic contradictions may be evidence that Congress never resolved the extent of the compromise between the House bill on the one hand, and Senate bill and final Act on the other. At a minimum, they underscore the difficulty Congress had in reaching an acceptable compromise. Senator Muskie alluded to this difficulty in noting that the question of liability was one that his subcommittee had been "struggling with and frustrated by for a number of years."[78]

IV. Evil To Be Addressed: Functions of Liability Standard

The following is a discussion of whether a scope of liability expanded beyond or equal to that determined by *respondeat superior* is necessary to serve the functions which Congress intended its scheme of liability to serve. Unfortunately, while the evidence is

73. 451 U.S. at 995.

74. 116 Cong. Rec. 9325 (1970) (statement of Rep. Blatnik).

75. 115 Cong. Rec. 28,969 (1970) (statement of Sen. Cooper).

76. 115 Cong. Rec. 28,954 (1969). *See also* S. Rep. No. 351, 91st Cong., 1st Sess. 5 (1969). See Healy & Paulsen, *supra* note 3, at 564 (arguing that the Senate Public Works Committee's conclusion leads to an interpretation of the third party defense as including a shipbuilder or repair yard).

77. 116 Cong. Rec. 9327 (1970).

78. *Hearings on S.7 and S.44 Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, U.S. Senate*, 91st Cong., 1st Sess. 951 (1969) [hereinafter cited as *Hearings*]. "The oil pollution provisions were extremely difficult to resolve because they affected directly our merchant marine, concepts of admiralty law, the American insurance market, the overseas insurance market, the balance of payments, our international relations, the economy, small business, onshore and offshore oil facilities . . . as well as the predominant consideration of the protection of our ecology." 116 Cong. Rec. 9328 (1970) (statement of Rep. Harsha).

fairly clear as to which functions Congress intended, it does not clearly lead to a conclusion that either standard is necessary—and, thus, chosen by Congress—to fulfill those functions.

A. *Encourage Prevention and Prompt Removal*

One objective which Congress sought in adopting subsection 311(f) was to increase owners' incentives to prevent spills,[79] and to undertake cleanup operations after a discharge. The Senate Report on S.7 notes that owners ought to be encouraged to clean up spills because owners usually learn of a spill before the government does and are thus in the "best position to prevent or minimize damage."[80] The House standard of negligence, which departed from prior law in requiring a reverse burden of proof, might have served this function by increasing the prospect of liability for causes over which the owner is otherwise responsible under common or maritime law. The increased liability limits in the House bill over those in the Limited Liability Act,[81] might also have served this function, at least with regard to shipowners whose liabilities under maritime law were determined by the Limited Liability Act. Congress might also have considered section 311's provision for penalties, which can be mitigated on a showing that the owner undertook reasonable cleanup efforts,[82] as sufficient added incentives for owners to prevent spills and insure that they were promptly cleaned up.

The First and Fifth Circuits' narrow interpretation of the third party defense, thereby extending the scope of owners' responsibility beyond that in the House bill and prior law, theoretically provides an even greater incentive for owners to prevent and promptly clean up spills.[83] However, this interpretation is not

79. "The legislation is designed to encourage preventive action to eliminate discharges of oil wherever possible." S. REP. NO. 351, 91st Cong., 1st Sess. 7 (1969).

80. *Id.* at 17.

81. *See supra* note 62 and accompanying text.

82. *See supra* note 9 and accompanying text.

83. Helfrich offers several reasons why the CWA does not encourage owners to undertake the prompt cleanup efforts that Congress intended. Helfrich suggests that an owner prefers to put the burden on the United States of filing suit to recover fines and cleanup costs, particularly because, even if the owner loses, the owner retains use of the money to pay for such costs until the suit is over. Helfrich also notes that an owner would be "foolish" to willingly assume the cleanup costs if there is a possibility of exercising the third party defense in a suit by the United States to recover such costs. Helfrich, *supra* note 12, at 458. *Cf. infra* note 102 (1977 amendment requiring owners to pay costs upon alleging third party cause).

logically necessary to fulfill Congress' intended function; the House standard and penalty provisions also increase incentives for owners.

B. *New Risks—Nature of the Activity*

The legislative history indicates that Congress considered existing standards of liability to be inappropriate for the risk of damage from spills which was posed by the current extent of and expected increase in the marine transport and storage of oil. The Senate Report on S.7 notes:

> [M]aritime liability relates to the vessel, cargo and its employees. Insurance covers the hull, cargo, personal injury, and death and is designed to protect people who either work for, use, own or operate a vessel. Were this the case with oil pollution, the imposition of liability based on negligence would not be questioned. However, the discharge of oil can and usually does affect the general public, and persons . . . wholly unrelated to the vessel.[84]

Congress' general intent to impose a liability comparable to Congress' perceived risk does not necessitate interpreting the CWA to extend the scope of responsibility beyond the limit defined by the House bill as *respondeat superior*. To match the risk, Congress may have intended only to raise the limit of liability set by the Limited Liability Act.[85] Such an increase would have been designed to cover damages "which have a much wider impact on the public at large,"[86] and which are greater than the kinds of damage Congress faced when it passed the Limited Liability Act in 1951.

The Senate Report explains that the "new" risks posed by the expanding oil industry require a liability which is "absolute and unlimited . . . . If Congress imposed a negligent liability, it followed that there should be no limits on such liability."[87] This statement is inconclusive as to whether Congress considered a wider scope of owners' responsibility necessary to match the risks of oil transport and storage because neither the Senate bill nor final Act impose "absolute"—no fault and no defenses— and

84. S. REP. No. 351, 91st Cong., 1st Sess. 5 (1969).

85. *But see supra* note 57 (comment of Gilmore and Black that CWA liability is actually lower than that under the Limitation of Liability Act where a spill is caused by negligence within the owner's privity or knowledge).

86. S. REP. No. 351, 91st Cong., 1st Sess. 5 (1969).

87. *Id.*

limited liability. Congress lowered the standard for unlimited liability in the final Act to willful negligence from that of negligence in the Senate bill, but it is difficult to conclude whether this change was meant to be accompanied by a narrow scope of responsibility equivalent to that in the House bill.

The Senate Report lists the following factors as important in determining a standard of liability:

> 1) the effect of too rigid a liability test on maritime commerce; 2) the availability of insurance for any specific amount or type of liability; 3) the economic impact of any specific amount of liability on the owner, shipper and consumer; and 4) the impact of a burdensome liability test on the U.S. Government and people.[88]

The Senate's characterization of the above factors suggests that Congress was concerned about fairly allocating economic burdens, and clearly did not want to impose a liability which would put owners out of business.[89] But the legislative history gives no indication of how Congress applied those factors to determine the scope of owners' responsibility.[90]

Both houses of Congress attempted to coordinate their standards of liability with what they felt the insurance industry could bear, but again the legislative history gives no indication of what scope of responsibility Congress considered appropriate to match the insurance coverages which might be available to owners. The insurance industry favored the House standard of negligence with a reverse burden of proof, and predicted that it could provide only $5 million per accident for owners subject to absolute liability, far less than the $14 million limit of liability which Congress ultimately adopted.[91] A representative from the insurance industry testified that his recommended limitation was low because it would be unfair to hold owners absolutely liable for the costs of

88. *Id.*

89. *See also* 115 CONG. REC. 9021 (1969) (statement of Rep. Cramer) ("[T]he committee's intention is not to force on the businessman the closing of his business or bankruptcy because of our requirement of responsibility for discharge cleanup.").

90. The Conference Committee did reject an amendment offered by Representative Cramer which would have placed some of the burden of cleanup costs on oil companies as distinguished (to the extent possible) from shippers. 116 CONG. REC. 9327 (1970) (statement of Rep. Cramer).

91. *Hearings*, *supra* note 78, at 1347, 1372 (testimony of Paul J. Kreuzkamp, Marine Insurance Commission, Insurance Brokers Association, and Peter N. Miller, Thomas R. Miller & Son, Ltd.).

discharges from certain causes.[92] However, the causes mentioned closely resemble those which are defenses in the CWA, including a narrow third party provision.[93]

The legislative history also suggests that Congress may have given up trying to match its standard of liability with the expected availability of insurance. Senator Muskie confessed at the end of lengthy Senate committee hearings at which members of the insurance industry testified, that he had a "very strong feeling that a snow job [was] being done on us in the connection of insurance."[94] Senator Muskie further stated that he believed the level of insurance which the insurers indicated would be available to owners was only a minimum which could be raised to meet a new, higher standard of liability.[95]

C. *Litigation Function—Difficulty of Proving Negligence and Responsibility*

The legislative history indicates that Congress intended its standard of liability to enhance the United States government's ability to recover its cleanup costs.[96] One hindrance to prompt recovery which Congress perceived the United States faced with prior standards of liability was the "difficult, if not impossible, task of proving negligence."[97] The House bill, requiring owners to rebut a prima facie case of negligence, would have facilitated the United States' recovery of cleanup costs. Without being read to expand the scope of owners' responsibility, the Senate bill and CWA, both of which eliminated negligence as a standard for the imposition of limited liability, could also have served this function. Senator Muskie noted during floor debates that the Senate

92. *Id.* at 1367 (testimony of Mr. Miller).

93. *See infra* notes 109-11 and accompanying text.

94. *Hearings*, *supra* note 78, at 1547-48.

95. *Id.* at 1547. *Cf.* 116 CONG. REC. 9327 (1970) (statement of Rep. Cramer) (Conference bill was a better substitute than that of the House—"based on an evaluation of the world insurance market for this new type of risk"—and Senate, which was "completely uninsurable.").

96. The Second Circuit seems to view this as the only function Congress intended. United States v. Oswego Barge Corp., 673 F.2d 47, 48 (2d Cir. 1982) ("[The CWA's] only purpose is to create a precise remedy solely for the United States to recover specified damages pursuant to a carefully devised formula.").

97. S. REP. No. 351, 91st Cong., 1st Sess. 5 (1969). "Both Houses recognized the difficulty of proving fault as the basis of recovery." 116 CONG. REC. 9327 (1970) (statement of Rep. Cramer).

and House bills had a similar effect on the issue of negligence,[98] presumably because owners' burden of liability without fault is not much greater than that of having to rebut a prima facie case of negligence.

The Senate Report indicates that limited, no-fault liability was required for the United States to avoid even the burden of rebutting a case of nonnegligence made by the owner.[99] The report also states that the Senate bill was preferable because it enabled the United States to avoid litigation on the question of responsibility.[100] This objective is met only if the CWA and Senate bill, on which the Act was based, are interpreted in accord with the First and Fifth Circuit decisions as greatly expanding the scope of owners' responsibility beyond the limit of *respondeat superior*.[101] The actual limit of responsibility as defined by the exceptions remains to be litigated, even given that it lies beyond the limits of common law; the narrower the exception is construed by the courts, the more Congress' intent to ease the government's litigation burden will be effectuated.[102]

V. "THIRD PARTY" AND NATURE OF THE OTHER DEFENSES IN SECTION 311

In his dissent in *Hollywood Marine*, Justice Rehnquist noted that the CWA was "entirely silent as to what judicial refinements, if

98. 115 CONG. REC. 28,954 (1969). *See also* S. REP. No. 351, 91st Cong., 1st Sess. 5 (1969).

99. S. REP. No. 351, 91st Cong, 1st Sess. 5 (1969).

100. *Id. See also* 115 CONG. REC. 28,954 (1969).

101. It would not be true if "responsibility" is only intended to mean "fault."

102. *See infra* Section V(C) (on principle for determining scope of third party defense in area beyond independent contractors).

Congress' objective of insuring the United States' prompt recovery under section 311 was furthered in a 1977 amendment to subsection 311(g) which requires owners of vessels other than inland oil barges, and of facilities which store oil in bulk, to pay the United States for cleanup costs upon *alleging* that a spill was caused solely by a third party. If owners succeed in invoking the defense, subsection 311(g) affords them a claim—by subrogation from the United States—against such third party. Pub. L. No. 95-217, § 58(f), 91 Stat. 1566, 1595-96 (current version at 33 U.S.C. § 1321(g) (1982)).

> [This] provision . . . assures that the Government can pursue the insurer or the spiller to recover cleanup costs without awaiting final disposition of all third-party damage claims. This provision was adopted as a result of discussions with the Justice Department which indicated that the greatest limit on speedy cleanup cost recovery was the joining of cleanup liability suits with third-party negligence actions. This will no longer be the case.

S. REP. No. 370, 95th Cong., 1st Sess. 64-65, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4326, 4389-90.

any, were intended to be placed on the [broad] term 'third party.' "[103] On the contrary, the other defenses to owners' liability in subsection 311(f) are clues as to how the third party defense should be construed. Although "third party" is broad on its face, the term should be construed to define a narrower class of persons than all those beyond the limit of *respondeat superior*, in order to fit the scheme of liability in subsection 311(f) which is comprised of all the defenses. This scheme is detailed below.

A. *Conduct to Which the Other Exceptions Refer*

The Fifth Circuit argued that the third party exception should be interpreted narrowly because the other exceptions refer to a narrow set of acts.[104] The First Circuit described these acts as unrelated to the ship's or facility's operation and as occuring outside of the owner's ship or facility, or which are caused by strangers.[105] According to this description, the First Circuit explained, a vandal who opened the ship's valve would be a third party, but an independent contractor who negligently installed the valve while "act[ing] for the ship" would not.[106] Thus, the compulsory pilot in *Burgess* and the tug in *LeBoeuf* were not third parties because their activities were related to the operation of the owners' ships. Similarly, owners of tugs which push much of the oil on inland waterways, as noted by the Second Circuit in *Tug Ocean*, would also not be third parties with respect to their tow.

The First and Fifth Circuits' construction of "third party" is supported by the legislative history. The Senate Report uses, as an example of the acts which the third party exception was intended to cover, the collision of an unrelated vessel with the owner's ship which was secured at a dock.[107] In the House, the exceptions were characterized as being "very limited."[108]

Representatives from the marine transportation and insurance industry, testifying before the Senate Subcommittee on Air and Water Pollution, offered similarly narrow examples of causes for which it would be unfair to hold owners liable. These examples

103. 451 U.S. at 995.
104. 621 F.2d at 789.
105. 564 F.2d at 982.
106. *Id.*
107. S. REP. No. 351, 91st Cong., 1st Sess. 6 (1969).
108. 116 CONG. REC. 9327 (1970) (statement of Rep. Cramer).

included the same one as that used in the Senate Report,[109] a ship struck by a mine,[110] and an act of sabotage over which the shipowner had no control.[111] These examples suggest that even the maritime industry would consider any exceptions to a blanket liability to define a narrower set of causes than that beyond the traditional limit defined by *respondeat superior*.

B. *Other Exceptions and Limits of* Respondeat Superior

The above section discussed the third party defense in terms of the nature of the conduct referred to by the other defenses. This section discusses how the defenses, as a group, correspond to a scheme of liability limited by *respondeat superior*.

Some commentators contend that Congress included the defenses in subsection 311(f) merely to state those instances in which owners would not be liable under the common law of negligence and *respondeat superior*. For example, Druckman argues that in order to ease the government's litigation burdens Congress did not specifically adopt the House's negligence provision, but kept the House's standard of fault by simply listing those occasions which would "exempt the owner from liability in almost all instances of nonnegligent spills."[112] Druckman bases this argument on the legislative history suggesting that the standard of "absolute liability" with exceptions in the Senate bill was similar to that of negligence with a reverse burden of proof in the House bill, and that negligence usually accompanies a spill.[113]

One problem with this argument is that it places little significance on Congress' characterization of its standard of liability as "strict" and "absolute."[114] It is unlikely that Congress used these characterizations without intending one of their common ramifications: expansion of the scope of responsibility beyond that defined by the master/servant relation which is associated with

109. *Hearings*, *supra* note 78, at 1367 (testimony of Mr. Miller) (the collision of an unrelated vessel with the owner's ship which was at anchor).

110. *Id.* (testimony of Mr. Miller).

111. *Id.* at 1411 (testimony of Mr. Checkett, American Petroleum Institute).

112. Note, *supra* note 33, at 321.

113. *Id. See also* Healy & Paulsen, *supra* note 3, at 566 (considering it an "extremely unlikely event" that an owner would be able to rebut a prima facie case of negligence but not be able to prove one of the defenses).

114. *E.g.*, 116 CONG. REC. 9327 (1970) (statement of Rep. Cramer); 115 CONG. REC. 28,954 (1969) (statement of Sen. Muskie).

negligent liability.[115] The Restatement cites cases in which exceptions to common law strict liability were granted for acts of "third persons" such as a trespasser, a vandal and an upstream owner.[116] These exceptions are similar to the few descriptions of the CWA exceptions in the legislative history, in the First and Fifth Circuits' decisions, and as urged by the insurers.[117]

The Second Circuit in *Tug Ocean* indicated that tug owners could be statutory third parties in relation to the vessels they towed,[118] but the court has also recognized Congress' intent, in passing subsection 311(f), to impose "strict liability."[119] The First and Fifth Circuits argued that once Congress' intent of strict liability is recognized, a broad interpretation of the exceptions would defeat that intent.[120] Under "strict liability" owners would be liable for most causes. With a broad third party defense, however, owners could escape liability "merely by hiring out their operations to tugs and independent contractors,"[121] for whose acts owners are not responsible under *respondeat superior*.

The second problem with Druckman's argument is that the defenses are exceptions from a set of causes which itself is beyond the limit set by *respondeat superior*.[122] For example, the defense for

115. *E.g.*, RESTATEMENT (SECOND) TORTS § 522 (1976) ("One carrying on an abnormally dangerous activity is subject to strict liability for the resulting harm although it is caused by the unexpectable (a) innocent, negligent or reckless conduct of a third person. . . .").

116. *Id.* § 522, Reporter's Note. In only one case cited did the third party have even a contractual relationship with the owner. Langabaugh v. Anderson, 68 Ohio St. 131, 67 N.E. 286 (1903) (third party lessee). *See also* W. PROSSER, PROSSER ON TORTS § 60, at 460-61 (1941); PROSSER AND KEETON ON TORTS § 79, at 564 (W. Keeton ed. 1984).

117. *See supra* Section V(A), test accompanying notes 104-111.

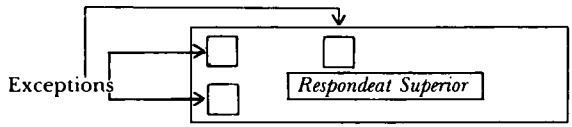
118. 584 F.2d at 1164; *see supra* text accompanying note 48.

119. Matter of Oswego Barge Corp., 664 F.2d 327, 340 (2d Cir. 1981), *reh'g denied*, 673 F.2d 47 (1982).

120. Tamano, 564 F.2d at 982; LeBoeuf, 621 F.2d at 789.

121. LeBoeuf, 621 F.2d at 789.

122.



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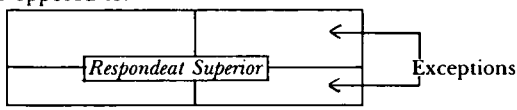


negligence on the part of the United States government would be meaningless under a limit defined by *respondeat superior*. As long as a discharge was not caused, at least partly, by the owner or his or her servants,[123] the owner would not be liable for the cost of cleaning up a discharge caused by the United States, whether or not the United States was negligent. If Congress had limited the act of United States defense to negligent acts on the assumption that a spill would be caused by the owner's negligence if not by negligence of the United States then Congress would have limited the third party defense to negligent acts of third parties, as well. Construing all of the defenses as simply restating those causes not resulting from negligence of the owner or of his or her servants would also make several of the defenses redundant.[124] Under this construction, a negligent act of the United States or an act of war of a foreign country would be subsumed under the third party defense.

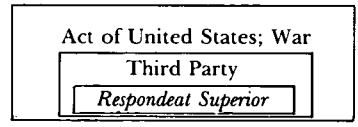
C. *Principles on which Exceptions Are Based: Fairness and Control*

The two sections above analyzed the third party defense in terms of the nature of the other defenses and their relation to the scope of owners' responsibility under *respondeat superior*. This section interprets the third party defense in accordance with the principles on which the other defenses appear to be based, and in relation to the principle underlying the doctrine of *respondeat superior*.

One principle which seems to support the defenses in subsection 311(f) is fairness. Congress might have determined that, although it is fair to designate the owner as insurer for most causes under the theory of strict liability,[125] owners would be unfairly burdened with liability for spills caused by such acts of God—unforeseeable grave natural disasters—which the owner

123. See *infra* Section VI, for discussion of whether or not owners' conduct sufficient to foreclose the defense must be negligent.

124.



125. *See, e.g.*, RESTATEMENT (SECOND) TORTS § 522, comment a (1976) ("The reason for imposing strict liability upon those who carry on abnormally dangerous activities is that they have for their own purposes created a risk that is not a usual incident of the ordinary life of the community.").

could not anticipate nor take special measures to prevent. Similarly, Congress might have considered it unfair to allow the United States government to recover cleanup costs for a spill which was caused by its own negligence.

Fairness can be better explained in conjunction with the principle of control. The Senate Report discusses this principle in reference to the acts of God and war exceptions.

> [O]ne obvious area over which the owner or operator would have no control would be a discharge caused solely by an act of war. . . . Another area . . . beyond the control of an owner or operator . . . would be any discharge . . . caused solely by an act of God about which the owner could have no foreknowledge, could make no plans to avoid, or could not predict.[126]

The courts' differing constructions of the third party defense under subsection 311(f) stem, in part, from the fact that the principle of control which Congress used in reference to the defenses, also underlies the master/servant relation in *respondeat superior*. Under *respondeat superior*, an owner is not liable for the negligent acts of a worker if the owner has contracted away its control over the worker's physical conduct, and if the owner has not acted negligently himself, for example, in hiring the contractor.[127]

Because both the CWA defenses and the doctrine of *respondeat superior* seem to be based on control, they might define the same scope of owners' responsibility. However, it is more likely that Congress intended to exempt an owner from liability only when the opportunity to exert control to prevent a spill never existed, and not when the owner voluntarily contracted away his right of control. The circumstances in which owners would be exempt from liability which are mentioned in the above quote[128] are based not on whether the owner voluntarily relinquished control, but on whether the owner initially had such opportunity to control. Moreover, a focus on the owner's opportunity to control—rather than on the actual control exercised—accords with the focus of strict liability which is on the owner's overall activity, regardless of how much control the owner *chooses* to exercise over the conduct of such activity.

The effect of imposing liability on the basis of owners' opportunity to prevent a spill is evident by analogy to a case involving an

126. S. REP. No. 351, 91st Cong., 1st Sess. 5-6 (1969).
127. *See supra* note 18 and accompanying text.
128. *See supra* text accompanying note 126.

owner's liability under section 311 for the cost of cleaning up a discharge from the owner's barge. In *Complaint of Steuart Transp. Co.*,[129] the owner's barge discharged oil after sinking when water filled the barge because of misplaced "scupper plugs" and the tearing loose of a rotted deck fitting.[130] The district court found that the owner was negligent in requiring its employees to maintain only a "haphazard non-system of inspection," such that the misplaced plugs and rusted deck fittings were never noticed. "It is not a sufficient performance of an owner's duties to tell a number of people to inspect as part of their jobs and hope that everything that needs periodic inspection will receive it."[131] If the owner had hired persons as independent contractors under *respondeat superior* the owner could not have enforced any inspection program and, presumably, would not have been liable for the contractor's negligent inspection. The principle of control underlying the third party and other defenses in section 311, in effect, mandates that such an owner ensure proper inspections are undertaken in all circumstances, and that the owner is liable for spills caused by improper inspections even when the owner contracts away all control over inspections.

Justice Rehnquist discussed the tug/barge relation in *Hollywood Marine* in the following terms:

> [The owner's] barges are towed by tugboat operators who are in no way associated with petitioner except by reason of the contract between the two for services to be performed by the tugboat operator. Under such contract, the tugboat operator exercises complete *control* over the method and manner of performing the towing operations, including all decisions to be made as to questions of navigation.[132]

Justice Rehnquist's description implies that the tug operator's control would exempt the barge owner from responsibility under the traditional doctrine of *respondeat superior*. The First and Fifth Circuits placed a different— albeit somewhat vague—significance on the principle of control. The First Circuit noted that owners should not be able to avoid liability for the acts of, for example, valve installers hired as independent contractors. Such installers, according to the court, "act[] for the ship" and, like a compulsory

129. 435 F. Supp. 798 (E.D. Va. 1977).
130. *Id.* at 803.
131. *Id.*
132. 451 U.S. at 994 (emphasis added).

pilot who "might be regarded as an independent contractor," are "at all times subject to the ultimate control of the ship's master."[133] The Fifth Circuit explained that such "ultimate control" over the tug in *LeBoeuf* stemmed from the owner's "hiring [the tug] in the first place, specifying its itinerary, and retaining it throughout the job."[134]

Citing the First and Fifth Circuits' decisions, the district court in *Sea-Land* stated that a "third party" within the meaning of subsection 311(f) must be beyond the owner's "control."[135] The district court did not find the owner to have violated ordinary standards of care in negligently hiring or directing the builder, and assumed that the builder was an independent contractor.[136] Yet the court held that the builder could not be a statutory third party because it was controlled sufficiently by the owner's selection of the builder and provision of detailed work instructions.[137]

Thus, the courts' opinions suggest that the control which an owner exercises in hiring an independent contractor, and which an owner retains—even after contracting out enough control to exempt the owner from liability for the contractor's conduct under *respondeat superior*—is sufficient to prevent the owner from escaping liability under the third party defense in the CWA. The courts' use of the principle of control in terms of the opportunity to exercise it follows from the standard of strict liability which Congress intended section 311 to impose.[138] As stated earlier,[139] this standard focuses on the nature of the owner's overall activity, not on how the owner chooses to conduct such activity.

VI. Sole Cause Standard: Negligence or No-Fault Causation?

As discussed above, the dispute over the third party defense focuses on the role of *respondeat superior*—a doctrine which is normally associated with liability based on fault—in a scheme of strict liability. This section also discusses the lingering role of fault-based standards of liability, but in the context of the statutory re-

133. 564 F.2d at 982.
134. 621 F.2d at 790.
135. No. A79-150 at 5 (D. Ark. filed Dec. 2, 1980).
136. *Id.* at 6.
137. *Id.* at 5.
138. *See supra* text accompanying notes 114 and 119.
139. *See supra* note 115.

quirement that an owner must prove any of the four causes listed as defenses as the sole cause of a discharge in order to be exempted from liability.[140] While the above discussion concluded that remnants of liability based on fault ought not be considered by courts in determining who is a third party, this section concludes that the sole cause standard for the conduct of owners attempting to invoke the third party defense should not be any stricter than one of negligence.

It is settled that any negligence on the part of the owner will defeat the sole cause requirement.[141] Whether owners' conduct which is not negligent can fail the sole cause test is less certain. In *Reliance Ins. Co. v. United States,*[142] the Court of Claims enunciated the rule that if contributory causes of a discharge were the act or omission of a third party and an *omission* of the owner, then the third party is the sole cause unless the owner's omission was negligent.[143] However, the court announced a different rule where contributory causes consist of an act or omission of a third party, and a nonnegligent *affirmative* act of the owner. In this circumstance, the third party cause is the sole cause only if the owner's act is "so indirect and insubstantial as to displace [the owner] as a causative element of the discharge," even if the discharge would not have occured but for the act of a third party.[144]

In *Reliance* the Court of Claims held that the owner of an oil facility could not recover cleanup costs from the United States under subsection 311(i) for a discharge of oil into navigable waters which occured when the owner's dredging uncovered an "underground deposit of an oily pollutant."[145] The court assumed that the deposit had been caused by an unknown third party, but held that the third party's act was not the sole cause of the discharge because the owner's dredging was a "significant element in the causal chain leading to the ultimate spill, since without this

140. *See supra* note 13.

141. *See, e.g.*, Atlantic Richfield Co. v. United States, 1 Cl. Ct. 261 (1982) (owner could not recover cleanup costs under subsection 311(i) because it could not prove absence of fault in leaving tanker truck unguarded when vandals came to open it).

Subsection 311(i) permits an owner who cleans up a spill to recover from the United States the costs of cleanup if the owner can prove that one of the defenses listed in subsection (f) was the sole cause of the spill. 33 U.S.C. § 1321(i) (1982).

142. 677 F.2d 844 (Ct. Cl. 1982).

143. *Id.* at 848.

144. *Id.* at 849.

145. *Id.* at 846.

direct intervention" the oil deposit would not have been disturbed.[146]

The Court of Claims' rule on owners' nonnegligent affirmative acts is arguably justified by the plain meaning of the sole cause provision of subsections 311(f) and (i) which does not include language on fault or duty of care. The rule also seems consistent with Congress' general intent to impose a heavier burden on owners of bearing the costs of cleaning up discharges from owners' facilities or vessels. The following is a discussion of whether the court's rule or a rule holding the owner's affirmative acts only to a negligence standard under the sole cause test is best suited to the scheme of liability which Congress intended section 311 to create.

The Court of Claims in *Reliance* first assumes that, while affirmative acts can be "easily identified" and "evaluated," omissions can only be evaluated in terms of failure to exercise due care.[147] The court's assumption may be a practical one, but is not one which Congress seemed to have made. In a slightly different context, Congress provided that a third party defense applies "without regard to whether [the third party's] act or *omission* was or *was not* negligent."[148] This provision suggests that Congress considered acts and omissions to be held to the same standards. Whether the express provision that third parties' acts and omissions can be nonnegligent and the absence of any qualification regarding owners' acts or omissions proves that Congress intended the latter to be held to a negligent standard only, is uncertain.

The Court of Claims did not argue that its act/omission distinction and "direct and substantial" causation test are derived from common law notions of proximate cause, but that its distinction is based on the principle of control which underlies the defenses.[149] Two points are helpful in assessing this reasoning. First, according to the discussions above, the principle of control does not refer simply to control over one's physical motions. Rather, control

146. *Id.* at 848-49. While the court assumed that the deposit of oil had been caused by a third party, the court also noted that plaintiff had failed to establish this fact. *Id.* at 847 n.5. This failure most likely increased the court's desire to find the plaintiff to have been a contributory cause of the spill.

147. *Id.* at 848.

148. 33 U.S.C. § 1321(f), (i) (1982) (emphasis added).

149. 677 F.2d at 849.

refers specifically to actions which an owner could conceivably have taken to prevent a spill. Second, the principle of control is already built-in to the issue of who is a third party: by definition, a third party cause is one over which the owner could exert no control (whether potential or actual) to prevent.[150] Thus, for the Court of Claims to say that an owner's nonnegligent act is a partial cause of the spill if the owner had some sort of control over the third party's act, is to distort the principle as Congress perceived it. By definition, the owner had no control over the third party, and could have taken no further preventive measures to avert the spill. The owner in *Reliance* had no more "control" over its dredging operations in terms of prevention/mitigation than it had over any other act conducted at the oil storage facility.

The *Reliance* court distinguished its "direct and substantial" test of causation from that of "immediate cause" urged by the United States. According to the court, application of the latter test would lead to "anomolous and unjust" results as in the case of an owner who "caused" a discharge by detonating a third party vandal's time-bomb which was triggered when the owner turned on a light switch in the facility.[151] However, the owner in *Reliance* had no more control—in the sense that Congress used the principle—to prevent the spill when dredging than an owner who triggered a bomb by turning on a light.

A negligence standard for determining whether an owner's affirmative act defeats the sole cause test is more consistent with Congress' concept of control than the court's direct and substantial standard. Even if, by definition, an owner had no control over the third party's conduct, if the owner's negligence was a contributing—but for—cause of the spill, the owner nonetheless could have exerted control to prevent the spill by avoiding its own negligent conduct. A sole cause test for both omissions and affirmative acts which is based on fault is also supported by legislative history. The Senate Report on S.7 states:

> [W]hile the owner or operator should not be liable if he could prove that a discharge was caused by one of these acts, it was also necessary that such exceptions be allowed only when the owner or operator proved the discharge to be solely the result

150. *See supra* Section V(C).
151. 677 F.2d at 849 n.7.

> of one of the exceptions. *Any culpability on the part of the owner or operator would vitiate the exception.*[152]

It follows from the discussion above that the court's rule on affirmative acts will not serve as more of an incentive for owners to take precautionary measures to prevent spills caused by third parties than would a negligence standard: by definition, the owner cannot control third parties' conduct. Theoretically, however, the court's rule might encourage owners to take preventive measures *beyond* those required by ordinary standards of care, to prevent their "substantial" acts from triggering discharges caused by third parties. If a negligence standard was the basis for the sole cause test owners would only be encouraged to exercise due care to guard against third party causes. Of course, strict liability for causes not covered by the third party and other defenses still encourages owners to take extra precautionary measures with respect to such causes. Whether owners would take such additional measures that would be needed to cover every act which courts later determined to be so "substantial" as to defeat the sole cause test seems doubtful. As argued above, any distinction between substantial and insubstantial acts on the basis of control is tenuous. Thus, owners would be at a loss to know which acts required the exercise of extra care, in addition to that care over the owner's entire activity which the overall scheme of strict liability itself encourages.

If a sole cause standard based on causation and not negligence does promote an "extra effort" by owners to guard against third parties, then it is all the more reason to judge omissions by that standard as well. If Congress did intend to encourage owners to take measures beyond those required by ordinary standards of care to prevent spills caused by acts of third parties beyond owners' control, it seems likely that Congress would have intended this incentive to apply to all spills caused by third parties whether or not they were triggered by affirmative acts of owners. Moreover, Congress could simply have imposed absolute liability (i.e., with no defenses) on owners rather than the tortuous scheme envisioned by the Court of Claims and analyzed above. Absolute liability might even be more fair to owners by providing more cer-

152. S. REP. No. 351, 91st Cong., 1st Sess. 6 (1969) (emphasis added). *See also* 115 CONG. REC. 28,954 (1969) (statement of Sen. Muskie). *Cf.* Note, *supra* note 33, at 321 (arguing that last sentence of quote indicates Congress' intent to retain the concept of fault for its entire scheme of liability in subsection 311(f)).

tainty of potential liabilities than a scheme which depends on distinctions between substantial and insubstantial acts.

Justification for the court's distinction among affirmative acts sufficient to defeat the sole cause test might be based more soundly on common law principles of proximate cause than on Congress' notion of control. But whether such principles are consistent with the statutory framework based on strict liability is doubtful. The court's rule as to owners' affirmative acts does eliminate the necessity of litigating negligence, at least, to determine sole cause. This result is consistent with Congress' intent to facilitate the United States' recovery of cleanup costs.[153] Distinguishing between substantial and insubstantial acts may prove to be just as burdensome to litigate as negligence, however. What is the physical difference between substantial and insubstantial acts? Are acts which require much force and result in much physical movement but which are conducted regularly in the course of the owners' storage or transport operations not substantial, as opposed to one-time acts like dredging?

Moreover, difficult distinctions among owners' particular acts like that between "immediate" and "direct and substantial" causes detract from the role which the owner's overall activity plays in the scheme of strict liability which Congress intended section 311 to create. Owners' liability for affirmative acts under the court's test is based simply on chance: whether the triggering act required a "substantial" effort—like dredging—or a minimal effort—like flipping a light switch. Liability on this basis has little to do with the notion underlying strict liability of the owner as insurer for the consequences of a discharge from the owner's overall oil storage or transport operations. This notion is derived from the nature of the owner's overall activity, not from any distinction between particular "immediate" and "substantial" acts.

A subsequent Claims Court decision in *Cities Service Pipe Line Co. v. United States*, [154] takes the *Reliance* court's causation test one step further toward its logical, yet utterly absurd, conclusion that a third party cause is not the sole cause if an owner's "normal" operation of its facility is also necessary to cause the spill. The owner in *Cities Service* proved that its underground pipeline had been damaged sometime within the last ten years by heavy equip-

153. *See supra* note 96 and accompanying text.

154. 4 Cl. Ct. 207 (1983), *aff'd*, 742 F.2d 626 (Fed. Cir. 1984).

ment operated by an unknown third party. Citing *Reliance*, and the plain meaning of the sole cause provision,[155] the Claims Court denied the owner's claim for recovery of cleanup costs under subsection 311(i). The court stated that although no culpability arises from the owner's normal use of its pipeline, such normal use was sufficient to defeat the sole cause test in subsection 311(i). According to the court, "[p]laintiff's use of the pipeline, over a period of what may have been ten years, [was a] cause" of the spill because the damage attributable to the third party "would never have matured into a rupture without plaintiff's continuing use of the pipeline and the resultant wear and tear."[156]

The court's extension of the *Reliance* rule to owners' "normal" activities seems justified by the particular facts in *Cities Service*. The owner's "normal" use which was found to be a contributing cause spanned a period of ten years, and involved the exact same piece of equipment which was damaged and from which the oil ultimately spilled.[157] Thus, the owner's normal use in *Cities Service* might be considered just as "direct and substantial" a cause as the owner's one-time act of dredging in *Reliance*.[158]

Yet, as with the owner's dredging in *Reliance*, the duration and particular item of use by the owner in *Cities Service* are no more relevant to the principles underlying section 311 than are any other normal activities conducted by an owner. For example, an owner's normal use which triggered a spill, but which lasted for only one day, and/or involved equipment other than that which actually released the oil, reveals no less "control" and is no more relevant to the dangerous nature of the owner's overall oil storage activity which is the basis for strict liability, than are the owner's normal use in *Cities Service* and the owner's dredging in *Reliance*.

Assuming that the *Reliance* and *Cities Service* decisions are indistinguishable from all future cases where an owner's normal use is a "but for" triggering cause of a spill, then these decisions, for all

155. *Id.* at 210.

156. *Id.* at 210-11.

157. *Id.* at 208.

158. Other factors must also have influenced the court's willingness to formulate and apply a "normal use" test. These factors are 1) the length of time between the third party's act and the resulting spill; 2) the owner's inability to identify the third party; and 3) the court's alternative holding that the owner's failure to notice the initial damage and subsequent wear and tear was a negligent omission which itself warranted a denial of the owner's claim under subsection 311(i). *Id.* at 208-10.

intents and purposes, prevent owners from *ever* invoking the third party defense. This result follows from the fact that all third party acts require some triggering "normal use" of the owner, if only the filling of a tank with oil, to cause a spill. The above sections of this Note concluded that Congress intended the third party defense to be applied only in limited circumstances. But there is no indication that Congress drafted that and the remaining defenses only to prevent access to them with an impenetrable "sole cause" barrier.

On appeal, the Federal Circuit Court of Appeals prevented the Claims Court's decision in *Cities Service* from leading to the remarkable result of completely foreclosing the section 311 defenses. The court of appeals upheld the Claims Court's finding as to negligence, but dismissed as "unnecessary" the lower court's alternative holding regarding the owner's normal use.[159] The court of appeals explained that the imposition of liability on the basis of conduct "inherent" in the owner's "business activity" would lead to the kind of "anomolous" result which the *Reliance* court warned against.[160]

The court of appeals seemed to recognize that the scheme of strict liability in section 311 was based on the abnormally dangerous nature of the owner's overall storage operation, rather than on particular acts which the owner conducts in the normal course of such operation. Yet the court of appeals explicitly accepted the *Reliance* court's rule that owners' nonnegligent affirmative acts *can* be contributing causes which would prevent owners from invoking the third party defense.[161] Thus, while the appellate court limited the otherwise far-reaching precedental impact of *Cities Service*, the court failed to eliminate the theoretical foundation for *Cities Service* which was established in *Reliance* and which, therefore, can still be applied to less extreme facts. As stated earlier, a "normal" use rule follows logically from the "substantial acts" rule enunciated in *Reliance*, but neither rules are suited to the scheme of strict liability which section 311 was intended to create.

Other causation requirements in section 311 do fit Congress' scheme of strict liability. The first is that the discharge at issue

159. 742 F.2d 626, 627 (Fed. Cir. 1984).
160. *Id.* at 627.
161. *Id.*

must come from the owner's vessel or facility.[162] As mentioned earlier, another causation requirement relates to the third party's acts or omissions "without regard to whether any such acts . . . are negligent" as qualified in subsection 311(f).[163] An assessment of third parties' acts on the basis of causation rather than negligence is justified because owners have no more control over third parties' acts which are not negligent than over acts which are negligent.[164] Thus, under the principle of control, an owner should be exempt from liability whenever a third party's act—whether or not negligent—causes a spill in the traditional sense of proximate cause.

While the provision in subsection 311(f) for nonnegligent acts or omissions of third parties is suited to the scheme of owners' liability, it may not be suited to the general statutory scheme of subsection 311(g) which allows the United States to recover costs against sole cause third parties.[165] Curiously, Congress omitted the "was or was not negligent" qualification in this section regarding claims by the United States against sole cause third parties, although Congress reinserted the qualification in reference to the "other party" defense for third parties. If Congress' omission was unintentional, then under subsection 311(g) a nonnegligent third party vessel which crashes into an owner's moored vessel, for example, is subject to the same scheme of strict liability as are owners. This is true even if the third party—unlike owners under the CWA—is not engaged in the transport of oil or hazardous substances, which activities are the justification for the

162. *See supra* note 42 (district court denied United States' motion for summary judgment on issue of whether the oil spill came from defendant's onshore facility).

163. *See supra* note 148 and accompanying text.

164. This is equally true for acts of the United States government, although it appears from the United States government defense that Congress intended owners to be the insurers of spills caused by nonnegligent acts of the United States.

165. In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party . . . such third party shall, . . . be liable to the United States Government for the actual costs incurred under subsection (c) for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent.

33 U.S.C. § 1321(g) (1982).

scheme of strict liability in the first place. By omitting the qualification, Congress may have intended subsection 311(g) to provide the United States with a claim against third parties only if they are negligent. Such a result would be more consistent with the notion of strict liability which is inapplicable to third parties engaged in a business other than the one related to the hazardous activity of storing or transporting oil.

VII. CERCLA LIABILITY: ANOTHER LOOK AT THE THIRD PARTY DEFENSE

The following is a comparison of the provisions in section 311 of the CWA with similar provisions including a third party defense in section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").[166] The two acts are worth comparing not only because they contain third party defenses to similar schemes of liability, but also because the acts are functionally similar and, in part, are functionally overlapping. The comparison is helpful in assessing the drafting of the third party provisions in the acts. The comparison is less helpful, however, in providing clear guidance for courts on whether to construe the CWA defense in accordance with Congress' intent—where clear—in providing the defense in CERCLA.

A. *Relation between CERCLA and CWA*

The similarity of liability schemes in CERCLA and the CWA is no coincidence. Congress passed CERCLA to update and consolidate liability provisions in the CWA and other federal statutes relating to toxic wastes.[167] Briefly, CERCLA authorizes federal and state governments to remove "hazardous substances" released from vessels and onshore and offshore facilities.[168] Section 107 of CERCLA,[169] the counterpart of section 311 of the CWA, provides federal and state governments with actions against owners and other individuals for recovery of removal costs.

166. 42 U.S.C. § 9607 (1982).

167. *See, e.g.*, Helfrich, *supra* note 12, at 456; Dore, *The Standard of Civil Liability for Hazardous Waste Disposal Activity: Some Quirks of Superfund*, 57 NOTRE DAME LAW. 260, 268-69 (1981); Note, *The Role of Injunctive Relief and Settlements in Superfund Enforcement*, 68 CORNELL L. REV. 706, 710 (1983). *See generally* GRAD, *supra* note 3, § 4A.04[1], at 4A-105 to 4A-123.

168. *See* §§ 104-106, 42 U.S.C. §§ 9604-9606 (1982).

169. 42 U.S.C. § 9607 (1982).

The definition of "hazardous substances" in CERCLA includes those substances listed pursuant to subsection 311(b)(2)(A) of the CWA, as well as those substances covered elsewhere in the CWA and in other federal pollution statutes.[170] CERCLA covers releases which occur in the "environment,"[171] including not only navigable waters within the United States' boundaries—which is the scope of CWA coverage[172]—but "any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air" in the United States as well.[173] CERCLA does not cover discharges of "oil," however, as defined in and subject to subsection 311(a)(1) of the CWA.[174] Nor does CERCLA simply pre-empt the CWA where the two statutes overlap, although CERCLA does bar simultaneous recovery for cleanup costs under section 311 of the CWA and section 107 of CERCLA.[175]

The scheme of liability in section 107 of CERCLA generally resembles that in section 311 of the CWA. Subsection 107(a)(1) imposes liability on owners and operators[176] of vessels or facilities for costs of removal incurred by the United States or a state; for other "necessary costs of response;" and for damages to natural resources.[177] Subsection 107(b) lists defenses for acts of God and war, and for acts or omissions of third parties.[178]

170. § 101(14), 42 U.S.C. § 9601(14) (1982).

171. § 101(22), 42 U.S.C. § 9601(22) (1982).

172. § 311(b)(3) of the CWA, as currently drafted, prohibits discharges "(*i*) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (*ii*) in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974 . . . or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States . . . ." 33 U.S.C. § 1321(b)(3) (1982).

173. § 101(8), 42 U.S.C. § 9601(8) (1982).

174. § 101(14), 42 U.S.C. § 9601(14) (1982).

175. § 114(b), 42 U.S.C. § 9614(b) (1982).

176. Subsection107(a)(2)-(4) also expressly includes persons who were owners or operators of discharging facilities at the time the hazardous substance was disposed, persons who owned and arranged for the disposal of hazardous substances at the discharging facility, and persons who transported hazardous substances to a discharging facility of their choosing. 42 U.S.C. § 9607(a)(2)-(4) (1982).

For simplicity, all persons in subsection 107(a) will be referred to hereinafter as "owners" unless otherwise indicated.

177. § 107(a)(4)(A)-(C), 42 U.S.C. § 9607(a)(4)(A)-(C) (1982).

178. 42 U.S.C. § 9607(b) (1982). For a comparison of the liability provisions in section 107 of CERCLA and section 311 of the CWA, see Helfrich, *supra* note 12, at 470-79. For a detailed description of CERCLA and its accompanying case law, see GRAD, *supra* note 3, § 4A.04[1], at 4A-105 to 4A-123 (1983).

B. *Third Party Defense—Contractual Nexus*

The most significant difference between the third party defense in the CWA and in CERCLA, for the purpose of determining the scope of owners' liability, is the provision in subsection 107(b)(3) of CERCLA that the third party defense does not apply to an "employee or agent" of the owner, or to a person "whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly," with the owner.[179] The first category of "employee or agent" restates the scope of liability under *respondeat superior*.[180] The second category plainly includes independent general contractors and their subcontractors, and others who are linked to owners through a contractual chain, and for whose acts the owner would not be liable under *respondeat superior*.[181] Thus, the third party defense in section 107 of CERCLA extends the scope of owners' responsibility beyond that which would exist if a standard of negligence was applicable. Moreover, section 107 prevents owners from contracting away their statutory liability. In so doing, the provision imports a broad scope of liability similar to that which the First and Fifth Circuits considered to prevail under the CWA.[182] If the contractual nexus standard in CERCLA had applied to the alleged third parties in *Tug Ocean* (tug pilot), and *Berkley Curtis Bay* (tug owner), the defense would not have been available.

The provision in section 107 of CERCLA that the third party defense does not apply to an individual who has a direct or indirect contractual relationship with the owner has enabled courts to

179. Subsection 107(b) reads:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by-(1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

42 U.S.C. § 9607(b) (1982).

180. *See supra* note 18.

181. *See supra* note 17 and accompanying text.

182. *See supra* Section V(c).

easily determine whether the defense applied in the two cases in which the defense was contested. In *United States v. South Carolina Recycling and Disposal, Inc.*,[183] the United States sued the owners, lessees and generators under subsection 107(a) of CERCLA for the cost of cleaning up toxic wastes at the owners' site. The District Court for the Southern District of South Carolina flatly rejected the owners' claim that the third party defense applied to a lessee who had used the site to dump toxic wastes. The court stated that because of the "contractual link" between the owners and lessee, the defense was not available to the owners.[184]

South Carolina Recycling was followed in a similarly perfunctory fashion by the District Court for the District of New Mexico in *United States v. Argent Corp.*,[185] which also held that the contractual relationship between an owner and lessee prevented the owner from asserting a third party defense as applied to the lessee.[186] It is uncertain how the lessor/lessee relationship would have been handled under section 311 of the CWA by the district court and Second Circuit in *Tug Ocean* which considered tugs contracted to tow barges to be third parties with respect to the barge owner.[187] Under the principle of control, as applied by the First and Fifth Circuits, the lessee would presumably not be a third party because the owner controlled the lessee by choosing it, and could have specified the nature and manner of the lessee's activities through appropriate provisions in the lease.

The legislative history of CERCLA is as conclusive as the plain meaning of the contract provisions in the third party defense of Congress' intent to prevent owners from contracting away liability by hiring independent contractors.[188] The third party defense in subsection 3071(a)(1)(c) of the original House bill—H.R. 7020—resembled that in the CWA by not containing qualifying language regarding contractual relations between owners and third parties.[189] The House report explicitly considered the defense to include independent contractors. In reference to the re-

183. 14 ENVTL. L. REP. [ENVTL. L. INST.] 20,272 (D.S.C. Feb. 23, 1984).

184. *Id.* at 20,275.

185. 14 ENVTL. L. REP. [ENVTL. L. INST.] 20,616 (D.N.M. May 5, 1984).

186. *Id.*

187. *See supra* text accompanying notes 43-49.

188. For a summary of the entire legislative history of CERCLA, see Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation & Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

189. 126 CONG. REC. H9452 (daily ed. Sept. 23, 1980).

quirement that owners exercise due care with respect to reasonably foreseeable acts or omissions of third parties, the report gives as an example the necessity of exercising due care in the "selection and instruction" of "a responsible contractor or other independent party engaged" by the owner.[190] The third party provision adopted in the final House version of H.R. 7020 was an amendment offered by Representative Gore which contains the contractual nexus language which Congress ultimately adopted.[191] In House debate, Representative Gore explained that his amendment was designed to prevent owners from contracting away their potential liabilities under CERCLA.[192]

In contrast with the original House bill which contained a third party defense intended to include independent contractors, the original Senate bill—S.148—contained defenses for acts of God and war, but not for acts or omissions of any third parties.[193] However, the Senate adopted amendments offered by Senator Stafford—who feared that the existing liability provisions would be too stringent to gain sufficient support—which included a third party defense with a contractual nexus limitation similar to that in the final House bill, and nearly identical to that ultimately included in section 107 of CERCLA.[194]

The statutory provisions, cases and legislative history discussed above clearly indicate that Congress intended to prevent owners from contracting out liability under CERCLA for cleanup costs. What is still unclear, however, is how far the contractual nexus provision of subsection 107(b) extends. Is there a limit to the number of contractual links which denote persons whose acts are excluded from the defense because of an indirect contractual relationship with the owner? Presumably any limit would be determined according to the principle of control which Congress considered to underlie the defenses, as in the CWA.[195] There might be discharges caused by persons whose acts could be traced to the owner through a series of contracts, but which were

190. H.R. REP. No. 1016(I), 96th Cong., 2d Sess. 34 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6119, 6137.

191. 126 CONG. REC. H9461-68 (daily ed. Sept. 23, 1980).

192. *Id.* at H9462-63. *Cf.* Tamano, 564 F.2d at 982; LeBoeuf, 621 F.2d at 789.

193. S.1480, 96th Cong., 2d Sess. § 4(a), 126 CONG. REC. S14,940 (daily ed. Nov. 24, 1980).

194. § 107(a), 126 CONG. REC. S14,953 (daily ed. Nov. 24, 1980). *Id.* at S14,964 (statement of Sen. Randolph).

195. *E.g.*, 126 CONG. REC. H9468 (daily ed. Sept. 23, 1980) (statement of Rep. Jeffords).

so remote that the owner could not have exercised any control to prevent them, nor which the owner would have considered in attempting to contract out liability. Although the scope of the third party defense in subsection 107(a) remains to be delineated, such a delineation will likely be easier than that necessary for the facially broad CWA defense.

The third party defense in subsection 107(b)(3) of CERCLA is instructive of how Congress could amend the corresponding provision in the CWA to narrow the scope of the defense, or as an example of how the defense in the CWA might be read by the First and Fifth Circuits. The defense in CERCLA is less instructive, however, of whether Congress intended, and whether courts should interpret, section 311 of the CWA to impose liability on owners for discharges caused solely by acts or omissions of independent contractors and others directly or indirectly related to owners through contract. This is true despite subsection 101(32) of CERCLA, which defines "liability," as used in section 107, to be the "standard of liability which obtains under Section 311 of the [CWA]."[196] The drafting of this provision and the legislative history indicate that Congress intended the standard of liability in CERCLA to match that already existing in the CWA, not to change the standard in the CWA to equal that created in CERCLA.[197]

CERCLA was passed in 1980, long after Congress adopted the original version of section 311 in 1970. Thus, CERCLA bears on Congress' intent when it passed the CWA only as postenactment legislative history.[198] Moreover, it is difficult to even conclude what that bearing would be. If "standard of liability" includes the issues of fault as well as scope of responsibility, the extension of owners' responsibility beyond independent contractors under section 107 of CERCLA might be viewed as Congress' attempt to clarify what it considered the scope of owners' responsibility under section 311 of the CWA.[199]

196. 42 U.S.C. § 9601(32) (1982).

197. *E.g.*, 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph); 126 CONG. REC. 31,965 (1980) (statement of Rep. Florio).

198. For relevance of postenactment legislative history, see, e.g., Bell v. New Jersey and Pennsylvania, — U.S. —, —, 103 S.Ct. 2187, 2194 (1983) ("[T]he view of a later Congress does not establish definitively the meaning of an earlier enactment, but it does have persuasive value.").

199. The First, Fifth and Second Circuit cases discussed earlier in this Note had all been decided before CERCLA was adopted, so Congress may have been aware of the case law

If the definition of liability in subsection 101(32) of CERCLA refers only to the issue of fault and not to the scope of responsibility under section 311 of the CWA, Congress may have drafted the third party defense in CERCLA differently from that in the CWA to narrow what it considered the scope of owners' responsibility created by the third party defense in the CWA. As mentioned above, the House considered the third party defense in its original bill, which was drafted as broadly as that in the CWA, to include independent contractors. Congress' drafting of the defense in CERCLA by treating independent contractors as third parties, while making the defense inapplicable to them through the separate contractual nexus provision, might also indicate that Congress considered independent contractors to be third parties under the CWA. On the other hand, Congress' continual reference to the standard of liability in section 311 as "strict,"[200] suggests that it considered the section 311 defenses to be narrow in order to achieve the broad scope of owners' responsibility which the common law standard imposes.[201]

Given that CERCLA has little bearing on the CWA as legislative history, should the broad scope of liability in CERCLA still be considered by courts as evidence of a national policy which the more ambiguous CWA should be construed to promote?[202] Such a construction would be justified by the functional overlap of the two acts in the area of hazardous substances and the functional similarity of CERCLA's coverage of hazardous substances and the CWA's coverage of oil. The reference in subsection 101(32) and legislative history of CERCLA would also support a concurrent construction of the two acts. However, that Congress intended CERCLA not to cover oil, as covered by the CWA, nor to pre-

on the third party defense in the CWA. On the day the House approved the final bill, Representative Florio inserted into the record a letter from the Justice Department which cited the First Circuit's dicta in *Tamano* that the CWA defenses are to be narrowly construed. 126 CONG. REC. 31,966 (1980) (letter from Alan Parker, Assistant Attorney General, Office of Legislative Affairs, United States Department of Justice).

200. *E.g.*, 126 CONG. REC. 31,965 (1980) (statement of Rep. Florio); 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph).

201. *See supra* notes 115-16 and accompanying text. *Contra* Note, *supra* note 33, at 321 ("[T]he suggestion that the current cleanup cost provision [in section 311 of the CWA] represents a shift toward strict liability is innacurate.").

202. *See, e.g.*, NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175, 194 (1967) (" 'Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit.' ") (citation omitted).

empt the CWA in the area of hazardous substances, suggests that Congress intended to preserve the specific differences of the two acts.[203]

C. *Causation*

Other aspects of the third party defense in section 107 of CERCLA and relating to causation are worth comparing with those in section 311 of the CWA (discussed in Section VI above) because the causation provisions are applied to functionally similar and, in part, overlapping statutes. Third parties' acts must be the sole cause of spills to exempt owners from liability under both CERCLA and the CWA.[204] CERCLA differs from the CWA, first, in not expressly providing that third parties' acts or omissions sufficient to trigger the defense can be negligent or nonnegligent. One can only speculate whether this change in drafting signifies that Congress intended to apply the *Reliance* distinction between omissions and affirmative acts,[205] to apply the same standard of negligence or nonnegligence which is expressly provided in the CWA, or to hold third parties' omissions and affirmative acts to the less burdensome, negligence standard.

The latter is supported by Representative Jeffords' description of the third party defense in Representative Gore's amendment which the House adopted, and which is nearly identical to that in the final Act: "The amendment . . . limits the defense of intervening actions of a third party to instances . . . where the defendant can prove that the defendant exercised due care and that the release resulted from the *negligence* of a third party."[206]

The second difference between the causation requirements for invoking the third party defenses in both acts is the express provision in CERCLA that owners must prove they were, in effect, not negligent with respect to the "hazardous substance concerned" and the acts or omissions of third parties.[207] Representative Jef-

203. *See, e.g.*, 126 CONG. REC. 31,965 (1980). Representative Florio explained that the third party defense was to be "narrowly defined" and that since section 311 standards were to be used "only where not superseded by standards of this bill, those defenses, and not those of Section 311, will control." Thus, Representative Florio must have considered the two defenses to have distinct ramifications.

204. See subsection 311(f) *supra* note 14 and accompanying text; subsection 107(b) *supra* note 179.

205. *See supra* text accompanying notes 145-46.

206. 126 CONG. REC. H9468 (daily ed. Sept. 23, 1980) (emphasis added).

207. See text of subsection 107(b) *supra* note 179.

fords' statement above, that the third party defense applies only when the owner can prove that due care was exercised, suggests that there is not an additional causation requirement. The argument made earlier in regard to the CWA that a separate causation test does not fit the scheme of strict liability,[208] would also suggest that the sole cause and due care provisions in CERCLA do not denote separate standards for owners' conduct.

This provision in conjunction with the sole cause test, however, suggests that Congress intended owners to be subject to separate tests of causation and negligence when invoking the defense in CERCLA. This intent is in accord with the Court of Claims' rule in *Reliance*, at least with respect to owners' affirmative acts under the CWA.[209] The express provision does not impose any new requirement of negligence. Even without the provision, negligent owners would fail the sole cause test and be unable to invoke the defense.[210] The express provision in CERCLA might serve to clarify the owners' burden of proving nonnegligence when invoking the defense although this burden was probably clear under the CWA, even without being expressly stated.[211] Thus, Congress' express provision that owners must prove they were not negligent to invoke the defense would seem to serve no other purpose than to insure that owners must meet separate tests of causation and negligence.[212]

208. *See supra* Section VI, paragraph following text at note 153.

209. *See supra* text accompanying note 144.

210. *See supra* note 141 and accompanying text (sole cause provision in CWA will clearly be defeated by owner's negligent conduct).

211. *See, e.g.*, Reliance, 677 F.2d at 848 (noting that even if owner "could establish that his conduct was not negligent," owner's affirmative act would be subject to a greater scrutiny under a causation test).

212. Analysis of the causation provisions in CERCLA does not help clarify ambiguities in the CWA for the same reasons as applied to the contractual nexus issue: CERCLA is postenactment legislative history; and, even if Congress' intent in CERCLA is clear, it is unclear whether Congress considered its drafting of CERCLA to correspond with or differ from the meaning it considered Congress to have intended the CWA provisions to import. As with the contractual nexus provision, courts interpreting causation provisions in the CWA must ask whether that Act ought to be construed in accordance with CERCLA, in view of the two acts' functional similarities and the provision in CERCLA referring to the standard of liability in section 311 of the CWA, or whether Congress' failure to pre-empt the CWA when it passed CERCLA means that courts should preserve the statutes' specific differences.

Conclusion

Courts interpreting the third party defense in section 311 of the CWA disagree over the extent to which Congress intended the CWA to depart from prior standards of liability based on fault. The First and Fifth Circuits argue that the term third party should be read narrowly because Congress intended to expand the scope of owners' responsibility beyond that defined by the common law rule of *respondeat superior*. An opinion by the Second Circuit and a dissent by Justice Rehnquist suggest that Congress intended the third party defense, in effect, merely to restate the common law rule. The first view is supported by the blanket liability approach of section 311 and legislative history referring to "strict" liability with "limited" exceptions. On the other hand, the second view is supported by the facially broad meaning of "third party" and legislative history referring to the similarity of the CWA and original House bill which used a standard of negligence and incorporated the limit of owners' responsibility under *respondeat superior*.

Analysis of the functions Congress intended its scheme of liability to serve is not conclusive of whether Congress intended to expand the scope of owners' responsibility beyond that in the House bill. A broad scope of responsibility would serve these functions more effectively than a narrow one. But it is unclear how far Congress intended its objectives to be pursued, and how extensive a redistribution of risks, which would result from an expanded scope of responsibility, Congress sought to engender. The House and Senate bills and the final Act encourage owners to prevent and to clean up spills; all three address the magnitude of damages to the public posed by owners' storage and transport operations; and all three ease the United States' litigation burdens, although only a narrow construction of the third party defense reduces the United States' burden of proving "responsibility."

Analysis of the statutory scheme of liability is more conclusive of the scope of the third party defense and supports a narrow reading of that defense. The defenses for other than third parties' acts define a narrow set of causes stemming from outside an owner's ship or facility, and are carved out of a set of causes which itself is beyond the set defined by *respondeat superior*. The defenses are based on the principle of control which refers to an owner's opportunity to take preventive measures and, unlike the principle of control underlying *respondeat superior*, does not exclude occa-

sions where an owner gave up that opportunity through contract. These conclusions, and the additional one that Congress intended to create a standard of strict liability, suggest that the defenses were not intended simply to avoid litigation on the issue of fault by describing all those situations where owners were not liable under standards of negligence and *respondeat superior*. More specifically, Congress did not intend the third party defense in section 311 to include independent contractors.

Analysis of the causation requirements reveals another ambiguity regarding the role of fault-based standards of liability in a scheme of "strict" liability which includes a third party defense. The Court of Claims ruled in *Reliance* that owners' omissions are subject only to a test of negligence, but that affirmative acts must meet an additional test of causation. The plain meaning of "sole cause" suggests that owner's conduct is subject to a standard resembling proximate cause. Yet, the court's rule ignores statutory provisions suggesting that omissions and affirmative acts ought to be held to the same standard. The rule also appears to be based on a misapplication of Congress' principle of control. Moreover, the court's imposition of liability on the basis of whether an owner's particular act—in conjunction with that of a third party—is later considered by a court to be substantial, is not consistent with a scheme of strict liability which is based on the nature of the owner's overall transport or storage activity. The absurd result from an entirely logical extension of the *Reliance* and *Cities Service* decisions—that owners' "normal" operations defeat the sole cause test—would prevent owners from ever invoking a section 311 defense. The Federal Circuit Court of Appeals foreclosed this result, but left its theoretical basis, as established in *Reliance*, untouched.

A comparison of the third party defenses in both the CWA and CERCLA reveals the variations—at least in drafting—which can exist between two schemes serving overlapping functions, and based on the supposedly same standard of "strict" liability. The contractual nexus provision in the third party defense in subsection 107(b)(3) of CERCLA corresponds to the First and Fifth Circuits' construction of the CWA defenses. CERCLA does not include language from the CWA on what third parties' acts are sufficient to trigger the defense. Nor does CERCLA clarify ambiguity in the CWA on what standards owners' acts must meet to pass the sole cause test and successfully invoke the defense.

The provisions and legislative history of CERCLA are of little use to determine Congress' intent when it passed the CWA. Moreover, Congress' refusal to include oil within CERCLA's coverage, and to merge the CWA and CERCLA provisions on hazardous substances, suggests that courts interpreting ambiguous terms in either statute should not use the other as a guide. However, CERCLA's reference to the standard of liability in the CWA and the functional overlap of the acts suggest that such judicial attempts to construe one act in accordance with the other would be justified to provide more clarity—as to who should bear which risks—than the two separate, complex schemes will afford.

If courts do not use CERCLA as a policy guide when interpreting the CWA, they should use the CWA amendments as a guide, although none of them specifically addresses the scope of the third party defense. Since 1970, Congress has raised the liability limitations,[213] imposed liability for all cleanup costs, whether reasonable or not,[214] and required owners to reimburse the United States for cleanup costs upon *alleging* third party cause.[215] These subsequent efforts to strengthen the CWA are not indicative of Congress' intent when it passed the Act in 1970, but do underscore Congress' objective of minimizing marine pollution from oil and hazardous substances and Congress' resolve that the CWA be an effective means for achieving this objective. The third party defense should not be construed so broadly as to weaken the Act which Congress has concurrently been trying to strengthen.

Finally, analysis of the causation requirements and scope of the third party defense in both CERCLA and the CWA reveal the complexity inherent in a scheme of strict liability which combines elements of absolute liability and fault. This complexity raises several questions about the propriety of such a scheme. Courts are required to make subtle factual determinations in applying the scheme, for example, when distinguishing between the control underlying *respondeat superior* and that underlying the defenses; or in assessing owners' obligations—beyond the normal duty of care—to safeguard against acts of third parties beyond owners' control. Are these factual assessments too subtle to be made realistically on a principled basis, and used by courts to es-

213. Pub. L. No. 95-217, § 58(d)(2), (5), (6), 91 Stat. 1566, 1595 (1977) (codified at 33 U.S.C. § 1321(f)(1)-(3) (1982)).

214. *Id.* § 58(g), 91 Stat. 1566, 1596 (1977) (codified at 33 U.S.C. § 1321(f) (1982)).

215. *See supra* note 102.

tablish clear standards of conduct for owners to follow? Do such subtle determinations give courts too ample an opportunity to justify any result they want to achieve?[216] Lastly, given the unlikelihood of returning to a standard of liability based purely on fault, and the prevalence of issues of fault even in a scheme of "strict liability," would a statutory standard of absolute liability be more practical for both courts and all parties concerned?

Michael M. Wenig

216. For example, the Second Circuit's comment in Tug Ocean that its finding of willful negligence was "necessary to make tug owners liable for cleanup costs," *supra* text accompanying note 48, suggests that the court was able to exercise such an opportunity.