



The Swedish Club

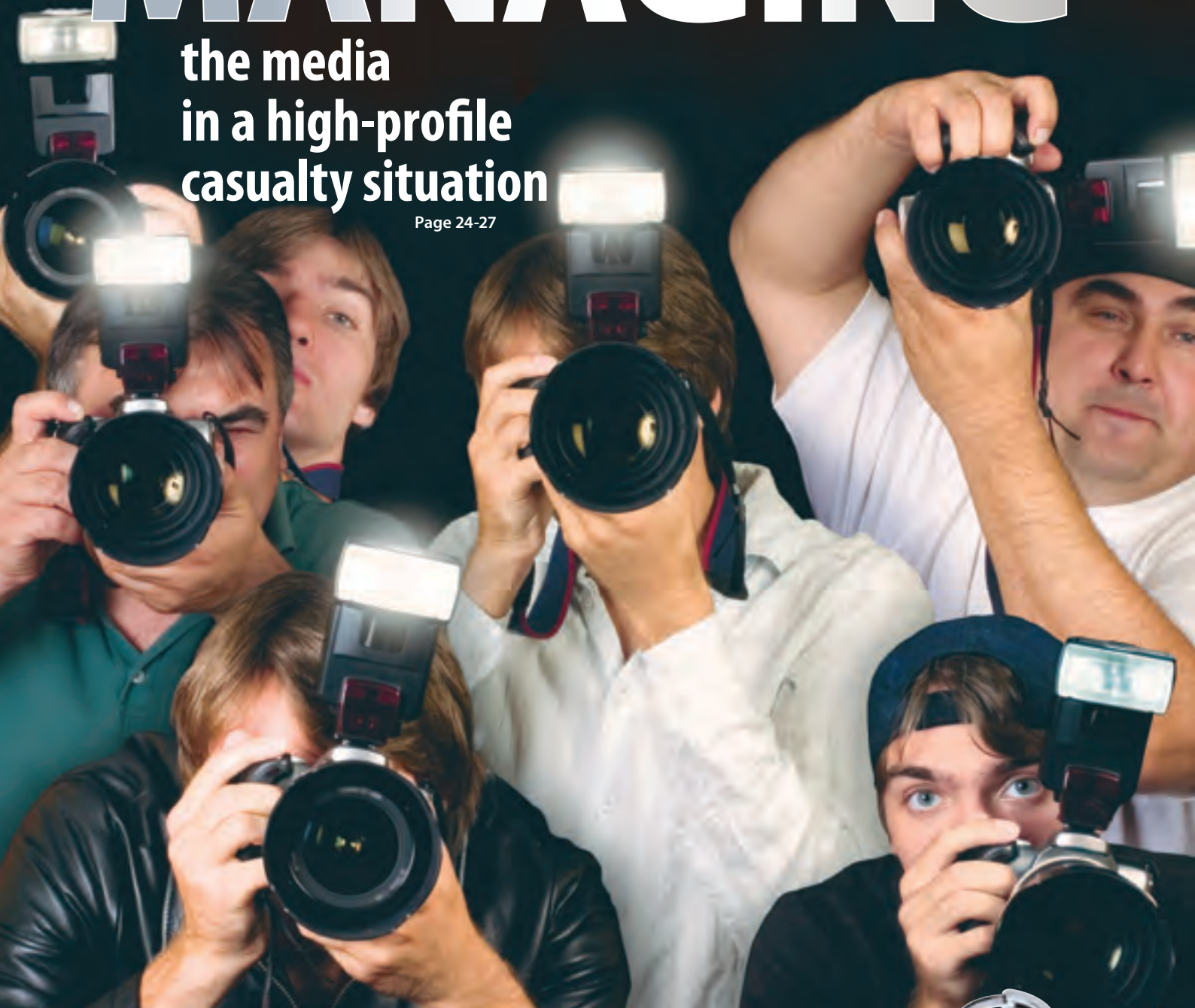
Triton

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United States Coast Guard to limit OPA 90 liability for



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Bert Ray received his B.S. degree from the College of William and Mary in 1982, an M.S. degree from George Mason University in 1986, and a J.D. degree from the University of Oregon in 1988. He is a member of the Alaska Bar Association, the Washington Bar Association, the Maritime Law Association of the United States, and Litigation Counsel of America. He has a diverse, general litigation practice that includes environmental, maritime, commercial, securities, malpractice and white collar criminal matters. He practices extensively in state and federal courts, as well as in commercial arbitrations, and before administrative agencies. He regularly represents clients in casualty responses in Alaska and along the US West Coast, serving as lead counsel during response operations and in resulting litigation. He also has significant experience representing clients in natural resource damage assessments conducted by state and federal agencies.

ON 27 JANUARY 2012 the United States Coast Guard National Pollution Funds Center (the “NPFC”) issued a decision upholding the right of the owner and operator of the Selendang Ayu to limit their liabilities under the U.S. Oil Pollution Act of 1990 (“OPA”) arising from the Selendang Ayu oil spill. The NPFC’s decision allows the ship’s owner and operator (the “RP”) to limit their OPA liabilities to USD 23,853,000.00, based on the ship’s gross tonnage and the applicable OPA limit at the time of the casualty. The OPA related liabilities resulting from the incident have exceeded USD 130,000,000, and the NPFC’s decision entitles The Swedish Club, the International Group, and the Group’s reinsurers to be reimbursed for their OPA expenditures in excess of the OPA limit from the Oil Spill Liability Trust Fund (“the Fund”).

The casualty

The fully-laden Panamax bulk carrier was on a voyage between Seattle, Washington and Xiamen, China in December 2004 when the casualty occurred. On 6 December 2004, while transiting the Bering Sea north of the Aleutian Islands, the crew shut down the main engine, after discovering a crack in one of the cylinder liners. With a storm approaching, the crew isolated the cracked cylinder liner, with the intention of restarting the engine and sailing to a port of refuge. However, after they successfully isolated the damaged cylinder, they could not restart the main engine. The storm reached the ship before local tugs could take her under tow, and drove the ship towards shore. When the tugs and a U.S. Coast Guard Cutter arrived on scene, they were unable to halt the ship’s drift in the stormy seas and winds. During this time, the ship’s crew struggled under extremely trying conditions to repair and restart the main engine.

On the afternoon of 8 December, after drifting for more than 50 hours, the Selen-

dang Ayu grounded on the exposed, rocky coastline of northwest Unalaska Island. The ship broke in half shortly after the grounding, resulting in the total loss of the ship and its cargo of soy beans, and the discharge of approximately 350,000 gallons of bunker fuel and diesel from the ship’s double bottom fuel tanks, which ruptured on impact. Tragically, six of the ship’s crew perished when a U.S. Coast Guard helicopter crashed while lifting them from the stricken ship.

The response

The Coast Guard and the State of Alaska established a command center at Dutch Harbor, Unalaska Island, a commercial fishing port located approximately 40 miles by air from the site of the grounding. Personnel from The Swedish Club, the RP, the Club’s local correspondent, and numerous oil response contractors travelled to Dutch Harbor to coordinate and handle the response, settle claims, and represent the ship’s owners and operators in the official government investigations which ensued. Despite the fierce winter conditions, the Club’s contractors were successful in removing more than 100,000 gallons of fuel from the ship’s wing tanks and engine room tanks, by pumping the fuel into portable tanks and flying them to shore by helicopter. Shoreline cleanup operations began in December 2004 and were completed in the summer of 2006.

Despite the fact that the Bering Sea is the largest and most productive commercial fishery area in the United States, the Club and its consultants were able to avoid the closure of several large commercial fisheries, and to settle all claims asserted by commercial fishermen without litigation, with the exception of one frivolous lawsuit that was dismissed by the Court. The Club settled the claims of local landowners whose lands were impacted by the spill, and conducted a cooperative natural resource damages assessment with state and federal officials.

grants petition Selendang Ayu Oil Spill



PHOTO: Unified Command

The ship broke in half shortly after the grounding.

Shortly after the grounding, the State of Alaska demanded that the owner remove the wreck of the Selendang Ayu. Given the size of the vessel, and the remote, exposed location of the wreck, removal of the wreck would have been very expensive. The Club, its local correspondent and consultants arranged for the removal of all remaining pollutants from the wreck. They then met with State of Alaska officials and demon-

strated that while the wreck itself posed no risk of harm to the environment, a large-scale wreck removal operation at the exposed, remote location of the wreck, and the resulting environmental disruption, posed significant environmental risks. As a result of these efforts, the State of Alaska ultimately agreed that the wreck could be left in place, so long as the superstructure remaining above the waterline was

removed. A local contractor was able to remove the remaining superstructure for a small fraction of the cost of removing the entire wreck.

Limitation of liability

Under OPA, an RP is strictly liable for response costs and damages arising from an incident. However, the RP may limit

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PHOTO: Unified Command

On 8 December 2004, the Selendang Ayu grounded on the exposed coastline of Unalaska Island.

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its OPA liability if it demonstrates that the Incident was not caused by gross negligence, willful misconduct, or the violation of a U.S. statute or regulation governing ship operations. In addition, the RP must demonstrate that it timely notified the United States of the incident, and that it provided reasonable cooperation and assistance in response to the spill. The burden of proof is on the RP to prove by a preponderance of the evidence that it is entitled to limit its OPA liability.

Because it may take several years before an RP is in a position to prove that it is entitled to limit its OPA liability, and it takes several years for the NPFC to adjudicate such a claim, the RP may incur OPA response costs and damages that exceed the limitation amount, before the NPFC determines whether the RP is entitled to limit its liability. One purpose of the Fund is to reimburse RPs who establish they are entitled to limit their OPA liability, and who have incurred OPA costs that exceed the liability limit.

In the case of the Selendang Ayu, the proximate causes of the grounding were the

crack in a main engine cylinder liner, and the crew's inability to restart the engine after isolating the cracked cylinder. The RP was required to prove that these events were not the result of gross negligence or willful misconduct on its part. Because the engine room was flooded when the ship grounded, and the ship's chief engineer and second engineer died in the helicopter crash, much of the evidence regarding the cause of the cracked liner, and the inability to restart the engine, was lost when the ship grounded and the helicopter crashed.

The Club, its correspondent, and engineering experts interviewed the surviving members of the ship's crew and other engineers and technical superintendents employed by the RP, examined the ship's maintenance records, and reviewed photographs of the engine taken by the crew while they struggled to restart it. As a result of the evidence obtained during this forensic investigation, they were able to persuade the NPFC that the cracked cylinder liner and the inability to restart the engine were not caused by gross negligence or willful

misconduct, or the violation of any United States laws.

The RP also had to address claims that the crew waited too long to notify the Coast Guard and local officials about the engine casualty, and delayed in searching for salvage tugs to respond. More than 12 hours elapsed from the time the engine liner crack was discovered until local officials were notified that the ship was drifting towards shore. The Club and its correspondent were able to demonstrate that there were no tugs available to respond to the casualty when it occurred, and that the tugs that eventually responded would not have arrived any sooner.

The decision to grant limitation of liability is the first step in what will be a substantial recovery for the IG and their reinsurers from the NPFC. Ultimately, this recovery will improve the Group's loss record with the reinsurance market, benefitting reinsurers as well as all of the Clubs and their members.

