

# Oil in Water: Juries and the Oil Pollution Act

## INTRODUCTION

Are juries best suited to sort through and apply facts in such complicated affairs as oil spills and cleanups? *United States v. Evergreen Resource Recovery, LLC* shows the Fifth Circuit’s willingness to expand Seventh Amendment rights for jury trials to corporations under statutory claims.<sup>1</sup> While oil corporations are not likely to pursue a jury trial, allowing for a jury trial presents significant opportunities to reframe arguments at trial to persuade a jury to find in a particular party’s favor. Allowing a jury trial for an oil spill cleanup case is a new right within the category of environmental laws. Finding a Seventh Amendment right for defendants under the Oil Pollution Act has potential implications for higher government expenditures, for greater outcome biases that may favor defendants, and for the introduction of a jury right in cases brought under similar environmental statutes. This *in brief* discusses the history of the Seventh Amendment, how the Fifth Circuit found that a right to a jury trial exists in Oil Pollution Act cases, and what this means for future cases where the right to a jury has been invoked.

## I. CASE HISTORY

### A. *The Seventh Amendment Right to Jury Trials*

The Seventh Amendment ensures two rights for defendants in courts: “the right of trial by jury” and that “no fact tried by jury, shall be otherwise re-examined in any Court.”<sup>2</sup> Within these two rights, there lies great power for both the defendant and the jury. If the claim resembles a cause of action traditionally given a jury trial under historic English common law, then the courts must grant a jury trial if a defendant requests one.<sup>3</sup> As factfinders at trial, jurors decide the

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1. 35 F.4th 405, 407 (5th Cir. 2022).
2. U.S. CONST. amend. VII.
3. *See* *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558, 564–65 (1990).

facts of the case. The court may not alter or interfere with the facts the jury decides, regardless of whether it objects to the jurors' rationale.<sup>4</sup>

*B. The Oil Pollution Act of 1990*

The Oil Pollution Act of 1990 (OPA) is legislation that Congress enacted with the intent to prevent oil spills from ships, processing facilities, and related tools.<sup>5</sup> The OPA outlines the elements of liability related to events of oil pollution, financial responsibility for cleanup, and procedures involving collecting claims by parties who clean up spills.<sup>6</sup> The OPA mandates strict liability for the party that causes an oil spill, and liability for removal costs are generally "uncapped."<sup>7</sup> Uncapped liability is significant because spill incidents cost, on average, more than \$2 million.<sup>8</sup>

The OPA allows for third parties to cleanup oil spill pollution on behalf of the responsible party and then collect for the costs of that cleanup.<sup>9</sup> The OPA specifies that all claims for cleanup should be "presented first to the responsible party," and if the responsible party neither concedes responsibility nor pays for the costs of the cleanup, the cleanup party may present its claim to the Oil Spill Liability Trust Fund.<sup>10</sup> The Oil Spill Liability Trust Fund, or "the Fund," is a federal fund that compensates cleanup operations so that prompt removal of oil pollution occurs.<sup>11</sup> The Fund typically pays out an average of \$49.2 million in claims for spills annually.<sup>12</sup>

If the polluting company neither takes responsibility nor compensates the cleanup operation for their actions, the operation may pursue legal claims against the polluter.<sup>13</sup> If the cleanup operation chooses to present the unpaid incurred costs to the fund, and the fund is used to compensate the cleanup operation, then the government assumes all rights and claims to the amount owed by the polluter.<sup>14</sup>

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4. See U.S. CONST. amend. VII; see also *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959) (finding that legal actions must be resolved for equitable actions to preserve the right to a jury trial).

5. 33 U.S.C. § 2701; see *Oil Pollution Act of 1990 (OPA)*, U.S. COAST GUARD, [http://uscg.mil/Mariners/National-Pollution-Funds-Center/about\\_npfc/opa/](http://uscg.mil/Mariners/National-Pollution-Funds-Center/about_npfc/opa/) (last visited Feb. 20, 2023).

6. See 33 U.S.C. §§ 2701–2706 (2023).

7. *The Oil Pollution Act of 1990 (OPA 90)*, BOEM, <https://www.boem.gov/The-Oil-Pollution-Act-of-1990> (last visited Nov. 21, 2023).

8. U.S. COAST GUARD, OIL POLLUTION ACT LIABILITY LIMITS IN 2020 19 (2021).

9. See 33 U.S.C. § 2713 (2022).

10. *Id.* § 2713(a), (b)(1).

11. BOEM, *supra* note 7, at 1–2.

12. U.S. COAST GUARD, *supra* note 8, at 9.

13. See 33 U.S.C. § 2713(c).

14. See *id.* § 2715(a).

C. *The Legal Claim*

In *United States v. ERR, LLC*<sup>15</sup>, the court held that there is a Seventh Amendment right to a jury trial for claims under the Oil Pollution Act of 1990. In the case, the government was pursuing claims to recoup the costs of oil pollution cleanup on behalf of a cleanup organization against Evergreen Resource Recovery, LLC (ERR).<sup>16</sup> The issue stemmed from an oil spill in the Mississippi River seven years prior.<sup>17</sup>

In May 2015, there was an oil spill on the Mississippi River near Belle Chasse, Louisiana.<sup>18</sup> ERR's wastewater and treatment facility was alleged to be the source and cause of the oil leakage into the river.<sup>19</sup> It is alleged that the company did not report the leakage, and that the leakage polluted approximately one mile of the river.<sup>20</sup> Upon discovery of the oil pollution, the U.S. Coast Guard investigated sources of the spill and concluded that the spill originated at the ERR facility.<sup>21</sup>

Due to the spill and related causal factors, ERR contacted Oil Mop, LLC, a cleanup operation, to remove the pollution from the Mississippi River and shoreline.<sup>22</sup> Oil Mop, LLC successfully removed and cleaned the pollution from the environment.<sup>23</sup> On July 22, 2015, more than two months after the initial spill, Oil Mop, LLC submitted its costs to ERR for the clean-up.<sup>24</sup> ERR did not pay the bill and Oil Mop, LLC presented the charges to the Oil Spill Liability Trust Fund.<sup>25</sup>

Oil Mop, LLC secured payment from the Fund, which “transferred, and subrogated all rights, claims, interests, and rights of action to the United States.”<sup>26</sup> The Federal Government then attempted to seek repayment for those costs.<sup>27</sup>

At the trial court, ERR and included defendants asked for a trial by jury on “all issues so triable.”<sup>28</sup> The trial court judge denied that request.<sup>29</sup> The defendants appealed the trial court's ruling on their motion for a jury trial. On appeal at the Fifth Circuit, the Fifth Circuit took up the issue of whether the

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15. 35 F.4th 405, 407 (5th Cir. 2022).

16. *See id.* at 407–09.

17. *Id.* at 408.

18. *United States v. E.R.R. LLC*, 417 F. Supp. 3d 789, 791 (E.D. La. 2019).

19. *See id.*

20. *Id.*

21. *Id.*

22. *See id.*

23. *Id.*

24. *Id.*

25. *See id.*

26. *Id.*

27. *Id.*

28. *Id.* at 792.

29. *See id.* at 796.

Seventh Amendment provides the right to a jury trial for OPA claims when the government seeks recovery.<sup>30</sup>

*D. Holding*

In its decision, the Fifth Circuit held that the defendants were entitled to a jury trial.<sup>31</sup> The Court used the Seventh Amendment jury trial test to determine whether there is a right for a jury under the OPA because the OPA does not explicitly provide for that right.<sup>32</sup>

The court explained the test, stating that a trial by jury is allowable “not only to common-law causes of action, but also to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18<sup>th</sup> century.”<sup>33</sup> In other words, a right to a jury trial is present when there is a common-law cause of action and when there is an action that would have been decided in an English court if that claim was brought in those courts during the 1700s. That second prong, allowing a jury trial if a claim would have been tried in a 1700s English court, contains another two-part test in which the court looks to “(a) the nature of the action” and “(b) the type of remedy” being sought.<sup>34</sup> If the court determines that under those two prongs, the claim would have been tried in a 1700s English court, then a jury trial right is found.

The United States made a claim for recoupment of the costs and a claim for subrogation against ERR. The court split those two claims and applied the above test to each.<sup>35</sup> The court found that the recoupment claim was best described as a tort claim.<sup>36</sup> Therefore, the “nature of the action supports a jury right.”<sup>37</sup> The court discussed how the tort claim contained two paths within itself to pursue the recoupment of monetary expenditures.<sup>38</sup> Given this, the court found that the OPA mimics the same “common-law options” in seeking recoupment, which are traditionally granted the right to a jury trial.<sup>39</sup> To further the analysis and strengthen the conclusion reached, the court leaned more heavily on the second factor in the test: the nature of the remedy, because the remedy type was “more important.”<sup>40</sup> Using historical analysis, the Fifth Circuit reasoned that the restitution asked for by the government is one grounded in law rather than equity because “the plaintiff . . . might be able to show just grounds for recovering

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30. *United States v. E.R.R., LLC*, 35 F.4th 405, 407 (5th Cir. 2022).

31. *See id.*

32. *See id.* at 410–11.

33. *Id.*

34. *Id.* at 411.

35. *See id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 412.

40. *Id.*

money to pay for some benefit the defendant had received from him.”<sup>41</sup> This is important because claims of equity do not have an attached right to a jury trial, while claims of law do.<sup>42</sup>

The court then turned to the subrogation claim. Since the prior claim comes with the right to a jury trial, the court found that “because [] the overlap between the two claims” was significant, then the jury must decide the facts first.<sup>43</sup> This reasoning is grounded in *Beacon Theatres, Inc. v. Westover*, in which the Supreme Court instructed that a jury must first decide all factual matters, and then issues tried by the judge are made relying on those decided facts.<sup>44</sup> While a subrogation claim is normally seen as an equitable claim, the court concluded that while “subrogation originated in courts of equity,” that is “equitable fiction.”<sup>45</sup> The court reasoned that since the *underlying claim*, the recoupment claim, is one that would be brought in a court of law, then the Seventh Amendment right stands.<sup>46</sup> Therefore, the court reasoned that the subrogation claim is merely a “procedural fiction” to allow the “underlying legal issues and legal relief to proceed” and that, because of that fiction, the defendant has the right to a jury for both claims.<sup>47</sup>

## II. ANALYSIS

### A. *The trial court concluded that a jury trial would upend environmental law procedures, and the Fifth Circuit remained silent.*

The trial court reasoned that there was no jury right because the court is “not inclined to disrupt the ‘avalanche of authority’” of decisions regarding removal costs being categorized as equitable relief.<sup>48</sup> The trial court explained that other courts have treated similar claims as equitable relief claims when those claims have arisen from similar laws to the OPA, like the Comprehensive Environmental Response and the Compensation and Liability Act. The court also explained that the OPA cases related to the Deepwater Horizon environmental crisis were also categorized as equitable.<sup>49</sup> The trial court kept in line with other courts’ interpretations so as to not “disrupt” understandings of how these types of environmental law are procedurally carried out.<sup>50</sup> The Fifth Circuit did not reference the “disrupt[ion]” hesitations that the trial court specified in its opinion.<sup>51</sup>

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41. *Id.* at 413.

42. *See id.* at 411.

43. *Id.*

44. *See generally* 359 U.S. 500, 508–10 (1959).

45. *United States v. E.R.R., LLC*, 35 F.4th at 415.

46. *See id.* at 414.

47. *Id.* at 416.

48. *United States v. E.R.R., LLC*, 417 F. Supp. 3d 789, 796 (E.D. La. 2019).

49. *See id.* at 794–95.

50. *Id.* at 796.

51. *Id.*; *see, e.g., United States v. E.R.R., LLC*, 35 F.4th at 405.

The implications of this decision are significant because it changes the way an important environmental law is interpreted, and it opens the door for similar interpretations of other environmental laws. By finding the right to a jury trial within the OPA, the OPA is now much different than other environmental laws. By not addressing the trial court's fears of what this opinion may mean, the Fifth Circuit left open the possibility that other environmental laws may also have an implied right to a jury trial. The shape and stability of arguing under the OPA has changed, so the introduction of jury trials may now also arise in the context of other environmental laws.

*B. The Fifth Circuit continues to find rights to a jury trial when their trial courts do not.*

The Fifth Circuit is setting the tone that it intends to bolster defendants' right to a jury trial. Rather than focusing on how courts interpret similar laws to determine the right to the jury trial, the Fifth Circuit looked at whether the stripped-down versions of the causes of action resemble that of historic causes of action.<sup>52</sup> In another 2022 ruling, the Fifth Circuit similarly overturned a decision that found no right to a jury trial in a Securities Exchange Commission case because the cause of action was that of "seeking penalties [which] is akin to debt collection."<sup>53</sup> With this string of rulings, the intent by the court becomes clear: rights to a jury trial should be found in favor of granting one in cases where there is a "close call."<sup>54</sup>

In areas of law in which finding a right to a jury trial is advantageous to the defendant, and in which the interpretation of whether a right to a jury is relatively ambiguous, it seems as though the Fifth Circuit is most sympathetic to finding in the defendant's favor. When other circuits are not finding the same outcome, or engaging in similar questions, the Fifth Circuit's conclusions signal that it is receptive to hold in favor of a defendants' right to a jury.

*C. Finding the right to a jury trial raises the government's litigation costs.*

This Fifth Circuit decision will have foreseeable consequences on cases brought under the OPA. For one, there will be a greater economic expense on behalf of the government. The justice system, both judge and juries, the party of the government, and the OPA, are all managed and financed by the government. Whether funds are raised through the OPA taxing structure, or through general revenue taxes, the payments related to those expenditures are made by the government. Jury trials are costlier on government operations than decisions

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52. *United States v. E.R.R., LLC*, 35 F.4th at 410–11.

53. Jody Godoy, *SEC In-House Judges Violate Right to Jury Trial, Appeals Court Rules*, REUTERS (May 20, 2022, 7:41 AM), <https://www.reuters.com/legal/government/sec-in-house-judges-violate-right-jury-trial-appeals-court-rules-2022-05-18/>; see *Jarkesy v. Sec. and Exch. Comm'n*, 34 F.4th 446, 449–50 (5th Cir. 2022).

54. See *United States v. E.R.R., LLC*, 35 F.4th at 407.

made by judges without a jury.<sup>55</sup> One study on courts costs determined that, “the entire (civil and criminal) jury system” cost “\$18.5 million, which is 8.8 percent of the... [amount budgeted] for the Federal courts.”<sup>56</sup> Simply put, jury trials are an added expenditure. When more cases can be tried by jury, that may mean more costs imposed on the government and taxpayers.

Furthermore, jury trials often take more time to conclude than bench trials.<sup>57</sup> According to a study conducted by Theodore Eisenberg and Kevin Clermont, “jury trials take about twice as long” as bench trials.<sup>58</sup> This is significant because the total time spent in the courtroom is significantly lengthened.<sup>59</sup> More time spent at trial deciding issues that could be easier and more expediently decided in a bench trial raises costs and drags out litigation for the involved parties.

While critics of this argument may point out that the Fifth Circuit is simply protecting an already established right, it is unfair to say that these types of causes of action require the decisions be made by jury. The original trial judge characterized the answer to whether there is a right to a jury to be a “close call,” so there is likely little to no harm done to corporate defendants by not finding a right to a jury. Rather, if these cases remained solely in the hands of judges, additional costs might be mitigated, and parties may be deterred from consuming excessive financial resources.

*D. Bad juror rationale could seriously undermine the purpose of the OPA and efforts to ensure expedient clean ups.*

Lastly, the implications of this decision could mean that subsequent cases might not be decided based on law and fact but persuaded by emotions and economy. In most cases, “jurors are valued because they do not decide issues solely on a rational basis, but decide questions of fact in a way the litigants and community find desirable.”<sup>60</sup> Significantly, once a decision has been reached by a jury, the rationale usually may not be questioned because “no fact tried by a jury, shall be otherwise re-examined in any Court.”<sup>61</sup> The right to a jury trial in this case allows jurors to make decisions about a company that belongs to a central industry within their own jurisdiction.

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55. See Spencer Lucas & Alex Behar, *The Risks and Rewards of Bench Trials*, ADVOCATE (Nov. 2020), <https://www.advocatemagazine.com/article/2020-november/the-risks-and-rewards-of-bench-trials>.

56. Rudolph Janata, *Pros and Cons of Jury Trials*, 11 THE FORUM 590, 591 (1976).

57. See Theodore Eisenberg & Kevin M. Clermont, *Trial by Jury or Judge: Which is Speedier?*, 79 JUDICATURE 176, 176 (1996).

58. *Id.*

59. See *id.*

60. Sandra A. Smith, *Polyfurcation and the Right to a Civil Jury Trial: Little Grace in the Woburn Case*, 25 ENVIRONMENTAL AFFAIRS 649, 665 (1998).

61. U.S. CONST. amend. VII.

Jurors may be swayed by arguments tied to their emotions or their economy.<sup>62</sup> In the Fifth Circuit, two of the three member states (Texas and Louisiana) are within the top five states that are most impacted through direct employment by the oil and natural gas industry.<sup>63</sup> The citizens in those two states also earn about \$146.9 billion in direct labor income from the oil and natural gas industry.<sup>64</sup> It is hard to say that the average community member of these states would not be swayed when it comes to deciding against employers that play such an integral role in the livelihood of their own local economies.

Past studies show that juries will side with the parties most closely related to their own labor categories. For example, in one case, “the proprietor jurors sided with the defendant (railroad) and the laboring jurors with the plaintiff (railroad worker).”<sup>65</sup> While a “runaway jury” story might be the extreme in this instance, jurors are influenced by their own lives and perspectives, which can influence their decision to be adverse to the environment or to a rightly decided outcome.<sup>66</sup> Jury trials in these types of cases may be turned into a strategic game in which parties selectively choose jurors sympathetic to their industry in order to get the most favorable outcome.<sup>67</sup>

While it is unclear why ERR requested a jury trial in this instance, the trial court’s opinion suggested that ERR sought a jury trial.<sup>68</sup> This suggests that the defendant’s strategy was predicated on exploiting the differences between judge and jury. Because there is some discrepancy between outcomes decided by judge or jury, there will likely be variability in outcomes of cases as they relate to the OPA.<sup>69</sup>

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62. See Gary Wisby, *Jurors Influenced by Gender, Emotions, Moral Outrage*, UNIV. OF ILL. CHI. TODAY (Nov. 24, 2015), <https://today.uic.edu/heres-how-to-sway-a-jury>; Freda Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. REV. OF LAW & SOC. CHANGE 1, 8.

63. PRICEWATERHOUSECOOPERS, IMPACTS OF THE OIL AND NATURAL GAS INDUSTRY ON THE US ECONOMY IN 2019 11 (2021).

64. See *id.* (calculating that Texas and Louisiana earned \$134.2 billion and \$12.7 billion respectively in direct labor income in 2019).

65. Freda Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. REV. OF L. & SOC. CHANGE 1, 5 (1973).

66. See RUNAWAY JURY (Regency Enterprises & New Regency 2003).

67. See Freda Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. REV. OF L. & SOC. CHANGE 1, 8; *The Impact of Juror Biases*, JURY ANALYST (Mar. 18, 2021), <https://juryanalyst.com/blog/the-impact-of-juror-biases/>.

68. See *supra* note 48 at 792 (adjudicating a case where the defendants “deny its designation as a ‘responsible party’”).

69. See Paula L. Hannaford-Agor et al., *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 L. AND HUM. BEHAV. 359, 371 (June 1, 2000) (comparing trial outcomes across jury trials where discussion of evidence among jurors was or was not allowed).

## CONCLUSION

*United States v. ERR, LLC* is a noteworthy decision because of the Fifth Circuit's willingness to find the right to a jury trial when the trial court disagrees and explains that similar laws do not allow for jury trials.<sup>70</sup>

The implications for how this law will affect the OPA and the larger body of environmental law remain unclear. The trial court's remarks on how this decision could cause the "avalanche of authority" were not subdued in the controlling opinion.<sup>71</sup> Looking forward, litigation related to the OPA will likely cost the government more money and impose a higher burden on budgets. Decisions related to blameworthiness might also be shifted because of jurors' tendency to decide irrationally.<sup>72</sup>

For now, lawyers working on the OPA will need to strategize in order to bring a successful case in a landscape in which the oil industry is a large contributor to the juror's economy and community. Strategies focused on telling better stories and swaying emotion might uniquely be found in OPA arguments, differing from environmental cases heard by judges, which are still rooted in technical facts and arguments. While the use of a jury in an OPA case has not yet happened, the fact the right to a jury can be invoked means that litigation under the OPA will contain new nuances than before.

*Ryan Laws*

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70. See *United States v. E.R.R., LLC*, 35 F.4th 405, 407 (5th Cir. 2022); *United States v. E.R.R. LLC*, 417 F. Supp. 3d 789, 796 (E.D. La. 2019).

71. See *United States v. E.R.R., LLC*, 35 F.4th at 407; *United States v. E.R.R. LLC*, 417 F. Supp. 3d at 796.

72. See Gary Wisby, *Jurors Influenced by Gender, Emotions, Moral Outrage*, UNIV. OF ILL. CHI. TODAY (Nov. 24, 2015), <https://today.uic.edu/heres-how-to-sway-a-jury>; Freda Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. REV. OF L. & SOC. CHANGE 1, 8.

**We welcome responses to this In Brief. If you are interested in submitting a response for our online journal, Ecology Law Currents, please contact [cse.elq@law.berkeley.edu](mailto:cse.elq@law.berkeley.edu). Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.**

