

Callidus News

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THE MUCH-AWAITED JURY VERDICT ON THE ILL-FATED FIRE ONBOARD THE "CONCEPTION"

Reported by CNN, to be "the deadliest marine accident in nearly 70 years" and "the most deadly transportation accident that we've seen in a decade."

On 2nd September 2019 the 75-foot dive boat "Conception" caught fire whilst it was anchored off the Santa Cruz Island, California. The tragedy took the lives of 33 passengers and 1 crew member, in the wee hours that morning.

The Conception was on the last day of the 3-day dive excursion and had aboard 33 passengers and 6 crew members. 5 of the crew members were sleeping above decks; the 33 passengers and 1 crew were in the below decks. Around the middle of the night, a fire broke out on the vessel

in the salon section and quickly spread, burning the boat down to the waterline and leading to its sinking. Only the 5, crew members, including the Captain Jerry Nehl Boylan, who had been on the above deck, were able to escape, as they abandoned the ship thereby surviving the casualty. All



THOUGHT
for the MONTH

The truth will set you free.
But not until it is finished
with you

DAVID FOSTER
WALLACE

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the 34 people below decks died of smoke inhalation and were charred.

A manslaughter charge was brought against the Captain of Conception, which the Federal Judge of Los Angeles dismissed initially on the ground that alleged gross negligence was not proved, in accordance with the document furnished before the court. To this the United States Attorney sought authorization from the Department of Justice to appeal against the order ascertaining that dropping the manslaughter charges merely on lack of gross negligence defies logic, when it is clear that the captain had acted negligently.

Though prior reports and even the stand taken by the captain's attorney was that the disaster might have been caused by the sparking of charging cell phones and batteries left for charging overnight, the investigators of the incident retorted that this could have been prevented if there was an overnight watchman to patrol the vessel; which was also a prerequisite as per the Coast Guard regulations to procure a boat license for such operations. In fact, the Certificate of Inspection clearly stipulates the need for an overnight watch.

According to the National Transportation Safety Board ("Board"), the captain's failure to post an overnight roving watchman was a key factor in the tragic incident. The fact of the matter was that about 45 minutes before the fire, a crew member was seen on camera visiting the decks; but the crew members only discovered the fire after it had grown substantially, thereby leaving them limited scope to rescue the passengers or to save the vessel from being completely engulfed by the flames. During the interviews, it was also confirmed that all the 5 crew members in the above deck were asleep when the incident occurred and there was no way to confirm if the crew member below decks was awake or asleep at the given time.

Even though the Board makes recommendations for the safety of passengers and the measures to be

adopted by boat operators, these are just recommendations and the Board does not have the authority to enforce the same. The Board did comment stating that, had their recommendations been followed, the tragedy might have been averted. For instance, it is recommended that an emergency exit hatch from the below-deck sleeper cabin, be in place; however, it was observed that, on the Conception, this emergency exit hatch was not easily accessible and would defeat the very purpose of being able to escape during an emergency. The then chairman of the Board in the year 2020 also pointed out repeated violations by the vessel operator company, Truth Aquatics, wherein 11 months before the Conception tragedy, a battery fire had broken out on another vessel run by the same company.

The case came up before the Jury in the first week of November 2023, and after being presented by the facts from the investigation reports of the Board; the case of the Prosecution was put forth, wherein the Captain of Conception, was shown to be negligent on the following grounds

1. Boylan despite being a Captain for 34 years had failed to appoint a night watch to patrol the boat.
2. The crew of Conception was not trained by the captain to handle an emergency fire situation on board. This led to the crew going into panic and chaos as a crew member from the video clip was shown running past a fire hose twice and did not think of using it to douse the fire.
3. Boylan called in a mayday and was the first to jump overboard, thereby abandoning the ship. The remaining 4 crew members followed, leaving behind the 34 trapped people in the belowdecks who succumbed to the inferno.

The Prosecution charged the Capt. Boylan with "failure to perform any

lifesaving or firefighting activities whatsoever at the time of the fire, even though he was uninjured."

The Defense attorneys tried to rescue Boylan from the accusations by stating that Boylan learned to operate the boat from Glen Fritzler, the owner of the Conception and the operator of Truth Aquatics. They claimed that the company did not require an overnight watch and Capt. Boylan who served with the company for decades learned to do things the "Fritzler way" without implementing a night watch and was not aware of it being dangerous for the passengers or crew. This plea was gunned down by this argument by stating that the "blaming the boss" defense would not hold good for the lives of the passengers in the hands of a captain.

Capt. Boylan pleaded not guilty to the charges and did not testify.

The Jury of the Federal Court of Los Angeles after processing all the evidence, reports, facts, and arguments in front of them took a day to reach a verdict that, the former Captain of Conception dive boat Jerry Nehl Boylan was guilty of gross negligence that took the lives of 34 people who placed their trust in him. With this Boylan now faces a sentence of up to 10 years in federal prison.

The verdict was met with mixed emotions from the families of the victims, some who wept with relief that justice was met after a wait for four years, while some others also felt that the sentence was not adequate for taking the lives of 34 people.

The interviews with some of the families of the victims brought to light the real ordeal lived by the victims and their family members. Like Susana Rosas, aged 65, whose three daughters and ex-husband succumbed to the fire; Susana Rosas had attended every single hearing of the trial and had witnessed the graphic testimony on the effort to recover the bodies from the charred wreck of the Conception, which has sunk 56 feet below the surface. To her, the captain, did not follow policy and protocol and the sentence of a possible

ten years of imprisonment felt lenient for the lives of 34 that were taken.

Another mother, Kathleen, who lost her son, McIlvain, said that Boylan failed the people who had entrusted him with their lives. He failed in his duty as a captain. He abandoned the ship. He abandoned the people on board. Among the items salvaged from the vessel was an iPhone with a short video, wherein her son McIlvain was saying, “There’s got to be a way out!” and “There’s got to be more extinguishers!”

James Adamic, who lost his son, daughter,

and granddaughter, in an interview said that the most important lesson from this tragic event is the message that goes out to other dive boat captains, many of whom admit to operating recklessly.

Capt. Boylan, will remain free until U.S. District Judge George Wu sentences him on February 8, 2024; where he could face up to 10 years imprisonment. In the meantime, it is learned that the families of the victims are trying to write their victim-impact statements, which they will deliver to the Hon’ble Judge at Boylan’s sentencing next month.

The tragedy is an eye opened not just for the boat operators in the United States, but should be treated with urgency by authorities globally, as this incident could reoccur in any part of the world. The authorities need to be stringent with their enforcement and cancel the license of those operators flaunting the requisites, that expose the lives of the people to unwarranted risks. The tragedy, provoked the United States Coast Guard as the boat licensing authority to tighten regulations ■

PROPOSED SEBI GUIDELINES ON REGULATING SPECIAL SITUATION FUNDS

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INTRODUCTION

Recently, on 28th November, 2023, the SEBI released a consultation paper (hereinafter ‘the paper’) seeking public opinion on the proposed regulatory framework surrounding Special Situation Funds acquiring stressed loans in the country. While the proposed guidelines aim to formulate a viable framework for monitoring and supervising the functioning of SSFs in acquiring stressed loans, these guidelines are not without its defects.

SSFs: A BRIEF BACKGROUND

When the proportion of stressed assets in the economy rises, the banking sector including the Non-Banking Financial Companies face with an increased burden of finding alternative means for capital infusion. To save the banking sector from the burden imposed by such stressed assets, the Securities and Exchange Board of India (SEBI) introduced a special category of Alternative Investment Funds (AIFs) known as



the Special Situations Funds (SSFs). SSFs are placed under category I of AIFs in the SEBI (Alternative Investment Funds) Regulations, 2012 (AIF Regulations). These Alternative Investment Funds (AIFs) manage and raise privately

pooled funds from risk-seeking investors expecting potentially higher returns at a later stage. The infusion of capital into such assets can help those companies which are in distress but have the potential for a turnaround.

MASTER DIRECTION – RESERVE BANK OF INDIA (TRANSFER OF LOAN EXPOSURES DIRECTIONS, 2021)

The provisions in these directions apply to financial entities including Scheduled Commercial Banks, Regional Rural Banks, Primary (Urban) co-operative Banks, All India Financial Institutions, Small Finance Banks and all Non-Banking Finance Companies. Loans can be sold by means of novation, assignment and loan participation, where only the economic interest in a loan exposure is transferred and not the loan contract per se.

‘Stressed loans’ are defined in these Directions to include those loan exposures that are classified as non-performing assets or as special mention accounts. These directions also provide that the entity to which the loan exposure is transferred to (transferee) should not be a person disqualified in terms of section 29A of the Insolvency and Bankruptcy Code, 2016. The transferee should also not



be associated with any other entities facing allegations of fraud that have been detected by the lender/ transferor entity.

These guidelines also provide that wherever the security interest held by the transferor in trust with the transferee as the beneficiaries, the transferee shall ensure that a mutually agreed and binding mechanism for timely invocation of such security interest is put in place.

Chapter IV of this Master Direction pertains specifically to the Transfer of Stressed Loans. This Chapter specifies certain principles based

on which the policy on the transfer of stressed loans shall be based. These include the following:

- a. The process of identification of stressed loans beyond a specified value shall follow a top-down approach starting from the head office or the corporate office of the lender.
- b. The NPAs as approved so by the Board or the Board Committee shall be periodically reviewed by the Board.
- c. The type of valuation to be employed must also be articulated with clarity in the transferor’s policy.

Further, if the transfer of stressed loans is undertaken as a resolution plan under the Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions, 2019, then such transfer is permitted to any class of entities listed in the Annex

attached to the Master Direction. Whenever any new class of entities is permitted by the respective financial regulator, the Annex will be updated and those entities can be the transferees of the stressed loans.

CHANGES IN THE REGULATORY FRAMEWORK FOR SSFS

The primary objective of the paper released by SEBI is to amend the SEBI (Alternative Investment Funds) Regulations, 2012 in tune with the scope of stressed loans as per the Reserve Bank of India (Transfer of Loan Exposure Directions, 2021). In the July, 2023 amendment of the above-mentioned Master Circular of the Reserve Bank of India (RBI), SSFs were also added to the Annex thus effectively enabling them to acquire stressed loans as per

clause 58 of the Master Directions. The regulatory framework put forth by the SEBI via the paper aims to address the following aspects broadly:

- A. Definition of Special Situation Assets
- B. Eligibility of investors in SSFs in terms of section 29A of the IBC
- C. Restrictions on investing in connected entities
- D. Minimum holding period and subsequent transfer of loans
- E. Oversight on SSFs

Definition of SSFs

The securities of those companies whose stressed loans are available for acquisition are categorized as Special Situation Assets as per Regulation 19I of the AIF Regulations. It was also clarified that SSFs having prior investment in securities of stressed companies shall not be disqualified or barred from acquiring stressed loans of the said companies. This relies on the assumption that stressed loans eligible for transfer in terms of Clause 58 will be visible to the SSFs.

Eligibility of Investors in SSFs

The RBI Master Directions state that a transferee to whom the economic interest in a loan exposure is transferred should not be a person disqualified under section 29A of IBC. The transferor entity is responsible for verifying that the criteria mentioned under section 29A are not flouted. The initial due diligence expected to be followed will be as per the RBI mandate for investors in ARCs along with ensuring compliance with section 29A. The mandate regarding section 29A ideally extends to SSFs investing in all kinds of assets and not just stressed loans.

Restrictions on Investing in Connected Entities

As per Regulation 19M (1) of AIF Regulations, an SSF cannot invest in its associates. An Associate is any person or entity holding more than fifteen percent of its paid-up equity share capital or partnership interest in the SSF. This mechanism has been put in place to

avoid possible round tripping of funds. To address the concerns regarding conflict of interest, the SEBI guidelines ensure that 'related parties' as per the Companies Act are also not directly involved in the process of an SSF acquiring a stressed loan. An SSF is prohibited from investing in a 'related party.'

Minimum Holding Period and Subsequent Transfer of Loans

The stressed loans acquired as per clause 58 of the Master Directions shall be subject to a minimum lock-in period of six months. Lock-in period refers to the time period during which the said investment cannot be withdrawn or sold.

Oversight on SSFs

The new guidelines propose to have a data sharing mechanism in place between the RBI and the SEBI to share

specifics regarding investors, manager or sponsors, assets involved, financing etc. It is proposed in the paper that the SSFs submit to a trade reporting platform duly notified by the RBI about any relevant information regarding stressed loans acquired under clause 58 of the RBI Master Directions. It is also proposed that the SSFs may be monitored by a supervisory framework in addition to the one meant for other AIFs.

CONCLUSION AND SUGGESTIONS

It can be noted that once the lock-in period ends, the SSFs are permitted to sell the loans only to the entities specified in the Annex to the RBI (Prudential Framework for Resolution of Stressed Assets). Since turning around these distressed assets can take longer gestational periods, limiting the sale to only a few potential buyers may be

counterproductive to the investors in the SSFs. If a sunset period is included in this restriction, it could positively impact the investors in the SSFs.

As the prevalence of stressed assets in the economy grows, both the banking sector and Non-Banking Financial Companies encounter an escalating challenge in seeking alternative avenues for capital injection. In response to this issue, the Securities and Exchange Board of India (SEBI) has introduced a distinctive category of Alternative Investment Funds (AIFs) called Special Situations Funds (SSFs). Such an endeavor can bear fruit only if a proper regulatory mechanism is in place to ensure the effective functioning of SSFs in the market. The proposed SEBI guidelines are hence a step in the right direction ■



ROYAL CARIBBEAN'S NEWEST RECORD-SETTING CRUISE SHIP SETS SAIL

Icon of the Seas, the new holder of the title of the world's largest cruise ship, has set sail on her maiden commercial voyage. The gargantuan ship is now underway on a sold-out weeklong cruise to the Caribbean islands.

Icon of the Seas is powered by six LNG low-pressure dual fuel four-stroke engines in diesel-electric configuration, turning three massive azipods. (Historically, LPDF four-stroke engines have had the highest methane slip rate among LNG powerplants, and this common design has come in for criticism from climate advocates. The engine manufacturer says that the technology has greatly improved in recent years.) But her 7,600 passengers will be paying attention to the imaginative amenities above the waterline, like the Aquadome, a helmet-shaped observation lounge located



above the bridge. This glass and steel structure was hoisted intact onto the ship at the Meyer Turku yard in Finland, and it was the largest ever single lift of its kind.

Inside, the ship has eight "neighbourhoods" and 40 eateries across 20 deck levels.

Seven pools and six waterslides await, along with theme-park

entertainment and a family-centric "stay-all-day" dedicated neighbourhood.

The ship cost \$1.8 billion to construct, approximately the cost of two Constellation-class frigates. Tickets run \$1,700-\$2,600 per person, according to the BBC, putting total revenue in the low eight figures per voyage ■

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