IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2694
Summary Calendar

MITSUBISHI CORPORATION
and
SHIN-ETSU CHEMICAL CO. LTD.,

Plaintiffs,

VERSUS

M/T PETROS, et al.,

Defendants,

DIXIE CARRIERS, INC.,

Defendant-Third Party
Plaintiff-Appellant,

VERSUS

MOBIL SHIPPING & TRANSPORTATION COMPANY
and
ODFJELL WESTFAL-LARSEN TANKERS A/S & COMPANY,

Defendants-Third Party
Plaintiffs-Appellees,

VERSUS

SOUTHWESTERN BARGE FLEET SERVICE,

Third Party Defendant.

Appeals from the United States District Court
for the Southern District of Texas
CA H 90 2292

October 6, 1993

Before SMITH, BARKSDALE, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

I.

Dixie Carriers Inc. ("Dixie"), as owner, entered into a charter party contract with Odfjell Westfal-Larsen Tankers A/S & Co. ("OWL"),[1] as charterer, pursuant to which Dixie agreed to charter the barge RIO 400 to OWL for the purpose of transporting a cargo of Vinyl Acetate Monomer ("VAM") from Intercontinental Terminal Corporation's facility in the Port of Houston for transhipment onto the M/T PETROS, a vessel owned by OWL. The cargo was contaminated with hexene after it was loaded onto the barge, and OWL filed a cross-claim against Southwestern Barge Fleet Service ("Southwestern"), the sub-contractor who had contracted with Dixie to clean the barge.

Prior to trial, Dixie, OWL, and Southwestern agreed to pay the original plaintiffs $400,000, plus attorneys' fees and costs, in settlement of their claim, with Dixie, OWL, and Southwestern each funding one-third of the settlement. After trial on the merits, the district court entered judgment against Dixie and Southwestern and in favor of OWL, finding them jointly and severally liable for OWL's contribution to the settlement agreement and requiring them

[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

[1] The interests of original defendants Mobil Shipping & Transportation Co., Odfjell Westfal-Larsen (U.S.A.), Inc., and Odfjel Westfal-larsen Tankers A/S & Co. are aligned. They are referred to collectively as "OWL."

to reimburse OWL for its attorney's fees and costs. The court also held that Southwestern was required to indemnify Dixie for Dixie's liability to OWL and for Dixie's attorney's fees and costs. In its findings of fact and conclusions of law, the court held that Dixie had breached its duty to maintain the barge in a good and serviceable condition and to furnish OWL with a barge suitable for its intended purpose.

Southwestern and Dixie appealed. Southwestern subsequently settled with OWL and Dixie and moved to dismiss its appeal.

Dixie contends on appeal that, under the terms of the charter party contract, OWL bore the risk of loss with respect to the cleaning of the barge and that Dixie was not required, as part of its obligation under the contract to maintain the barge in a good and serviceable condition, to deliver a barge which was fit for its intended purpose. Because of our disposition of the appeal, we do not address this issue.

II.

Although OWL did not expressly raise the question of mootness, Dixie discusses the issue in its reply brief. In any event, "[w]hether an appeal is moot is a jurisdictional matter, since it implicates the Article III requirement that there be a live case or controversy. In the absence of its being raised by a party, this court is obliged to raise the subject of mootness sua sponte." Bailey v. Southerland, 821 F.2d 277, 278 (5th Cir. 1987).

> In order for a controversy to be presented to a federal court, the resolution of the issues at hand must matter

> to the pertinent parties. It does not matter that in the future this litigation may be used as a strategic instrument; there must be an adversarial relationship between the parties as to the question and the judicial process must be capable of adjudicating it. Essential to the concept of a controversy, under Article III, is an ongoing adversarial posture between the parties before the court.

Talbott Big Foot, Inc. v. Boudreaux (In re Talbott Big Foot, Inc.), 924 F.2d 85, 87 (5th Cir. 1991) (internal quotations and citations omitted). "If a dispute has been settled or resolved, or if it has evanesced because of changed circumstances, including the passage of time, it is considered moot." Lamonica v. S.L.E., Inc. (In re S.E.E. Inc.), 674 F.2d 359, 364 (5th Cir. 1982).

Dixie urges us to reach the merits of the appeal because the same legal issue is presented in cases involving these same parties in litigation that is still pending or may be brought in the future. In effect, Dixie requests us to render an advisory opinion regarding Dixie's exposure to OWL in the other cases.

> Judicial power is not exercised to offer advice to a single party, nor to confirm the wisdom of private settlements already reached and honored. Nor is judicial power exercised when courts doubt the existence of sufficient adversary interest to stimulate the parties to a full presentation of the facts and arguments, which in our adversary system is available only from the parties.

S.L.E., 675 F.2d t 364 (quoting CHARLES A. WRIGHT ET AL., Federal Practice and Procedure § 3530 (1975)).

There is a narrow exception to the mootness doctrine for cases that present issues "capable of repetition yet evading review." Vieux Carre Property Owners, Residents & Assocs., Inc. v. Brown, 948 F.2d 1436, 1447 (5th Cir. 1991). While the issue presented in this appeal may be capable of repetition, the only reason it has

evaded review is because the parties reached a settlement. See id. ("The evading review prong of the exception requires that the type of harm be of limited duration so that it is likely to be moot before litigation is completed.").

Dixie argues that we should follow the Third and Eleventh Circuits, which apply two additional exceptions to the mootness doctrine: (1) when an appellant has taken all steps necessary to perfect the appeal and to preserve the status quo and (2) when the trial court's order will have possible collateral legal consequences. See Wakefield v. Church of Scientology, 938 F.2d 1226, 1229 (11th Cir. 1991); International Bhd. of Boilermakers v. Kelly, 815 F.2d 912, 916 n.5 (3d Cir. 1987); B & B Chem. Co. v. E.P.A., 806 F.2d 987, 990 (11th Cir. 1986); In re Kulp Foundry, 691 F.2d 1125, 1129 (3d Cir. 1982)).

The first exception does not apply in this case, as Dixie did not act to preserve the issue for appeal, choosing instead to settle with Southwestern. While Dixie reserved its right to pursue its appeal, we have indicated that such efforts are unavailing. See S.L.E., 674 F.2d at 364 ("The efforts made by appellants to preserve the justiciability of the appeals taken prior to the compromise settlement and dismissal of the litigation out of which the appeals arose, are keen and astute, but unavailing."); see also Ethredge v. Hail, 996 F.2d 1173, 1176-77 (11th Cir. 1993) (limiting "all necessary steps" exception to cases in which individual liberty interest is at stake).

Courts applying the "collateral legal consequences" exception

often cite Powell v. McCormack, 395 U.S. 486, 495-500 (1969). See B & B Chem., 806 F.2d at 990. In Powell, the Court held that "[w]here one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." 395 U.S. at 496-97. Under Powell, "[a] case is not moot so long as any claim for relief remains viable, whether that claim was the primary or secondary relief originally sought." Commonwealth Oil & Refining Co. v. E.P.A. (In re Commonwealth Oil Refining Co.), 805 F.2d 1175, 1181 (5th Cir. 1986) (citing Powell, 395 U.S. at 496 n.8, 499-500), cert. denied, 483 U.S. 1005 (1987). The possibility that the district court's judgment may have an effect on another case is not a collateral legal consequence under the rule in Powell. In any event, as Dixie admits, the ordinary remedy in this circumstance is to vacate the district court's judgment and dismiss. See Ratner v. Sioux Natural Gas Corp., 770 F.2d 512, 517 (5th Cir. 1985).

Accordingly, we VACATE the judgment and RENDER judgment dismissing the complaint as moot.