THE DEEPWATER HORIZON SETS OPA-90 PRECEDENTS

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The April 20, 2010 *Deepwater Horizon* disaster has produced important recent judicial decisions interpreting OPA-90 which will be of interest to owners, operators and charterers of vessels, including mobile offshore drilling units, lessees of oil exploration and production concessions in US waters, and their respective insurers. This article reviews those aspects of the decisions representing the first judicial pronouncements on the issues the litigation has raised and offers some comments on their significance. As the first decisions, these questions will likely have influence beyond that normally attributable to single trial court level determinations.
The following is an edited version of his remarks.

First, a very brief review of the OPA liability regime as it relates to the issues discussed below. The "Responsible Party" ("RP") from whose "vessel," "offshore facility," or "onshore facility" oil is discharged or for which there is a substantial threat of discharge, is liable for "removal costs" (clean-up) and "damages", including natural resource damages; the RP is also exposed to substantial penalties.

The RP's defenses are limited to establishing sole fault on the part of an act of god, and act of war, or a third party with whom the RP does not have a "contractual relationship." In most instances, the RP will find that the facts do not provide a defense. OPA does, however, preserve the RP's rights under general maritime law to seek indemnity or contribution from third parties whose activities may have caused the spill in whole or in part. For example, charterers who may have breached warranties fall into this category. In fact, with the *Deepwater Horizon*, BP availed itself of these rights by suing Transocean as the rig owner and operator, Halliburton, which was cementing the well, and Cameron, which built the blowout preventer which failed to contain the crude coming up the drillpipe from below the ocean floor.

Before discussing the decisions, it is worthwhile to identify the players and set out the relevant undisputed facts. BP and Anadarko were the co-owners of the Macondo Well, located on the seabed in the Gulf of Mexico. A blowout of the well occurred on April 20, resulting in explosions and a fire on the *Deepwater Horizon*, a mobile offshore drilling unit ("MODU"). It sank two days later, breaking the riser pipe that connected it to the Macondo Well. Oil flowed from the seabed through the blowout preventer ("BOP") and remaining section of riser pipe, and then into the Gulf. This release into the ocean water took place well below the water's surface.

The subsequent discharge of millions of gallons of oil into the Gulf resulted in multiple lawsuits being filed, which were consolidated. Transocean, the owner of the MODU, filed a shipowner's Limitation Action, 46 U.S.C. § 30501, et seq. In the Limitation Action, numerous claims were asserted, primarily for personal injury, wrongful death, economic loss, and property damage. In another case, the US government filed suit against BP, Anadarko and Transocean, claiming natural resource damages and civil penalties under the Clean Water Act. The United States also sought a declaratory judgment that all three of these defendants were "Responsible Parties" under OPA 90 and hence liable for removal costs and damages from the discharge of oil.

THE THREE DECISIONS ARE AS FOLLOWS:

The February 22, 2012 Decision[1]

In a February 22, 2012 decision, the first issue presented was under what circumstance the owner of a MODU can be held to be the "Responsible Party" under OPA 90.

As the lessees of the seabed below the *Deepwater Horizon*, BP and Anadarko did not generally dispute their liability for removal costs and damages under OPA 90 as the "Responsible Parties" for an "offshore facility." [33 U.S.C. § 2701(32)]. But the US government also sought to hold Transocean, the owner of the MODU, jointly and severally liable under OPA because the oil discharged from the BOP and the remaining riser section, which were deemed "appurtenances" of the *Deepwater Horizon*, a vessel. Under OPA 90, the owner of

a vessel that discharges oil into the sea can be deemed a Responsible Party when the oil flows from "appurtenances" to the ship.

The court held that the answer turned on how the MODU was being used at the time of the incident and whether the discharge occurs beneath the water's surface. The court's ruling lays down three, easy to follow rules.

1. If the MODU is being used as an offshore facility (is not being navigated) and the discharge occurs beneath the water's surface, the lessee/permittee alone will be the responsible party. The lessee's liability for removal costs is unlimited under OPA 90 and potentially limited to $75 million for other damages. [33 U.S.C. § 2704(a)(3)]

2. If the MODU is being used as an offshore facility and the discharge occurs on or above the water's surface, then the RP will be the owner/operator of the MODU up to the limits of liability for a tanker. Excess liability will be shouldered by the lessee.

3. If the MODU is not being used as an offshore facility — such as when it is moving from one location to another — the responsible party for the discharge will be the owner/operator of the MODU.

In the *Deepwater Horizon* case, the MODU was being used as an offshore facility when the discharge happened, and therefore BP and Anadarko as lessees of the area being drilled were held to be the "Responsible Parties" with respect to the subsurface discharge of oil, even though the discharge was from appurtenances to the vessel.

Because BP and Anadarko were both held to be responsible parties, the next issue the court reached was whether their liability under OPA was joint and several. The words "joint and several" do not appear in OPA. The statute does set the standard of liability with reference to the Clean Water Act, where liability is joint and several. But a recent Supreme Court case, *Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. 559 (2009), had held that the CWA's liability standard did not apply to the Comprehensive Environmental Response, Compensation and Liability Act, and this caused the DWH court to consider the issue because OPA's liability scheme follows that of CERCLA very closely.

The court concluded that OPA's legislative history made explicit Congress' intent to apply the CWA's standard of joint and several liability to OPA. BP and Anadarko were therefore held jointly and severally liable for removal costs and damages insofar as the United States and third parties are concerned. It remains to be seen how BP and Anadarko will treat this exposure as

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between themselves. Presumably, the losses will be allocated under the agreement governing the operations under the lease from the United States for the Macondo block.

This decision appears to be the first judicial pronouncement relating to the liabilities of a MODU depending on its function at the time of the spill, the liabilities of a lessee for subsurface releases, and confirmation that OPA imposes joint and several liability where there is more than one RP. This latter ruling may have broad application where one RP, as, for example, an independent tanker owner does not have the financial wherewithal to satisfy the liabilities it has incurred to third parties and should apply whether the Coast Guard has designated multiple RPs, or an RP attempts under OPA to have a third party whom it contends is solely at fault treated as an RP.

January 26, 2012 Decision[2]

The issue of significance to all those falling under the OPA liability scheme in this opinion concerns the enforceability of indemnification clauses in contracts that call for one party to indemnify the other without regard to fault, not only for removal costs and damages but also for both punitive damages and penalties arising from strict liability statutes like OPA and the CWA. Remember here the repeated press prognostications that the penalties could reach into the billions.

The drilling contract between BP and Transocean allocated to BP the risk of pollution originating <u>beneath</u> the water's surface, and to Transocean, the operator of the MODU, the risk of pollution originating on the water's surface. Thus, BP agreed to indemnify Transocean for the risk of subsurface oil pollution, "without regard for whether the pollution … is caused in whole or in part by the negligence of Transocean … and without regard to the cause or causes thereof … the unseaworthiness of any vessel … breach of contract, strict liability, … gross negligence."

Transocean's limitation action opened the floodgates to hundreds of claims filed against it. Transocean then impleaded BP (under Fed. R. Civ. P. 14(c)[3]), thus tendering

“The drilling contract between BP and Transocean allocated to BP the risk of pollution originating <u>beneath</u> the water's surface, and to Transocean, the operator of the MODU, the risk of pollution originating on the water's surface.”

BP to the claimants and demanding judgment in the claimants' favor. Meanwhile, in the United States's case, the government asserted claims against BP and Transocean for OPA 90 strict liability for removal costs and damages, and for penalties under the Clean Water Act, 33 U.S.C. §1321(b)(7). In both cases, BP and Transocean cross-claimed against each other seeking contribution and indemnity based upon the language in the drilling contract. Against this background, the court was asked to decide whether BP was required to indemnify Transocean for gross negligence, strict liability and statutory fines and penalties. The court answered "yes" to strict liability under OPA and to gross negligence, but "no" to reckless or intentional conduct," punitive damages, and fines and penalties.

The court reasoned that the contract was a fair allocation of risk and liability between sophisticated parties, and nothing in OPA prohibited a party from indemnifying another for gross negligence. However, the court also reasoned that BP was not required to indemnify Transocean for reckless or intentional conduct and that the enforcement of the indemnification

agreement on that basis would be void under public policy grounds. The court also rejected Transocean's effort to foist punitive damages and CWA penalties on BP, noting that such penalties were designed to punish and deter future pollution, and therefore could not be passed along under a contract for someone else to pay. To permit such a transfer of risk was seen to circumvent the "punish and deter" features of these liabilities.

August 26, 2011 Decision[4]

There are many complicated issues discussed in this opinion: Whether a MODU is a vessel for purposes of applying federal admiralty jurisdiction (it is) and whether OPA displaces general maritime law claims for punitive damages (it does not). But there is a simple issue that is worth noting.[5]

Before a claimant either brings a lawsuit against the Responsible Party in court, or submits a claim to the NPFC, he must first present the claim to the Responsible Party and either have the claim denied or the RP must take no action for 90 days. The court found that thousands of claimants had not taken this action before filing suit against BP, notwithstanding that OPA clearly required that claimants must first "present" their OPA claim to the Responsible Party before filing suit or submitting the claim to the Fund. While this requirement appears to be jurisdictional - meaning that failure to follow the required procedure should lead to dismissal of the claim - the court ruled that in the face of the thousands of pending claims, it would not undertake an examination of each claim and allowed the claims to proceed. This action, while taken in the interest of judicial economy, may well have provided BP with grounds for a successful appeal. However, with the voluntary settlement fund BP had established which now has been taken over by the court pursuant to a settlement between BP and thousands of claimants, the issue is probably moot.

But the lesson remains: RPs should follow this presentment requirement to the letter, as should claimants.

These opinions are thoughtful and well reasoned. Whether one agrees with the results or not, these three decisions are likely to exert considerable influence in the future if they stand. Given the amounts at stake, appeals must be anticipated, but piece by piece BP is settling with the major players and it may be that, as time passes, settlements will make appeals unnecessary and some or all of these trial court decisions may survive unchallenged in the *Deepwater Horizon* litigation. But for the timebeing they represent the only judicial pronouncements on the issues covered and must be taken into account in any analysis of oil pollution liabilities.

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1 *In re Oil Spill by Oil Rig DEEPWATER HORIZON in Gulf of Mexico, on April 20, 2010*,
--- F.Supp.2d ----, 2012 WL 569388, E.D.La., February 22, 2012 (NO. MDL 2179, 10-4536).

2 *In re Oil Spill by the Oil Rig DEEPWATER HORIZON in the Gulf of Mexico, on April 20, 2010*,
--- F.Supp.2d ----, 2012 WL 246455, E.D.La., January 26, 2012 (NO. MDL 2179, 10-2771, 10-4536).

3 Rule 14(c): Admiralty or Maritime Claim (1) Scope of Impleader.

4 *In re Oil Spill by the Oil Rig DEEPWATER HORIZON in the Gulf of Mexico, on April 20, 2010*,
808 F.Supp.2d 943, 2011 A.M.C. 2220, E.D.La., August 26, 2011 (NO. MDL 2179).

5 It should be noted that in an earlier decision the Deepwater Horizon court decided that OPA does not preclude the general maritime rule allowing punitive damages in the appropriate case. This decision is at odds with the First Circuit's decision in. *South Port Marine, LLC v. Gulf Oil Limited Partners*, 234 F. 3d 58 (1st Cir. 2000), holding that OPA as a comprehensive environmental liability scheme does not include punitive damages as a remedy available to those injured in a pollution incident. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) confirmed that admiralty courts could award punitive damages in the pollution context, but those claims arose prior to OPA's enactment. Thus, we think the availability of punitive damages under OPA-90 remains an open question.