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A boat passes through heavily oiled marsh near Pass a Loutre, La., May 20.

REUTERS/Lee Celano

GULF OIL SPILL

Oil spill MDL judge issues pretrial order, sets hearing

The New Orleans federal judge overseeing pretrial discovery in the litigation stemming from the Deepwater Horizon oil disaster will hold a conference Sept. 17 to set proposed trial dates and discuss other "housekeeping" duties.

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Westlaw Journal Environmental

Published since December 1980

Publisher: Mary Ellen Fox

Executive Editor: Jodine Mayberry

Production Coordinator: Tricia Gorman

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Westlaw Journal Environmental

(ISSN 2155-5850) is published biweekly by Andrews Publications, a Thomson Reuters/West business.

Andrews Publications

175 Strafford Avenue

Building 4, Suite 140

Wayne, PA 19087

877-595-0449

Fax: 800-220-1640

www.andrewsonline.com

Customer service: 800-328-4880

For more information, or to subscribe, please call 800-328-9352 or visit west.thomson.com.

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The Deepwater Horizon oil spill and multidistrict litigation: What to expect, what remains unknown

By Brant C. Martin, Esq., and Jodie A. Slater, Esq.

The explosion of the Deepwater Horizon offshore drilling rig in the Gulf of Mexico April 20 killed 11 workers on the rig and caused crude oil to gush relentlessly into the Gulf. The spill continued through mid-July, threatening the way of life of tens of thousands of Americans.

To date, the explosion has spawned hundreds of lawsuits alleging personal injury and wrongful death, a commercial impact on businesses, environmental damage, and other claims. In addition, depending on whether the leak has been fixed adequately, more lawsuits can be expected in the future. In fact, the environmental and economic impact of the explosion and oil spill has resulted in a legal tidal wave that, without any coordination, will overwhelm the state and federal courts in Louisiana, Florida, Texas, Alabama, Mississippi and other affected states.

To mitigate the onslaught of litigation, the Judicial Panel on Multidistrict Litigation consolidated hundreds of federal court cases Aug. 10. Although this action does not consolidate state court cases, it would affect any state case properly removed to federal court.

The removal of a Deepwater Horizon state court case to federal court is likely when there is a question of diversity of citizenship, the amount in controversy falls within federal jurisdictional limits and certain federal laws that would provide a basis for federal question jurisdiction are alleged.

Based on a review of previous MDL proceedings, the consolidation decision is likely to affect the organization of the teams of both the plaintiffs and defense, as well as the pretrial procedures used to manage fact discovery, expert discovery and pretrial rulings.

ESTABLISHING THE DEEPWATER HORIZON MDL PROCEEDING

The basis for the court's ability to consolidate the Deepwater Horizon cases rests in the Multidistrict Litigation Act passed by Congress in 1968, codified at 28 U.S.C. § 1407. The act states that civil actions pending in different districts and involving one or more common questions of fact may be transferred to any district for coordinated or consolidated pretrial proceedings.¹

Any transfer made under Section 1407(a) may only be authorized upon a determination that the transfer will "promote the just and efficient conduct" of the case and provide for "the convenience of parties and witnesses."² To this end, a judicial panel on MDL oversees the consolidation of related cases. The panel consists of seven circuit and district court judges, no two of whom are from the

by President Clinton in 1998, was appointed to serve as the "transferee judge." Judge Barbier will preside over the consolidated actions for only the pretrial proceedings.

At the conclusion of the pretrial proceedings, the JPML will remand the transferred actions to the district from where the case was originally transferred, unless the action was terminated during the pretrial proceedings.⁴ Under the terms outlined by the panel, the transferee judge (Judge Barbier) may only try cases that were originally filed in his district.⁵

Prior MDL proceedings may serve as a useful guide in predicting the handling of the hundreds of Deepwater Horizon MDL claims that have and will be filed against BP and others. However, the impact that the recently formed Gulf Coast compensation fund will have on the MDL may set a precedent for future MDL proceedings.

While the JPML's order does not consolidate state court cases, it would affect any state case that is properly removed to federal court.

same circuit, who are designated by the chief justice of the U.S. Supreme Court.³

In response to four separate motions, the JPML met in Boise, Idaho, July 29 to consider the need to consolidate the lawsuits spawned by the Deepwater Horizon explosion. The panel transferred 77 actions to the Eastern District of Louisiana Aug. 10 in the action styled *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, No. 2:10-md-02179-CJB-SS. The transfer order noted the existence of more than 200 potential "tag-along" actions.

U.S. District Judge Carl J. Barbier, a New Orleans native appointed to the federal bench

CASE-MANAGEMENT STRUCTURE

Pretrial consolidation in an MDL requires a formal case-management structure be established early on in the litigation process. The Manual for Complex Litigation contemplates that case-management teams be formed early to promote efficiencies and to streamline communication by and between the parties and the court.

For example, in the Exxon Valdez oil-spill litigation, the presiding state and federal judges entered a combined case-management order structuring the plain-tiffs' case-management team, which com-prise two co-lead counsel, a

The transferee judge, U.S. District Judge Carl Barbier, may only try cases originally filed in his district.

five-person executive committee, a treasurer, a discovery committee, a law committee and a plaintiffs' liaison counsel.⁶

Each arm of the case-management team has a specialized role to allow for coordination of logistical and substantive issues. In another example, U.S. District Judge Sam C. Pointer Jr. entered a designation of liaison counsel within two months after entering his initial case-management order in the product liability litigation concerning silicone gel breast implants.

Part of the reason for appointing a centralized liaison counsel was to simply ensure that all pleadings were distributed to all attorneys. It was the job of the national liaison counsel in the breast implant litigation to receive service of all pleadings, motions, briefs, orders and similar papers; to distribute them; and to perform other administrative functions as assigned from time to time.

The litigation stemming from the Gulf oil spill will require a similar case-management structure, and possibly even more sophisticated protocols, to manage the various grievances from plaintiffs from a number of states.

FACT DISCOVERY

Section 1407(a) of the MDL Act confers broad discretion on the transferee judge to design a pretrial program for all parties.⁷ To manage the consolidated litigation efficiently, the transferee judge has the authority to place pretrial proceedings on separate discovery tracks based on common fact issues or discovery based on a single defendant.⁸

The transferee judge is further authorized to enter a discovery schedule that allows discovery unique to a particular party to proceed concurrently with common discovery.⁹

The BP spill has generated hundreds of lawsuits spanning numerous subject areas, such as the spectrum of commercial cases. Complaints have been filed, for instance, by fisheries, restaurants, hotels and other

Gulf Coast businesses. In addition, there have been cases of personal injury, wrongful death, environmental damage and many other harms.

Although the MDL order does not specify the subject matter of the 77 cases that are subject to its jurisdiction or the subject matter of the some 200 "tag-along" cases, the order does specifically state that personal injury cases can be consolidated into the MDL.

Therefore, it is likely that all the cases, regardless of subject matter, will be consolidated into the MDL. However, it may be necessary to accommodate the differing discovery needs of personal injury and commercial plaintiffs by allowing separate discovery.

Judge Barbier is empowered to invoke procedures to make discovery that has already been completed in any action in the MDL applicable to other actions.¹⁰ As a result, the "tag-along" actions, despite the timing of their transfer to the MDL, may be bound by common discovery already completed that is relevant to their claims.

To facilitate the discovery process, a case-management team will often designate a committee to focus on developing a joint discovery plan while coordinating the timing of document production and depositions. The management teams of both the plaintiffs and defendants are likely to set up a document repository for sharing common data among their allies and for managing the influx of data from opposing parties. At this stage, BP and the other defendants are probably focusing on data preservation and gathering, whereas the plaintiffs' team will approach the issue of document collection and storage.

Given the volume of discovery requests, responses, document production and deposition testimony, numerous discovery disputes are inevitable. To assist with resolving these disputes, Judge Barbier is likely to appoint a discovery master, as the transferee judge did in the Exxon Valdez litigation, to assist the court with adjudicating discovery disputes.

EXPERT DISCOVERY

To illustrate the expert discovery process in an MDL setting, *In re Phenylpropanolamine (PPA) Products Liability Litigation* serves as an instructive example. In the PPA MDL, the court worked with the parties for more than a year to refine the expert discovery process and ultimately chose to divide discovery into two phases: generic causation discovery to take place in the MDL, and case-specific expert discovery to occur after remand to the transferor court.¹¹

The court then modified its scheduling order to provide for a two-week "opt-in" period after the plaintiffs' initial disclosures regarding general causation experts.¹² The opt-in period gave plaintiffs in individual cases the opportunity to review the Rule 26 disclosures of the plaintiffs' case-management team and to decide whether to use the collectively disclosed experts in their individual cases.¹³ Under certain conditions, even those plaintiffs who adopted the designations of the case-management team were able to designate different experts to testify at trial, should they so choose.¹⁴

The court in the Deepwater Horizon MDL, like the court in the PPA MDL, should entertain expert discovery proposals and devise a discovery process to preserve the delicate balance between efficiently managing complex litigation and preserving individualized justice. After completion of pretrial discovery, resolution of scientific issues will be reserved for the transferor judge in individual proceedings, as set forth in *Lexecon Inc. v. Milberg Weiss Bershad Hayes & Lerach*, 523 U.S. 26 (1998).

CONSISTENCY OF PRETRIAL RULINGS

By way of example, the *In re Silica Products Liability Litigation* offers insight into the variety of legal issues that the Deepwater Horizon MDL court will address on a global level in order to ensure pretrial ruling consistency. The MDL allows for the transferee judge to issue global rulings on pretrial issues as varied as jurisdiction and experts, sometimes over the objections of parties wishing to have the issues examined separately.

For example, in the *Silica Products* MDL, a number of remand motions were pending when the cases were initially transferred

to the Southern District of Texas, and more remand motions were filed *after* transfer to the MDL. Recognizing that the authority for consolidating cases does not expand the jurisdiction of either the transferor or transferee courts, the court addressed the basic tenets of jurisdictional issues, each in turn, considering the amount in controversy, complete diversity and improper joinder of each case.

The court addressed the defendants' burden globally. The court refused to consider separately the claims of each individual plaintiff against each individual defendant for purposes of determining jurisdiction, as urged by the defendants. Instead, the court reviewed the Mississippi Rules of Civil Procedure for compliance by all the plaintiffs collectively and concluded it lacked subject matter jurisdiction over

President Obama appointed Kenneth R. Feinberg of the mediation firm Feinberg Rosen LLP to oversee the claims facility. Calling on his experience as the special master for the \$7 billion Sept. 11 victim compensation fund, Feinberg will distribute the \$20 billion fund to compensate individuals and businesses for losses suffered because of the Deepwater Horizon oil spill.

Although the compensation fund formulated by President Obama and BP Chairman Carl-Henri Svanberg is unprecedented, it has received criticism for being underfunded. Critics also warn the fund will unfairly force desperate claimants to choose an upfront, lump-sum payment in exchange for a full and final release of claims against BP. Many of the claimants do not have the resources to weather a lengthy MDL pretrial proceeding, only to await trial upon remand from the MDL.

The Deepwater Horizon explosion has generated hundreds of lawsuits spanning numerous subject areas, such as the spectrum of commercial cases.

a majority of the plaintiffs because the cases were not properly removed to federal court.¹⁵ Those cases were remanded to the transferor courts as a whole, and the properly removed and/or filed federal court cases remained in the MDL.

The court also addressed the admissibility of certain expert testimony on a global level, as the court in the Deepwater Horizon MDL will probably do. Consolidation will also allow for consistent class-action determinations in the Deepwater Horizon MDL.

INTERSECTION WITH BP COMPENSATION FUND

Further complicating the Deepwater Horizon MDL proceedings is the announcement of the formation of the BP Gulf Coast Claims Facility.

Announced in June, the claims facility is the result of negotiations between the White House and representatives of BP. The GCCF is a \$20 billion compensation fund for Gulf oil-spill victims, funded at a rate of \$5 billion per year over four years by BP and secured by collateral of \$20 billion of BP's assets.

The impact of the GCCF on the Deepwater Horizon MDL has yet to be determined. The claims facility, with its unprecedented size and origin, has only just been formed. It is anticipated that many claimants will accept payments from the claims facility, dismiss their lawsuits or never bring them at all, thus reducing the size and scope of the MDL. Nevertheless, without more information about the nascent fund's rules and procedures, predicting its impact on the Deepwater Horizon MDL proves difficult.

Observers must sit on the sidelines to watch and wait for more insight into the interplay between the fund and the MDL. This is especially true for environmental claims, which some are likely to deem not compensable by any lump sum. In all likelihood, environmentalists will expect more equitable remedies, requesting injunctive relief, monitoring and other court-ordered supervision, among other legal remedies.

Although early reports indicate that leftover money from the fund will be used for environmental cleanup, it is simply too early to determine the effect this will have on the MDL.

CONCLUSION

Although the establishment of the GCCF may lessen the size and scope of the MDL, no one should be led to believe it will eliminate all the litigation.

Parties will not be required to accept payments from the fund and may proceed in the consolidated arena of the federal MDL. This is especially true in the case of environmental claims, many of which are not brought for the purposes of securing direct monetary relief.

As the Deepwater Horizon MDL works through the court system, its structure is likely to evolve into a compendium of committees, fashioned after the MDLs of the past. Similarly, many of the techniques and discovery plans will be borrowed from MDLs that predated the spill. Given the complex nature and sheer number of claims, the court may find it necessary to create new procedures to better manage and expedite the handling of the MDL.

In short, the legal impact of the Deepwater Horizon MDL is far-reaching and will have a shelf life that is far longer than the media attention focused on the Gulf oil spill. Attorneys can expect new case law and MDL procedures to result as the ultimate legacy of the Deepwater Horizon. [WJ](#)

NOTES

¹ See 28 U.S.C. § 1407(a).

² *Id.*

³ *Id.* § 1407(d).

⁴ *Id.* § 1407(a).

⁵ See *Lexecon Inc. v. Milberg Weiss Bershad Hayes & Lerach*, 523 U.S. 26 (1998).

⁶ See N. Robert Stoll: *Litigating and Managing a Mass Disaster Case: An Oregon Plaintiff Lawyer's Experience in the Exxon Valdez Oil Spill Litigation*, 50 Or. St. B. Bull. 14, *16 (1995).

⁷ See 28 U.S.C. 1407(a); see also *In re Bear Stearns Cos. Sec., Derivative & Employee Ret. Income Sec. Act (ERISA) Litig.*, 572 F. Supp. 2d 1377 (J.P.M.L. 2008); *In re Janus Mut. Funds Inv. Litig.*, 310 F. Supp. 2d 1359 (J.P.M.L. 2004); *Acuna v. Brown & Root Inc.*, 200 F.3d 335 (5th Cir. 2000); *In re Equity Funding Corp. of Am. Sec. Litig.*, 375 F. Supp. 1378 (J.P.M.L. 1974).

⁸ See *In re Multi-Piece Rim Prods. Liab. Litig.*, 464 F. Supp. 969 (J.P.M.L. 1979).

⁹ *Id.*

¹⁰ *In re Aircraft Accident at Barrow, Alaska, on Oct. 13, 1978*, 474 F. Supp. 996. (J.P.M.L. 1979).

¹¹ Barbara J. Rothstein, Francis E. McGovern & Sarah Jael Dion, *A Model Mass Tort: The PPA Experience*, 54 *DRAKE L. REV.* 621, 628 (2005-06).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* 629-30.

¹⁵ *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005).



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Oil spill

CONTINUED FROM PAGE 1

In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010, No. 10-02179, 2010 WL 3269206 (E.D. La. Aug. 10, 2010).

U.S. District Judge Carl Barbier of the Eastern District of Louisiana said Aug. 10 that, until he names liaison counsel for the consolidated actions, he is appointing James Roy of Domengeaux Wright Roy & Edwards in Lafayette, La., and Stephen Herman of Herman Herman Katz & Cotlar in New Orleans interim liaison counsel for the plaintiffs.

Don Haycraft of Liskow & Lewis in New Orleans, one of the attorneys representing BP in the litigation, will serve as interim liaison counsel for the defendants.

More than 300 lawsuits have been filed since the April 20 BP oil well explosion and resulting spill. Most of the cases were filed in federal courts in Texas, Florida, Louisiana, Mississippi and Alabama, the states whose shorelines were closest to the spill and where the fishing and tourism industries are suffering.

On Aug. 10 the Judicial Panel on Multidistrict Litigation transferred 77 spill-related lawsuits from five states to Judge Barbier's court. More than 200 potential tag-along cases could follow.

BP, which leased the Deepwater Horizon rig from Transocean Ltd., is one of the companies being sued, but the list of the defendants is growing (see box).

Defendants in Oil Spill Cases

- BP, majority owner of the Macondo deepwater oil well
- Transocean Ltd., the owner of the Deepwater Horizon drilling platform
- Cameron International Corp., the supplier of the device that was designed to prevent a blowout at the well site
- Halliburton Energy Services Inc., which did cement work on the well and well cap
- Anadarko Petroleum, which owned a 25 percent interest in the Macondo well
- MOEX Offshore 2007 LLC, which owned a 10 percent interest in the well

Judge Barbier also named additional interim liaison counsel for the defense Aug. 12:

- Kerry Miller of Frilot LLC in New Orleans, counsel for Transocean.
- Donald Godwin of Godwin Ronquillo PC in Dallas, counsel for Halliburton Energy Services Inc., which did cement work on the well and well cap.
- Phil Wittmann of Stone Pigman Walther Wittmann LLC, counsel for Cameron International Corp., which supplied the

device that was designed to prevent a blowout at the well site.

- Deborah Kuchler of Kuchler Polk Schell Weiner & Richeson in New Orleans, counsel for Anadarko Petroleum, which owned a 25 percent interest in the BP well, and MOEX Offshore 2007 LLC, which owned a 10 percent interest.

Judge Barbier said he intends to appoint a plaintiffs steering committee to conduct and coordinate the discovery stage of the litigation. Applications must be filed with the Eastern District of Louisiana clerk's office by Sept. 27.

The judge will also consider defense recommendations for membership on the defendants steering committee.

OTHER PROVISIONS OF THE ORDER

Judge Barbier said he expects counsel to familiarize themselves with the Manual for Complex Litigation (Fourth) before the Sept. 17 conference.

A website will be created for the oil spill MDL and will be accessible by going to the Eastern District of Louisiana's website and clicking on the link for MDL cases.

Finally, Judge Barbier stressed that all parties and their counsel have a duty to preserve evidence that may be relevant to the litigation. The duty extends to documents and data, including calendars, diaries, electronic messages, voice mail, e-mail, hard drives, films and charts. **WJ**

Relevant Court Document:
Pretrial order #1: 2010 WL 3269206

Alabama sues BP, Transocean over Gulf oil spill

Alabama is the first state to file environmental lawsuits against BP and several other companies over this summer's oil spill, asserting the defendants' "negligence" and "reckless behavior" caused the disaster.



A health advisory sign warns swimmers in Orange Beach, Ala., to avoid oil-polluted waters June 14.

REUTERS/Lyle Ratliff

The suits seek unspecified economic, compensatory and punitive damages.

State ex rel. King v. BP PLC, No. 2:10-690, complaint filed; State ex rel. King v. Transocean Ltd. et al., No. 2:10-691, complaint filed (M.D. Ala., N. Div. Aug. 12, 2010).

Attorney General Troy King filed two lawsuits in the U.S. District Court for the Middle District of Alabama, alleging the defendants are liable under the Oil Pollution Act, 33 U.S.C. § 2701, for damages to the state's natural resources and to real and personal property owned by the state and its citizens.

The suits seek unspecified economic, compensatory and punitive damages.

One of the complaints names BP and its affiliates as defendants. The other names several companies involved in the well or drilling process: Transocean Ltd., Halliburton Energy Services, Anadarko Petroleum Corp., Mitsui & Co. and Cameron International Corp.

The suits claim the defendants' actions, including the following, led to the spill:

- Refusing to install an acoustically activated, remote-control shutoff valve.
- Using defective materials.
- Failing to note or fix "dangerous and recurring problems" or to institute protective measures.
- Accelerating drilling operations to improve revenue streams.
- Using dangerous substances in the oil cleanup.

In an Aug. 13 statement King said he disagrees with those who say the suits are premature.

"As an Alabama lawyer, I say that, if anything, based on BP's broken promises, their history of saying one thing and doing another — and now, new information that they have been secretly working to gain a legal advantage

— further delay can only further damage our people," he said.

According to King, BP is retaining all the best expert witnesses so they will be unable to testify against the company. Further, the oil giant is selling assets, perhaps to divest itself of assets that American courts could reach to satisfy a judgment, he said.

Additionally, BP is developing a report to assist in its argument that the company was not "grossly negligent," which would limit its liability, King said. **WJ**

Attorneys:

Plaintiff: Attorney General Troy King and Assistant Attorneys General Cheairs Porter and Robert Tambling, Montgomery, Ala.

Related Court Documents:

BP complaint: 2010 WL 3319413
 Transocean complaint: 2010 WL 3235471

MICHIGAN OIL SPILL

Families affected by Michigan oil spill file class action

Three Michigan families living near bodies of water polluted by a leaking oil pipe have filed a class-action lawsuit against the pipe's owner.

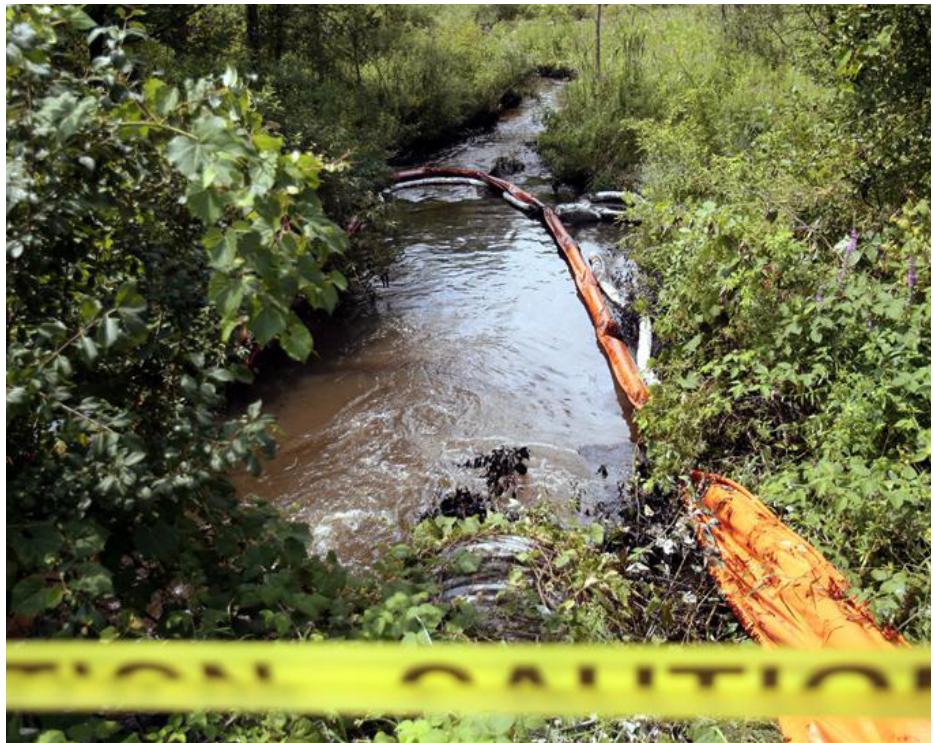
Watts et al. v. Enbridge Inc. et al., No. 1:10-753, complaint filed (W.D. Mich. Aug. 2, 2010).

The suit filed in the U.S. District Court for the Western District of Michigan names as defendants Enbridge Inc. and subsidiaries Enbridge U.S., Enbridge Energy Co., Enbridge Energy L.P., Enbridge Pipelines Lakehead L.L.C. and Enbridge Energy Management L.L.C.

The plaintiffs estimate more than 800,000 gallons of oil have escaped so far, "creating a toxic stench in an area spreading over more than 30 miles."

The plaintiffs are Cheryl and Darwin Watts, Rhonda and Gerald Stepp, and Ginny and Steven Lewis. They allege trespass, nuisance, negligence, violations of Michigan's Natural Resources Act and Environmental Protection Act, and strict liability for abnormally dangerous activity.

According to the suits, Enbridge owns and maintains a 30-inch oil pipeline that ruptured July 25 and leaked crude oil into Talmadge Creek, which flows directly into the Kalamazoo River in southern Michigan.



REUTERS/Rebecca Cook

Absorbent booms collect oil from Talmadge Creek in Michigan, near where a pipeline owned by Enbridge Inc. ruptured July 25.

The plaintiffs estimate more than 800,000 gallons of oil have escaped so far, "contaminating the waters, coating and killing wildlife, and creating a toxic stench in an area spreading over more than 30 miles."

The plaintiffs all own creek or riverfront property that has been contaminated with oil stemming from recent flooding of Talmadge Creek and the Kalamazoo River. This has affected their quality of life and, in some cases, business operations, the suits say.

The plaintiffs cite "news reports" that say the U.S. Department of Transportation, which oversees the pipeline, repeatedly warned the Enbridge defendants to address issues regarding the pipeline's safety and performance. Further, the Environmental Protection Agency reportedly has called Enbridge's long-term cleanup strategy "deficient."

Finally, the spill could spur the release of contained contaminants that were already

on or near the riverbed from prior pollutant releases, the plaintiffs say.

They note many residents already have relocated.

The proposed class includes "all persons impacted by the oil spill who have suffered damage to property, loss of enjoyment of their property, damage to business, or loss of the use of their property and homes."

The District Court has subject matter jurisdiction under the Class Action Fairness Act, 28 U.S.C.A. § 1332, because diversity of citizenship exists and class members' claims in the aggregate exceed \$5 million, the plaintiffs assert. **WJ**

Attorneys:

Plaintiffs: David H. Fink, E. Powell Miller and Mark L. Newman, Miller Law Firm, Rochester, Mich.

Related Court Document:

Complaint: 2010 WL 3235472

\$10 billion lawsuit filed over BP's Texas City refinery

BP is facing a class-action lawsuit over an equipment malfunction at its Texas City refinery that allegedly released 500,000 pounds of pollutants into the air between April 6 and May 15.

Fontenot et al. v. BP Products North America Inc., No. 10-00295, complaint filed (S.D. Tex. Aug. 3, 2010).

The suit, filed Aug. 3 in the U.S. District Court for the Southern District of Texas, charges BP Products North America did not inform city officials of the scale of the release until it was over.

Hamilton Fontenot and other named plaintiffs representing the class are seeking compensatory damages, as well as punitive damages in excess of \$10 billion.

The complaint estimates the proposed class will number in the tens of thousands.

The class will consist of a subclass of people who worked at the refinery between April 6 and May 16 and a subclass of people who lived or worked within the Texas City limits during the release.

The named plaintiffs allege the release occurred because of a failure in the refinery's "ultra-cracker" unit, which converts petroleum products into high-octane gasoline. The hydrogen compressor in the unit is responsible for trapping noxious chemicals. When it went offline, BP sent the gases to a flare, the suit alleges.

The pollutants released from the refinery include benzene, carbon monoxide, propane and other toxic chemicals, according to the complaint.

The Texas City refinery, capable of producing more than 460,000 barrels per day, is the third largest petroleum refinery in the U.S. and the "largest single polluter" in the country, the complaint says.

"The refinery has a long history of violations that have resulted in nearly 20 deaths since 2005, hundreds of injuries, hundreds of toxic releases, and numerous environmental and safety violations," the complaint says.

In March 2005 a series of fires and explosions killed 15 workers and injured more than 1,000 people.

Investigators found the explosion was caused by organizational and safety deficiencies at all levels, the suit says.

Since the 2005 explosion, four more people have died at the refinery, the suit says.

Also, in a four-year period, there were more than 500 leaks, spills and releases at the refinery, especially benzene releases, according to the complaint.

In late 2009 the Occupational Safety and Health Administration cited BP for more than 700 issues, many of which had been outstanding for more than four years, the suit says.

Last year OSHA levied a fine of more than \$87 million based on BP's conduct, the largest in the agency's history.



REUTERS/Richard Carson

Flags fly at half staff outside the BP refinery in Texas City, Texas, March 24, 2005, the day after an explosion at the plant killed 15 workers.

As for the recent discharge of pollutants, the complaint says, tens of thousands were injured and their long-term health was jeopardized after they were exposed to pollutants while working at the refinery or simply by living or working in Texas City.

The suit alleges negligence, common-law assault and battery, and private nuisance. **WJ**

Attorney:
 Plaintiffs: Anthony Buzbee, Houston

Related Court Document:
 Complaint: 2010 WL 3134541

See Document Section A (P. 19) for the complaint.



Howmet, which manufactured casings for aircraft turbines, used liquid potassium hydroxide as a cleaning agent.

RCRA

Engine parts maker's sale of used solvent violated RCRA

With one dissent, a panel of the District of Columbia U.S. Circuit Court of Appeals has ruled that a manufacturer of turbine engine parts violated the Resource Conservation and Recovery Act when it shipped used solvent to a fertilizer maker without first obtaining a permit.

Howmet Corp. v. Environmental Protection Agency et al., No. 09-5360, 2010 WL 3063262 (D.C. Cir. Aug. 6, 2010).

Howmet Corp. filed suit under the Administrative Procedure Act, challenging penalties levied against it by the Environmental Protection Agency under RCRA, 42 U.S.C. § 321.

According to the opinion, Howmet, which manufactured casings for aircraft turbines, used liquid potassium hydroxide as a cleaning agent. It then shipped the used solvent to Royster-Clark Inc., a fertilizer manufacturer, for use in its products.

The EPA learned of the sales and fined Howmet, saying the solvent qualified as "spent material" under RCRA and was subject to hazardous-waste regulations.

U.S. District Judge Emmet G. Sullivan of the District of Columbia granted summary judgment to the EPA.

Howmet appealed, arguing that the solvent did not have a single "purpose" as defined by RCRA and so could be used as both a solvent and a fertilizer ingredient without qualifying as a spent material.

The appeals court rejected that argument and affirmed the lower court's ruling.

Judge Janice Rogers Brown, writing for the majority, held that even though the word "purpose" as used in RCRA was ambiguous, the law included the phrase "purpose for which it was produced" in its definition of "spent material."

A solvent used to make fertilizer after it had been used to clean metal castings was exactly the type of product that the EPA sought to regulate as "spent material," she wrote.

Furthermore, Howmet had fair notice of the way in which the EPA was interpreting the phrase "spent material" because it was described in the agency's guidance manual, the judge said.

Judge Brett Kavanaugh dissented, finding that the EPA's interpretation of "purpose" as only the purpose for which it was produced was "flatly inconsistent" with the law.

"As a matter of plain English, the purposes for which a material is produced are not limited to how the material is initially used by a purchaser," he said. **WJ**

Related Court Document:
Opinion: 2010 WL 3063262

See Document Section B (P. 30) for the opinion.

'Silent' excess policy imposed defense duty, Wisconsin high court rules

Resolving issues of first impression, a divided Wisconsin Supreme Court has determined an excess carrier had a duty to defend its insured on environmental-contamination claims even though the policy did not contain an express duty-to-defend provision.

***Johnson Controls Inc. v. London Market et al.*, No. 2007AP1868, 2010 WL 2520941 (Wis. June 24, 2010).**

In a 4-3 ruling, the state high court said the excess policy incorporated the duty to defend found in an underlying policy.

The Supreme Court further held the excess carrier's duty to defend was not conditioned on exhaustion of the primary insurer's policy limits.

The dispute originated in the 1980s, after Johnson Controls Inc. was identified as potentially responsible under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, for contamination at a number of sites. Under CERCLA, potentially responsible parties can be required to contribute to cleanup costs at contaminated sites.

During the 1970s, when the contamination allegedly occurred, Johnson Controls held commercial general liability policies with multiple insurers under a layered program providing primary, umbrella and umbrella excess coverage.

Johnson Controls filed a declaratory judgment suit, seeking a ruling requiring its various insurers to defend and indemnify it in connection with the CERCLA claims.

Several insurers eventually settled with the firm, but umbrella excess insurer London Market instead filed a motion for partial summary judgment asserting it had no duty to defend.

The trial court ruled in Johnson Controls' favor, and London Market appealed.

The insurer asserted its policy imposed a requirement only to indemnify its insured and even if it had a defense duty, it had not been triggered.

The Wisconsin Supreme Court considered two certified questions, both matters of first impression in the state:

- Should a duty to defend be imported from an underlying umbrella insurance policy into an excess umbrella liability policy by language in the excess policy stating that it is subject to the same terms, definitions, exclusion and conditions as the underlying policy "except as otherwise provided"?
- Is the excess liability carrier's duty to defend primary in nature, such that it may be triggered even if the excess policy expressly requires exhaustion of the underlying policy as a precondition to liability and the underlying policy has not been exhausted?

The appeals court certified both issues to the state Supreme Court.

Writing for the majority, Justice Ann Walsh Bradley acknowledged that although the excess policy contained a duty to indemnify, it said nothing about a duty to defend.

However, she pointed out, the excess policy included a "follow form" provision incorporating the "terms, definitions, exclusions and conditions" of the underlying Travelers policy. The Travelers policy contained both a duty to defend and a duty to indemnify.

"Given that Travelers imposes a duty to defend, and London Market's silence regarding that duty, a reasonable person in the position of the insured would interpret London Market's policy as incorporating the duty to defend found in the Travelers policies," Justice Bradley wrote.

The majority next considered London Market's alternative argument that the limits of the primary policy must be exhausted before an excess carrier's duty to defend can be triggered.

The court determined a provision in the excess policy stating that "liability" does not attach until underlying insurers have paid the full amount of their liability referred only to indemnification, not the duty to defend.

Consequently, London Market was required to assume the defense, the majority concluded, affirming the lower court and remanding the case.

Justice Annette Kingsland Ziegler, writing for the three dissenting judges, argued the majority's finding of a duty to defend "undermines the plain language of the London Market policy, which promises only indemnification." [WJ](#)

Attorneys:

Plaintiff: William M. Cannon, Mark L. Thomsen, Allan M. Foeckler and Brett A. Eckstein, Cannon & Dunphy, Brookfield, Wis.

Defendants: Christopher J. Johnson, Beck, Chaet, Bamberger & Polsky, Milwaukee; Patrick T. Walsh, Hinkhouse Williams Walsh, Chicago; Susan R. Tyndall, CMT Legal Group, Waukesha, Wis.

Related Court Document:

Opinion: 2010 WL 2520941

NOAA reopens 5,000 square miles of Gulf fishing area

The National Oceanic and Atmospheric Administration announced Aug. 10 that it has reopened 5,144 square miles of the Gulf of Mexico to commercial and recreational fishing.

However, more than 52,000 square miles of Gulf waters remain closed to fishing.

The area to be reopened is off the Florida Panhandle and, at its closest point, is about 115 miles northeast of the site of the BP well that began gushing oil April 20. Although the company said Aug. 5 that its cementing operations on the well are complete, the drilling of a relief well to seal it off completely is still underway.

NOAA said data has shown no oil in the reopened area since July 3, and fish caught in the area and tested have shown no signs of contamination.

The reopening was announced after consultation with the Food and Drug Administration.

“Consumer safety is NOAA’s primary concern, which is why we developed rigorous safety standards in conjunction with the FDA and the Gulf states to ensure that seafood is safe in the reopened area,” NOAA administrator Jane Lubchenco said in a statement.

The agency will continue to take samples for testing from the newly reopened area. Additionally, it has begun dockside sampling to test fish caught throughout the Gulf by commercial fishermen.

WHERE’S THE OIL NOW?

NOAA released its estimates of what has happened to the 4.9 million barrels of spilled oil Aug. 4.

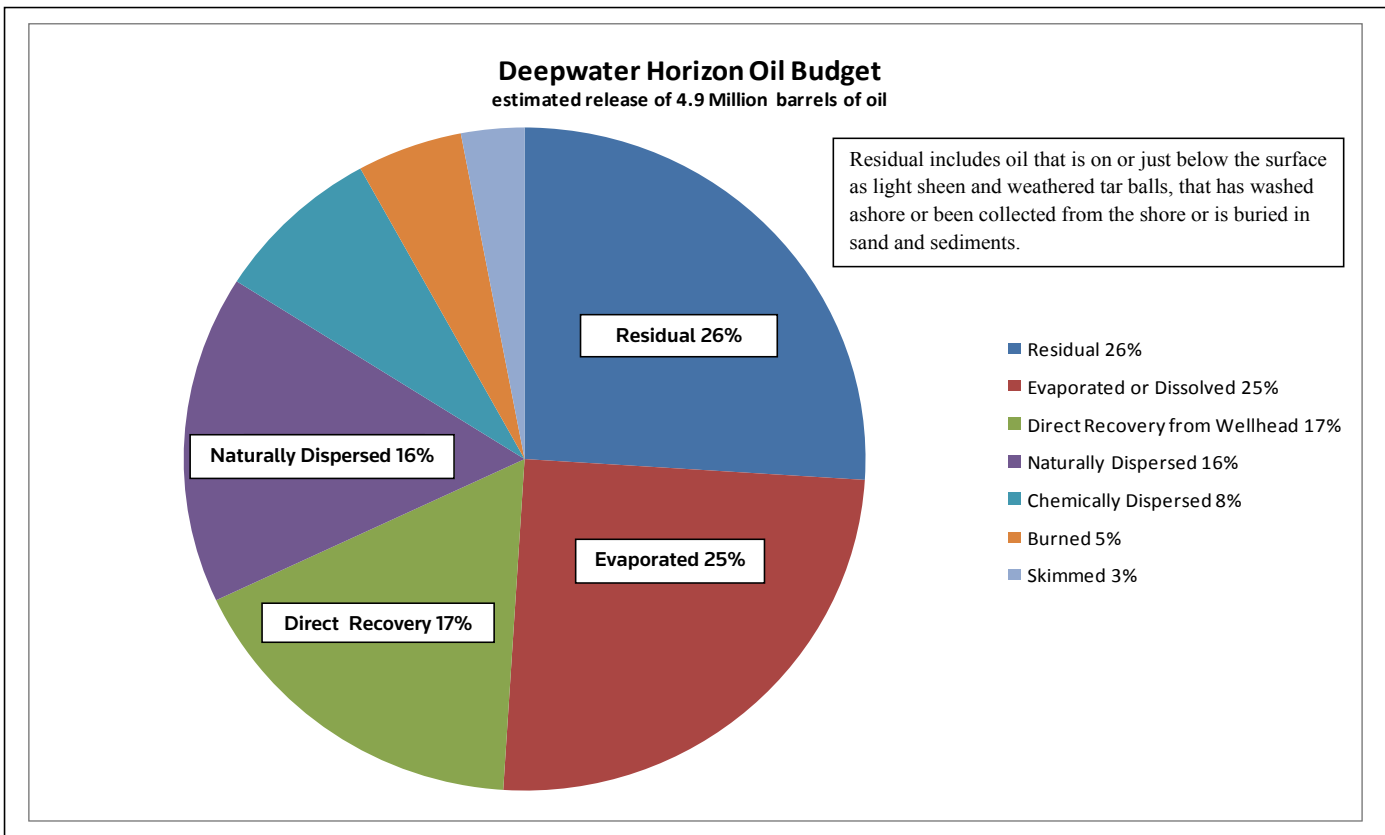
It said the vast majority of the oil has evaporated or been burned, skimmed, recovered from the wellhead or dispersed.

The agency said a third of the oil was captured or mitigated through response operations such as skimming and burning.

Twenty-five percent of the oil naturally evaporated or dissolved, and 16 percent was dispersed naturally into microscopic droplets.

The remainder, about 26 percent, is on or just below the surface as residue and weathered tarballs; has washed ashore or been collected from the shore; or is buried in sand and sediments.

“The estimates do not make conclusions about the long-term impacts of oil on the Gulf,” the agency’s statement said. **WJ**



Source: National Oceanic and Atmospheric Administration

LEGISLATION

For farmers, could less paperwork mean more pesticide spraying?

U.S. Sen. Blanche Lincoln, D-Ark., introduced legislation Aug. 6 that would allow farmers to apply pesticides over water without obtaining permits under the Clean Water Act.

The FIFRA Paperwork Reduction Act, S. 3735, would reverse the 6th U.S. Circuit Court of Appeals' 2009 ruling that chemical pesticides are pollutants under the statute, 33 U.S.C. § 131, and therefore applicators would need a permit.

The court vacated a 2006 Environmental Protection Agency rule exempting certain applications of pesticides from the CWA's permit requirement. *Nat'l Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. Jan. 7, 2009).

The U.S. Supreme Court denied review in February. *CropLife Am. v. Baykeeper*, No. 09-547, cert. denied (U.S. Feb. 22, 2010).

CropLife America said it was pleased with the bill.

"We are glad that Sen. Lincoln stands firm as an ally to the agricultural community and recognizes the potential damage that the 6th Circuit's ruling will cause," CEO Jay Vroom said in an Aug. 9 statement.

Under the bill, farmers who are in strict compliance with the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136, would not need the CWA permits.

FIFRA provides the basis for the regulation, sale, distribution and use of pesticides in the U.S. Under the statute, the EPA reviews and registers pesticides for specified uses.

"Subjecting our farmers, foresters and ranchers to an additional layer of bureaucracy



U.S. Sen. Blanche Lincoln Photo Courtesy of Senator Lincoln's Office

under the Clean Water Act was never Congress' intent," Lincoln said in a statement.

The legislation was co-sponsored by Georgia Democrat Saxby Chambliss. [WJ](#)

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Insurance coverage for BP oil spill claims

By Finley Harckham, Esq.

Many different types of companies and other enterprises have been harmed by the oil BP spill in the Gulf of Mexico, and they have been harmed in a variety of ways.

Most prevalent is the loss of profits suffered by companies that rely directly upon the Gulf waters and beaches for their livelihood; these include businesses in the commercial fishing, energy and tourism industries. The losses suffered in those industries set off chain reactions resulting in damages to their suppliers and customers, locally and across the country.

Other businesses will incur liability or at least legal fees in lawsuits alleging negligence and possibly malfeasance by corporate boards.

The losses and liabilities of many of the entities adversely affected by the spill are covered by property or liability insurance.

However, as explained below, certain conditions and exclusions found in many first-party property policies will present serious and sometimes fatal obstacles to insurance recoveries.

DON'T IGNORE INSURANCE

Pursuing claims through the independently administered BP fund or through the courts might fully compensate some businesses for their losses. However, policyholders should act now, if they have not done so already, to protect their rights to insurance coverage in case it is needed.

All insurance policies require prompt notice of losses suffered by and claims asserted against a policyholder. Although courts will often excuse that requirement if the late notice has not prejudiced the insurance company, policyholders should strive to avoid a potential problem by notifying their insurers as soon as possible and by documenting and preserving evidence of their losses as fully as possible.

Also, most property insurance policies contain contractual limitations on the time in which any suit against the insurer must be brought for nonpayment of a claim. Those periods can be as short as six months from

the date of loss, though many states have statutorily mandated longer periods that supersede the contractual provisions.

Policyholders must check their policies carefully for such provisions and protect their interests, preferably by obtaining written agreement from the insurer to extend the suit deadline and allow sufficient time to resolve a claim or, if necessary, by filing a protective lawsuit.

scared tourists away, because the Gulf waters are not the property of the policyholder or its customers or suppliers.

However, many businesses will be able to meet the property damage requirement if oil reaches their beaches, docks or industrial facilities, or fouls their boats or other equipment.

Also, companies that have licenses to use the Gulf waters and seabed for fishing, oil, and gas exploration and extraction or for other

Losses suffered in the commercial fishing, energy and tourism industries set off chain reactions resulting in damages to their suppliers and customers, locally and across the country.

PROPERTY DAMAGE AND LOST PROFITS

Coverage for damage to a company's property and loss of profits is found in its own first-party property insurance policies and perhaps in the property policies of other entities if it is named as an additional insured.

In addition to coverage for property loss, most of these policies insure against lost profits under a number of "time element" coverages for business interruption, contingent business interruption and orders of civil authority.

Business interruption

Most property insurance policies pay for lost business income resulting from damage to covered property. This type of coverage is often referred to as business interruption insurance.

Many policies also provide so-called contingent business interruption coverage for losses stemming from damage to the property of a supplier or customer.

Both types of insurance require, as a predicate to coverage, that there be damage to property and profit loss from that damage.

The property damage requirement might preclude coverage for businesses that suffer losses simply because an offshore oil slick

purposes may be able to establish coverage for contingent business interruption caused by damage to the property of a "supplier" (*i.e.*, the government entity that has licensed its business activities in the Gulf).

For example, fishing companies that have business licenses to fish in certain waters may well be able to argue that property in which they have an insurable interest has been damaged.

Moreover, companies far away from the Gulf may have covered claims for contingent business interruption because of lost orders from companies that suffered physical damage.

Coverage for civil authority orders

Coverage might also be provided for some companies under their insurance for business interruption resulting from orders of civil authority that prevent access to their property. An example was the order given by the mayor of New Orleans to evacuate the city when Hurricane Katrina was approaching in 2005.

Like business interruption insurance, coverage for orders of civil authority is typically tied to property damage, though it can be anyone's property, not just that of the policyholder or its suppliers or customers.

It is likely that many thorny issues will arise over coverage for business interruption caused by advisories against swimming, fishing and boating in contaminated areas and by denial of access to areas licensed for energy exploration or extraction.

EXCLUSIONS IN PROPERTY POLICY COVERAGE

If the requirements for coverage for business interruption or orders of civil authority can be met, policyholders may still have to contend with exclusions in their insurance policies. Perhaps most problematic will be the so-called pollution exclusions.

Many businesses will be able to meet the property damage requirement if oil reaches their beaches, docks or industrial facilities, or fouls their boats or other equipment.

Many such exclusions are broadly worded, and they clearly include oil spills in certain circumstances. However, many pollution exclusions contain an exception for contamination that results from a "hostile fire."

A very good argument can be made that the current disaster resulted from a hostile fire, but insurance companies will likely contest that issue.

Many property policies also contain exclusions for damage to "land." Undoubtedly, insurers will rely upon that exclusion to deny coverage for claims based upon fouled beaches and fishing beds.

However, beaches that are groomed and developed may fall outside the exclusion, and damage to natural resources such as fish should not be considered "land."

LIABILITY INSURANCE

Companies facing liabilities for alleged harm resulting from property damage or bodily injury can look for defense and indemnity from their liability insurance coverage.

Both general liability insurance policies and pollution liability insurance policies may cover such claims.

Companies (including any captive insurance companies) facing lawsuits should give notice under all primary, umbrella and excess

liability policies in their insurance program despite a present \$75 million cap on liability. Legislation to eliminate caps on liability has been proposed.

A prudent policyholder facing oil spill liability claims ought to provide notice now rather than wait to see what happens with such legislative initiatives.

DIRECTORS AND OFFICERS INSURANCE

Derivative actions against directors and officers of companies involved in the Gulf of Mexico oil spill already have been filed in

court. Dozens of such lawsuits are sure to follow. D&O insurance should be tapped to provide defense and indemnity of directors and officers facing such claims.

D&O insurance is written on a "claims made" basis, and it is extremely important to give immediate notice of claims or suits under those policies.

PROTECTING AND PURSUING RIGHTS TO COVERAGE

The following steps can help to ensure that a company's rights to coverage are preserved, and they increase the likelihood of successfully resolving claims.

Provide prompt notice. Identify and provide notice under all policies that might provide coverage, and do so as promptly after losses are suffered or liability claims are asserted.

Comply with time deadlines. In addition to contractual statutes of limitation, property policies often set deadlines for the submission of proofs of loss and notice of intent to replace or actual replacement of damaged property. Identify and comply with all such deadlines or obtain written agreements extending the time do so.

Assemble a claim team with all the skills needed to maximize the recovery. Although most policyholders only communicate with an adjuster, the insurance company has a team of attorneys, accountants and in-house claims personnel who are working hard to minimize the payment of your claim through coverage defenses and the calculation of the loss.

The policyholder's knowledge of its own business goes a long way to leveling the playing field but many arcane coverage issues and claims-adjustment practices require special expertise.

Keep a written record of everything that transpires with respect to the claim in correspondence to the insurer. This record may deter dilatory claims handling by putting the insurer on notice that its actions — or inaction — are being preserved for a possible bad-faith claim later on.

Insist the insurer pay all undisputed amounts before negotiating over the contested portion of a claim. Typically, the insurer will make a "good faith" partial payment

Tips for protecting and pursuing rights to coverage

1. Provide prompt notice.
2. Comply with time deadlines.
3. Assemble a claim team with all the skills needed to maximize the recovery.
4. Keep a written record of everything that transpires with respect to the claim in correspondence to the insurance company.
5. Insist that the insurance company pay all undisputed amounts before negotiating over the contested portion of a claim.
6. Do not be shy about claiming losses that result from an insurance company's dilatory handling of the claim.
7. If a claim cannot be resolved through negotiation, you may have a choice of proceeding either to appraisal or litigation.

A prudent policyholder facing oil spill liability claims ought to provide notice now rather than waiting to see what happens with legislative initiatives to lift the \$75 million cap on liability.

and then pay little or nothing more until a final negotiation over all the open issues.

This partial payment allows the insurer to hold onto funds that should be paid out for undisputed portions of the claim and increases its leverage for later negotiations. Counter this strategy by forcing the insurance company to commit to a position on coverage and to pay the amounts due under its own analysis of the claim. Start by demanding a coverage determination.

Typically, insurers issue vague letters on the reservation of rights that quote numerous policy provisions without explaining how those clauses apply to the claim. Such a letter is intended to protect the insurance company from a waiver of defenses, but it does not fulfill its obligation to provide a timely coverage determination.

Respond to the letter on the reservation of rights with a demand for a detailed and specific coverage determination, reminding the insurer that its failure to do so may constitute bad faith. Also, demand payment of the undisputed amount of each element of the claim.

For example, a dispute over the period of restoration for business interruption coverage should not delay payment for property loss. If the insurance company will not agree to make partial payments, submit partial proofs of loss, which will trigger the deadlines for payment under unfair claims-handling statutes in most states.

Do not be shy about claiming losses that result from an insurer's dilatory handling

of the claim. Under Louisiana law and that of other states, the period of restoration for a business interruption loss may be extended by the insurer's untimely payment of the property loss.

Business interruption coverage is provided for a hypothetical period of time that is reasonably necessary to restore the damaged property, but it should take into account the reality faced by the policyholder, including the delayed payment of insurance proceeds.

The insurance company may also be liable for consequential damages flowing from its breach by failing to make timely payments. Those damages might include lost profits or extra expenses that exceed the limits of coverage and lost value of the enterprise if it could not resume operations because the insurance company improperly withheld or delayed payment.

If a claim cannot be resolved through negotiation, you may have a choice of proceeding either to appraisal or litigation.

Either party can demand appraisal, a form of arbitration provided for under many insurance policies, to resolve disputes over the amount of the loss. It can be a quick and inexpensive way to quantify the claim.

However, appraisal is not required and may not be appropriate when there are coverage issues to be resolved. For example, if the parties disagree over the amount of a business interruption loss because of a dispute over whether market conditions after the occurrence should be considered when calculating damages, the policyholder

would be entitled to have that coverage issue decided in court. Appraisers, who typically are in the building trades, generally are not qualified to address such issues.

Also, bad-faith claims fall outside the scope of an appraisal clause and will have much greater value if placed before a jury. Thus, the policyholder must carefully consider its options and not necessarily feel compelled to agree to an appraisal simply because the amount of damages is one issue in dispute.

CONCLUSION

A key to the satisfactory resolution of insurance claims is for policyholders to take control of the process to the extent possible and to demonstrate a resolve to secure the coverage for which they paid. Now is the time to push Gulf oil spill claims to resolution. **WJ**



Finley Harckham, a senior shareholder in the New York office of **Anderson Kill & Olick**, regularly advises and represents insurance policyholders with respect to coverage claims and lawsuits. He also heads the firm's loss advising subsidiary, Anderson Kill Loss Advisors. He can be reached at (212) 278-1733 or fharckham@andersonkill.com.

N.C. GOVERNOR SIGNS BILL TO TOUGHEN OIL-SPILL LIABILITY

North Carolina enacted legislation Aug. 2 that will lift the cap on damages that can be recovered as a result of an offshore oil spill. In a statement Gov. Bev Perdue said she signed S.B. 836 to protect the state's coastal communities from potential disasters such as the recent oil spill in the Gulf of Mexico. Under the legislation, liability applies regardless of the spill location and includes coastal fishing waters. Also, any damages stemming from cleanup are covered. Perdue says other states can use S.B. 836 as a model as they prepare legislation in response to the Deepwater Horizon oil spill.

PIPELINE COMPANY TO SPEND \$44 MILLION TO PREVENT SPILLS

Plains All American Pipeline and several subsidiaries will spend about \$41 million to upgrade 10,420 miles of crude oil pipeline to resolve Clean Water Act violations stemming from 10 oil spills in four states, federal regulators said Aug. 10. The spills ranged in size from 2.5 barrels to 4,500 barrels, and most were caused by pipeline corrosion. Under the settlement filed in the U.S. District Court for the Southern District of Texas, the company also will pay a \$3.25 million civil penalty. That penalty will be deposited in the federal Oil Spill Liability Fund, used to finance federal response activities and to provide compensation for damages sustained from discharges of oil into water or adjoining shorelines.

United States v. Plains All American Pipeline LP, No. 10-2833, consent decree entered (S.D. Tex. Aug. 10, 2010).

FERTILIZER COMPANY SETTLES HAZARDOUS-WASTE CASE

CF Industries has agreed to spend about \$12 million to reduce and manage hazardous wastes at its Plant City, Fla., facility, according to federal and state regulators. Under the consent decree filed Aug. 6 in the U.S. District Court for the Middle District of Florida, the company also will pay a civil penalty of more than \$700,000 and provide \$163.5 million to guarantee long-term care of the closed facility. The settlement resolves the company's alleged violations of the Resource Conservation and Recovery Act, 42 U.S.C. § 321. The statute addresses the handling, storage and disposal of hazardous waste. The Environmental Protection Agency said the company agreed to implement several management plans to ensure future compliance with the statute.

United States et al. v. CF Industries Inc., No. 10-01756, consent decree entered (M.D. Fla. Aug. 6, 2010).

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