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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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# 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.<sup>1</sup>

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."<sup>2</sup> 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.<sup>4</sup> Under the terms outlined by the panel, the transferee judge (Judge Barbier) may only try cases that were originally filed in his district.<sup>5</sup>

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.

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

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

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

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

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

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.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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.

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

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a majority of the plaintiffs because the cases were not properly removed to federal court.<sup>15</sup> 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

<sup>1</sup> See 28 U.S.C. § 1407(a).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* § 1407(d).

<sup>4</sup> *Id.* § 1407(a).

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

<sup>6</sup> 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).

<sup>7</sup> 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).

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

<sup>9</sup> *Id.*

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

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

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* 629-30.

<sup>15</sup> *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