

Expert Analysis

Update on the Deepwater Horizon Multidistrict Litigation

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It was 19 months ago that the blowout of the British Petroleum Macondo well below Transocean's Deepwater Horizon drilling platform triggered what has been called the greatest environmental disaster of its kind in U.S. history. The surge of about 210 billion gallons of oil into the Gulf of Mexico, which began April 20, 2010, and lasted through mid-July 2010, prompted not only expansive environmental cleanup efforts, but a widespread legal response as well.

On Aug. 10, 2010, the Judicial Panel on Multidistrict Litigation transferred 77 related actions to the U.S. District Court for the Eastern District of Louisiana to be presided over by Judge Carl J. Barbier.¹ On Aug. 25, 2010, the JPML issued a consolidation order mandating that the limitation-on-liability claim filed by the managing owners and operators of the Deepwater Horizon vessel also be transferred to the MDL. For just over a year, Judge Barbier's court and counsel have been working tirelessly to orchestrate perhaps one of the largest and most complex multidistrict litigation efforts of our time.

PROGRESS AND TRIAL ORDERS

On Aug. 10, 2010, Judge Barbier hit the ground running – within the MDL's first week, he had issued the initial transfer order and four additional pretrial orders. Among these first four orders of business was Pretrial Order No. 1, setting the date for the MDL's first pre-trial conference. In this order, Judge Barbier took a moment to address the attorneys involved, for the first time acknowledging the breadth of this MDL and stressing the importance of the attorneys' cooperation in working toward an efficient and just resolution:

It is not yet known how many attorneys will eventually join this litigation, but we can assume it will be a large number. As attorneys involved in a multidistrict case, you will probably be laboring together for some time in the future with work progressively becoming more complicated and exacting. Some of you know each other and some are complete strangers. Undoubtedly each has a different style and personality. It is likely that during the course of this litigation your working relationship will occasionally be

strained, communication derailed, and mutual trust questioned. The just and efficient resolution of this litigation will depend in large measure on the way you as attorneys comport yourselves and overcome the temptations and trepidations inherent in a case of this magnitude.²

Within the next week, Judge Barbier had appointed James P. Roy and Stephen J. Herman as plaintiffs' co-liaison counsel and Donald Goodwin, Deborah D. Kuchler, Phil Wittmann and Kerry Miller as interim liaison counsel for defendants. In his sixth pre-trial order, Judge Barbier directed these two groups to work together to make joint recommendations to the court in furtherance of the objectives of Pretrial Order No. 1.

In acknowledging the "ongoing well control, remedial, and physical evidence recovery efforts" associated with the Macondo well, Judge Barbier issued an order Aug. 26, 2010, securing final and complete well control by techniques involving injecting cement into the well under pressure. To provide maximum environmental safety and security for the operations related to the aforementioned technique, the court further ordered that the blowout preventer in place at the time of the leak be removed and replaced with a new, fully functioning blowout preventer prior to starting the injection operations. Subsequent access to the blowout preventer that was removed from the Macondo well (and stored at the NASA Michoud facility) was granted to BP for further forensic inspection.

On Sept. 16, 2010, Judge Barbier held his first proceeding. At this pretrial conference, deadlines for the master complaints, answers and limitation action were established; filing and service guidelines were agreed upon; and a submission due date for the first proposed case management order was set.³

Conceding the heightening complexity of the litigation, Judge Barbier issued an order Oct. 7, 2010, appointing Duke University School of Law professor Francis E. McGovern as special master to "assist this court, the parties, and counsel in coordinated MDL-2179 with other related matters, including, but not limited to, matters in other federal courts, matters in state courts, the Oil Spill Liability Trust Fund, the Gulf Coast Claims Facility, and matters in other related entities."⁴

Judge Barbier noted in his order that McGovern is "uniquely qualified" to perform the requisite effective and timely coordination duties, having served in a similar capacity in two previous MDL proceedings and having written extensively about coordination in complex litigation. As special master, McGovern's role is to assist the court and the parties in the efficient management and resolution of the litigation by fostering and enhancing communication, coordination and cooperation among all entities involved.

By Oct. 18, 2010, in accordance with Pretrial Order Nos. 8 and 10, members had been appointed to the various steering and executive committees. On that same day, Pretrial Order No. 11 was entered, setting forth the first case management order in the MDL and establishing the framework for the MDL as it is operating today. Most importantly, this order constructed pleading bundles, effectively separating the proceeding into four claim categories to increase efficiency as the MDL progresses (see box on next page).

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The order further established detailed discovery rules and filing deadlines for master complaints from each pleading bundle and sub-bundle subject to such a filing requirement and responses to those complaints from each defendant.⁶

On Nov. 2, 2010, a pretrial order setting out the procedure for protecting confidentiality was entered in order to expedite the flow of discovery material, facilitate prompt resolution of confidentiality disputes, protect confidential material and ensure that such protection is afforded only to material entitled to such treatment.

From early November to mid-December, Judge Barbier entered several filing and discovery-related pretrial orders. Pretrial Order No. 16 outlined discovery procedures and format relating to the production of documents and electronic data, Pretrial

Pleading bundles

Bundle A:

All personal injury and wrongful-death claims resulting directly from the events of April 20, 2010.

Bundle B:

All claims by private individuals and business-loss claims designating sub-bundles as follows:

Sub-bundle B1:

Non-governmental economic-loss and property damage claims.

Sub-bundle B2:

Racketeer Influenced and Corrupt Organizations Act claims.

Sub-bundle B3:

Post-explosion cleanup claims (later defined as “cleanup, medical monitoring, and post-April 20 personal injury claims”).*

Sub-bundle B4:

Post-explosion emergency responder claims.

Bundle C:

All public damage claims brought by governmental entities for the loss of resources, the loss of tax revenues, response costs and civil penalties.

Bundle D:

Any injunctive and regulatory claims, designating sub-bundles as follows:

Sub-bundle D1:

Claims against private parties.

Sub-bundle D2:

Claims against the government or any government official or agency.

* See Pretrial Order No. 25, *Clarifying the Pleading Bundles, Responsive Pleadings, and the Master Complaints* (Jan. 12, 2011).

Order No. 17 outlined deposition protocol and Pretrial Order No. 20 outlined direct-file procedures for parties wishing to join in a master complaint.

In addition, in an order entered Nov. 19, 2010, Judge Barbier granted the BP defendants' motion for confirmation of non-applicability of preservation-of-evidence obligations as to certain subpoenaed items and certain non-evidentiary items, outlining in detail which items fall into category one (government-subpoenaed/requested evidence), category two (non-evidence) and category three (abandon in-place evidence).

On Jan. 27 Judge Barbier announced the appointment of attorney R. Michael Underhill as coordinating counsel for the federal government's interests and Alabama Attorney General Luther Strange as coordinating counsel for the states' interests.⁷ Cognizant of the delicate governmental interests at stake in the MDL, Judge Barbier directed the members of the government coordinating counsel to confer and coordinate among themselves and the steering committees to achieve the "greatest possible efficiencies" with respect to the scheduling of discovery.

On Feb. 25, Pretrial Order No. 29 was issued, requiring the BP party defendants to produce all documents previously produced in *Arenazas et al. v. BP Amoco Chemical Co. et al.*, No. 05-CV-0337 (Tex. Dist. Ct., 212th Dist., Galveston), and/or any related cases litigated before the 212th District Court in Galveston, Texas.

Specifically, the *Arenazas* proceedings concerned the March 23, 2005, fire and explosion at BP's Texas City refinery and the subsequent allegations that BP's operation of this particular refinery was not only grossly negligent, but also violated federal, state, industry and even its own safety standards. Standing as Judge Barbier's first decisive effort to expedite the discovery process for the Deepwater Horizon MDL, the Texas City refinery explosion litigation documents will be treated as if formally produced in this MDL — a result of the alleged factual similarities between the events of March 23, 2005, and April 20, 2010.

Also on Feb 25, Judge Barbier responded to a motion for entry of an order relating to the preservation of certain physical sample materials by issuing a pretrial order doing just that. On June 24 and July 8, two additional pretrial orders were issued relating to the testing of those preserved samples.

On March 3, Judge Barbier entered Pretrial Order No. 32, setting forth his second case management order and revising the deadlines timeline originally established by his first case management order. Most notably, Judge Barbier set these deadlines:

- May 1, 2011, filing of all preliminary witness lists.
- June 1, 2011, the identification of all fact witnesses not required for expert opinions, but who should be deposed before trial.
- An allotment of about two weeks, beginning Oct. 31, 2011, for all expert depositions.
- A filing deadline of Feb. 1, 2012, for all pretrial motions.

As of April 12, Judge Barbier, in Pretrial Order No. 34, described the progress of the MDL as follows:

Since being assigned this massive, complex litigation, this court and counsel have spent enormous amounts of time and effort organizing and structuring the cases in an effort to move the litigation forward in the most efficient, expedited, and fair manner. In doing so, the court has conducted numerous status conferences and hearings, has issued a number of pretrial rulings, and has issued a series of pretrial management orders (PTOs) for the orderly disposition of discovery and other pretrial proceedings. The PSC [Plaintiffs' Steering Committee] and counsel for the various defendants have engaged in extensive discovery, including numerous depositions, and production of massive volumes of documents. Additionally, extensive testing and forensic analysis of physical evidence has been performed, and further testing is scheduled. At the instruction of the court, the parties have scheduled a large number of additional depositions and other discovery, all in preparation for what is anticipated to be a lengthy trial beginning in February 2012, in which issues of liability, limitation and allocation of fault will be decided.⁸

On June 16 Judge Barbier entered an order granting defendants' motion to dismiss the master complaint for the D1 pleading bundle in its entirety for failure to state a claim upon which relief could be granted. Plaintiffs' injunctive relief claims failed due to lack of standing, mootness and a failure to show that defendants were "in violation" as required under the Clean Water Act, the Endangered Species Act, the Emergency Planning and Community Right-to-Know Act, and the Comprehensive Environmental Response, Compensation and Liability Act.

About one month later, Judge Barbier ruled on the admissibility of an investigatory report prepared by John Wright, an employee of Boots & Coots International, a global provider of integrated pressure control and related services to onshore and offshore oil and gas exploration and development companies. Although retained by BP to perform and report on a negative-pressure test aboard the Deepwater Horizon April 20, 2010, Wright refused to be deposed by plaintiffs, who in turn sought admission of his report in lieu of his testimony.

On July 15 Judge Barbier granted the plaintiffs' motion for entry of the report, thereby establishing the admissibility of Wright's investigatory findings.

On June 16, Judge Barbier entered an order granting the BP defendants' motions to dismiss the B2 master complaint in its entirety for failure to state a claim upon which relief could be granted. Specifically, the judge found that plaintiffs had failed to allege proximate causation.

On Aug. 26, Judge Barbier entered another order, this time granting in part and denying in part defendants' motions to dismiss the B1 master complaint. Specifically:

- All claims brought under state law were dismissed because of maritime law preemption.
- General maritime law claims were dismissed under the *Robins Dry Dock* rule prohibiting recovery of pure economic loss in tort for failure to allege physical damage to a proprietary interest.⁹
- All general maritime negligence claims against BP's co-working-interest owners of the Macondo well, Anadarko and Mitsui Oil Exploration Co., were dismissed

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for plaintiffs' failure to state a plausible claim against the non-operating lessees/defendants.

- All claims for declaratory relief and attorney fees under general maritime law were dismissed.

In September Judge Barbier's third case management order was issued with respect to the scope and structure of the trial of liability, limitation, exoneration and fault allocation that is scheduled to commence Feb. 27, 2012. The order breaks the trial down into three phases:

- Phase One (Incident Phase): Where the court will address issues arising out of the conduct of various parties, third parties, and non-parties allegedly relevant to the loss of well control at the Macondo well, the ensuing fire and explosion on the MODU [mobile offshore drilling unit] Deepwater Horizon on April 20, 2010, and the sinking of the MODU Deepwater Horizon on April 22, 2010, and the initiation of the release of oil from the Macondo well or Deepwater Horizon during those time periods.
- Phase Two (Source Control Phase): Where the court will address source control issues (consisting of issues pertaining to the conduct of various parties, third parties, and non-parties regarding stopping the release of hydrocarbons stemming from the incident from April 22, 2010, through approximately Sept. 19, 2010) and quantification of discharge issues (consisting of issues pertaining to the amount of oil actually released into the Gulf of Mexico as a result of the incident from the time when these releases began until the Macondo well was capped on approximately July 15, 2010 and then permanently cemented shut on approximately Sept. 19, 2010).
- Phase Three (Containment Phase): Where the court will address issues pertaining to the efforts by various parties, third parties, and non-parties aimed at containing oil discharged as a result of the incident by, for example, controlled burning, application of dispersants, use of booms, skimming, etc.¹⁰

On Sept. 30, Judge Barbier entered yet another order granting in part and denying in part the defendants' motions to dismiss the B3 master complaint. All B3 claims against Anadarko and Mitsui Oil were dismissed because of the duplication of those same claims in the B1 master complaint. All negligence per se claims were dismissed because of the plaintiffs' failure to assert a definite statement of the claim. The claims of plaintiffs who have not alleged an injury as recognized in *Hagerty v. L&L Marine Services*, 788 F.2d 315, 319 (5th Cir. 1986), were dismissed. Finally, plaintiffs' claims for battery and nuisance asserted under maritime law were dismissed.

TRANSOCEAN'S LIMITATION-OF-LIABILITY CLAIM

In May 2010 Transocean filed its complaint and petition for exoneration from or limitation of liability in the U.S. District Court for the Southern District of Texas. Transocean, along with the other owners, operators and managers of the Deepwater Horizon, sought to limit their liability to the amount or value of their interest in the vessel and its freight at the end of its Jan. 30, 2010, drilling voyage. Specifically, they asserted that the rig's value (and thus their liability) does not exceed \$26.7 million. Transferred to the Deepwater Horizon MDL on Aug. 25, 2010, the

limitation-of-liability claim brought by Transocean has taken several steps since its consolidation.

During the initial in-court status conference Sept. 16, 2010, the court tentatively scheduled the Transocean limitation and liability trial to commence in October or November 2011. In a motion to the court made in early October 2010, however, liaison counsel for the defense advised the court that despite their best efforts, it appeared that it would not be possible for them to adhere to the court's previously imposed trial schedule.

The ongoing forensic analysis and testing of the blowout preventer, coupled with the resultant delay in depositions related to the blowout preventer, led the liaison counsel for the defense to file a motion to continue requesting that the limitation trial be re-scheduled to commence in February 2012. On Oct. 6, 2010, Judge Barbier found that there was good cause to reset the limitation trial date, thereby granting Transocean's motion to continue the limitation trial from its tentative start date of October or November 2011 to Feb. 27, 2012.

Since the Oct. 6 order, there have been only two other acts by the court with regard to Transocean's limitation-of-liability claim. The deadline for potential claimants to bring claims against Transocean was set for April 20, 2011. On Feb. 23 Judge Barbier entered an order permitting the plaintiffs' steering committee to publish additional notice giving them clear warning of the impending deadline. This additional notice was necessary because of concerns that the previous notice was not designed to reach a broad enough audience. Transocean accepted the changes made, and the amended notice was disseminated using the agreed-upon content.

CONCLUSION

As evidenced by the efforts of Judge Barbier, his court, and plaintiffs' and defendants' steering committees and liaison counsel, the Deepwater Horizon MDL is in a state of constant evolution. As the MDL has worked its way through the court system, its structure has evolved, as anticipated, into a compendium of committees, a technical compilation of orders and a slew of complex and meticulous discovery plans. While the scheduled start date of the trial moves closer, Judge Barbier and counsel will continue to work diligently to maintain the efficiency and objectivity that has been demonstrated during the past 19 months. **WJ**

NOTES

- ¹ See *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, MDL No. 2179, 2010 WL 3166434 (J.P.M.L. Aug. 10, 2010).
- ² *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, MDL No. 2179, Pretrial Order No. 1 (E.D. La. Aug. 10, 2010).
- ³ Additional deadlines for filing cross-claims and for filing answers and third-party complaints for Rule 14(c) defendants in the limitation action were implemented by order March 15, 2011.
- ⁴ *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, MDL No. 2179, order appointing Francis E. McGovern as special master issued (E.D. La. Oct. 7, 2010).
- ⁵ *In re Oil Spill*, Pretrial Order No. 25, Clarifying the Pleading Bundles, Responsive Pleadings, and the Master Complaints (E.D. La. Jan. 12, 2011).
- ⁶ *In re Oil Spill*, Pretrial Order No. 11, Case Management Order No. 1 (E.D. La. Oct. 18, 2010) (responsive pleading deadlines amended by Pretrial Order No. 28 [Feb. 14, 2011], master complaints and responsive pleadings clarified by Pretrial Order No. 31 [Mar. 3, 2011]).

- ⁷ *In re Oil Spill*, Pretrial Order No. 26, Announcing the Appointment of Government Coordinating Counsel (E.D. La. Jan. 27, 2011).
- ⁸ *In re Oil Spill*, Pretrial Order No. 34, Requiring Leave of the Court for Dismissals without Prejudice (E.D. La. Apr.12, 2011) (later vacated by Pretrial Order No. 42 (E.D. La. Sept. 16, 2011)).
- ⁹ *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927) (laying down the general proposition that claims for pure economic loss are not recoverable in tort).
- ¹⁰ *In re Oil Spill*, Amended Pretrial Order No. 41, Case Management Order No. 3 (E.D. La. Sept. 21, 2011).



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