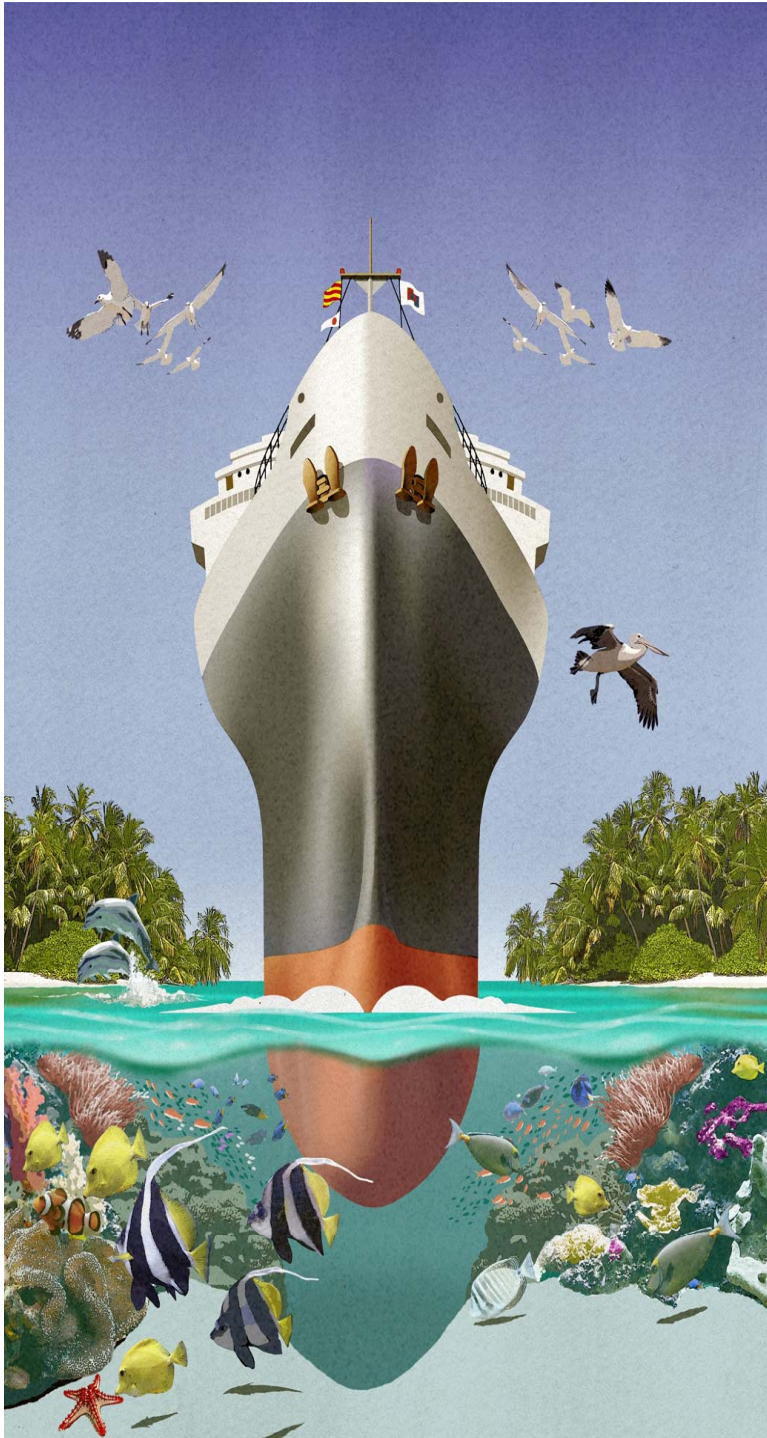


Spill Control Association of America Annual Meeting

RESPONDER IMMUNITY UPDATE

Jonathan K. Waldron
March 8, 2012

The information contained herein is abridged and summarized from numerous sources, the accuracy and completeness of which cannot be assured. This should not be construed as legal advice or opinion and is not a substitute for the advice of counsel.



LAWSUITS FOLLOWING THE *DEEPWATER HORIZON*

Response to *Deepwater Horizon*

- Emergency response vessels rushed to the rig to save lives and render assistance
- Responder companies worked to clean up the oil that was pouring into the gulf
- Lawsuits filed
- Complex Multi-District Litigation (MDL)
- Gaps identified in current responder immunity regime

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OPA 90 AND RESPONDER IMMUNITY

Polluter Pays Principle, 33 U.S.C. § 1321(c)(4)

- OPA 90 included a responder immunity provision to protect from liability those individuals or corporations who provide care, assistance, or advice in mitigating the effects of an oil spill
- Congressional Intent – Responses to oil spills be immediate and effective
- Substantial financial risks and liability exposures associated with spill response could deter a prompt, aggressive response
- Responsible Party (RP) is liable for any of the removal costs or damages that a responder is relieved of under OPA 90 “polluter pays” principle

GulfOilSpillImages.com

MDL AND LAWSUITS AGAINST RESPONDERS

Hundreds of Lawsuits Filed

- Most suits filed against BP, Transocean, other RPs and companies involved with rig operations
- Over 525 cases active in federal court

Suits also Filed Against Responders

- Plaintiffs have been successful in simply alleging gross negligence (without providing any supporting facts)
- Also pled “exposure” claims resulting from alleged exposure to released oil or from approved dispersants applied even though approved for daily use by FOSC
- Exposure claims fall outside the scope of the specific responder immunity provisions
- No suits against responders pending in state courts



MDL AND LAWSUITS AGAINST RESPONDERS (continued...)

MDL

- Special federal legal procedure designed to speed the process of handling complex cases
- MDL cases are civil actions involving one or more common questions of fact pending in different districts
- Judicial Panel on MDL decides whether cases should be consolidated under MDL and where to transfer the cases
- *Deepwater Horizon* litigation was consolidated in the United States District Court for the Eastern District of Louisiana before Judge Barbier

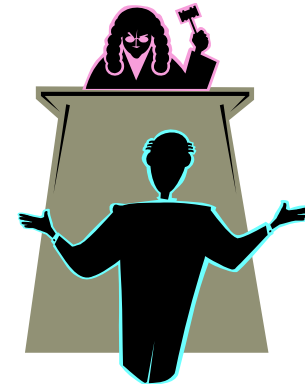
Pleading Bundles - Cases catalogued into pleading bundles called Master Complaints under various categories



MDL AND LAWSUITS AGAINST RESPONDERS (continued...)

Emergency Response Defendants

- Owners/operators of the rescue vessels that answered the distress call and responded to the fire emergency after the explosion
- Alleging negligence/gross negligence under General Maritime Law and OPA 90
- Alleging liability for sinking of the *Deepwater Horizon*
- Caused the sinking of the *Deepwater Horizon* and the resulting oil spill by not following industry standards



MDL AND LAWSUITS AGAINST RESPONDERS (continued...)

Clean-Up Response Defendants

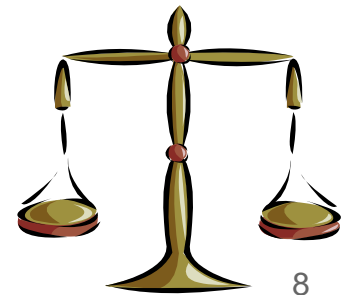
- Manufacturer of the dispersants
- Companies providing the aircraft spraying dispersants
- Spill Management Team for BP
- Nation's two leading oil spill response contractors
- Alleging various torts causing personal injury as a result of exposure to oil and/or dispersants and damages to personal and real property as a result of dispersants or oil coming into contact with such property



MDL AND LAWSUITS AGAINST RESPONDERS (continued...)

Dismissal of Emergency Responders

- Emergency Responders filed Joint Motion to Dismiss all claims
- OPA 90 claims dismissed because the spill was not from the OSVs
- Negligence claims under General Maritime Law dismissed October 12, 2011
- One of the four elements for a negligence claim is that there must be a duty to the plaintiff
- Duty must be with respect to an interest that is foreseeably jeopardized by negligent conduct
- The alleged harm (property damages/economic losses) not the type of harm risked by the negligence act



MDL AND LAWSUITS AGAINST RESPONDERS (continued...)

Clean-Up Responders' Motion to Dismiss

- In April 2011 Motion to Dismiss Filed
- Court ruled September 30, 2011
- Claims made under general maritime law and state law for negligence, strict products liability, nuisance, and battery
- No cause of action (or responder immunity) under OPA 90 for personal injury
- Plaintiffs: VOO operators, non-VOO vessel operators, decontamination crews, onshore workers, and residents
- Derivative immunity and preemption are not established by the facts pled in the Complaint, but may be reasserted if proved by Defendants
- Claims pled under state law are preempted by maritime law and dismissed
- Personal injury claims of Plaintiffs who have not alleged an injury dismissed
- No legal grounds for nuisance claims
- Claims for battery are dismissed because intent to cause harm was not alleged
- Plaintiffs who are seamen (VOO and Vessel Plaintiffs) are not entitled to punitive damages, but non-seamen Plaintiffs may seek punitive damages



MDL AND LAWSUITS AGAINST RESPONDERS (continued...)

Plaintiff's Motion to Dismiss without Prejudice

- On February 16, 2012, the Plaintiffs filed a motion to amend the B3 Complaint to remove the responder defendants from the B3 Master Complaint and dismiss the claims asserted against the responder defendants without prejudice
- This means that the B3 claims could be reasserted prior to the running of the statute of limitations (three years)



MDL AND LAWSUITS AGAINST RESPONDERS (continued...)

Clean Up Responders' Response

- On February 24 Responders requested the court to dismiss the claims with prejudice
- Alternatively, if the court does not dismiss the claims with prejudice, Responders requested the court to allow filing the motions for summary judgment or to require the plaintiffs to pay costs and attorney fees

BP Settlement

- BP trial delayed one week on February 27, 2012
- BP settlement announced March 2
- What does it mean?



MDL AND LAWSUITS AGAINST RESPONDERS (continued...)

- Phase Two (Stop Oil Flow) - Scheduled for July 2012, will address issues arising out of alleged delays in and ultimate stopping of the release of oil from the well and the amount of oil actually released
- Phase Three (Response) – Scheduled for October 2012, will address injuries or other damages that are alleged to be the result of the response efforts.
- Cost – Responders paying \$\$\$\$\$ to defend suits





RESPONSE INDUSTRY REACTIONS AND INITIATIVES

Responders unlikely to respond aggressively in the future

Responders requiring extra layers of indemnification

Responders seeking detailed directions and approvals from government officials

Formation of Coalition

- Salvage industry
- Emergency Response and Firefighting industry
- Response industry
- Dispersant industry
- Spill Management industry
- Oil Well Containment industry



RESPONSE INDUSTRY REACTIONS AND INITIATIVES (*continued...*)

Proposed Legislation

- Actions consistent with National Contingency Plan (NCP)
- Actions under OPA 90 and general maritime law
- Actions for wrongful death or personal injury
- Type of “actions” (*e.g.* firefighting, salvage, well containment) a person takes providing care, assistance, or advice defined to clarify scope of coverage
- Response to spills of hazardous substances affecting the marine environment



RESPONSE INDUSTRY REACTIONS AND INITIATIVES (*continued...*)

- Pleading standard
- Frivolous lawsuits and payment of attorney fees and court costs
- Presumption of care if action was in furtherance of the objectives of the NCP
- Gross negligence vs. willful misconduct
- Derivative immunity
- Civil and criminal penalties



STATUS OF LEGISLATION AND ACTION BY CONGRESS

Congressional Activity 2011

- Coast Guard and Maritime Transportation Act of 2011 (H.R. 2838)
 - Introduced in House on September 2, 2011
 - Passed by House on November 15, 2011
 - Did not contain any spill related legislation
- Coast Guard Authorization Act for FY 2012 and 2013 (S.1665)
 - Introduced in Senate on October 6, 2011
 - Did not contain any spill related legislation
- *Deepwater Horizon* Spill Legislation?



STATUS OF LEGISLATION AND ACTION BY CONGRESS *(continued...)*

Congressional Activity 2012

- S.1665 – Commerce, Science and Transportation substitute amendment reported on January 26, 2012
- Chairman LoBiondo, who chairs the Coast Guard subcommittee, intends to introduce oil spill legislation and include a responder immunity provision in 2012
- Alternatively, we will seek other possible vehicles for enactment of our responder immunity proposal including the Coast Guard Authorization Bill



STATUS OF LEGISLATION AND ACTION BY CONGRESS (*continued...*)

Deepwater Horizon Investigations

- Presidential Commission Report – January 11, 2011
- Coast Guard Marine Board “preliminary” report - April 22, 2011
- Republic of the Marshall Islands, the flag state of the *Deepwater Horizon* – August 17, 2011
- BOMRE/Coast Guard Joint Investigation Report – September 14, 2011
- Department of Justice Criminal Investigation - ???

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COUNSELORS AT LAW

QUESTIONS?

Contact

Jonathan K. Waldron

Blank Rome LLP

**600 New Hampshire
Avenue, N.W.**

Washington, D.C. 20037

Tel. (202) 772-5964

waldron@blankrome.com

