ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
2073 SCOMM 78: SENATE SPEC. COMM. ON OIL & GAS, 1991-1992

91

(c) Surety bond.

(1) An applicant may demonstrate financial responsibility by obtaining and submitting to the Administrator a surety bond which conforms to the requirements of this subsection. The surety company issuing the bond must, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the U.S. Department of the Treasury.

(2) Applicants utilizing surety bonds to demonstrate evidence of financial responsibility shall establish a standby trust fund. Under the terms of the bond, all payments made thereunder shall be deposited by the surety directly into the standby trust fund in accordance with the Administrator's instructions.

(3) The bond must guarantee that the applicant shall pay, pursuant to existing law, the costs of cleanup/removal of all oil spilled or discharged in or on California marine waters, including spills which could impact California marine waters, and costs or expenses incurred in the restoration or replacement of natural resources damaged or destroyed as a result of the discharge of oil when it is determined that the applicant is the ~~party responsible for the spill.~~ **responsible party.**

(4) Under the terms of the bond, the surety shall become liable for the bond obligation when the applicant fails to pay and/or perform as guaranteed by the bond and upon notification of the surety, by the Administrator, that the applicant has failed to pay and/or perform as guaranteed by the bond.

(5) The surety may cancel the bond prior to its expiration date. The termination date shall be 30 days after written notice that the surety company has elected to terminate the bond and has so notified the certificant, is received by the Administrator, as evidenced by a United States Postal Return Receipt. However, with respect to any vessel(s) covered by the surety bond which is (are) carrying oil in bulk as cargo and which was (were) loaded prior to the termination date, termination shall not take effect earlier than 30 days from receipt by the Administrator of the notice prescribed above and furthermore not until either (1) completion of the discharge of such cargo, or (2) until 60 days after the receipt of the prescribed notice by the Administrator, whichever is earlier.

(6) The bond shall contain no additional terms or conditions which limit the surety company's obligation to pay for costs and damages arising under Government Code Section 8670.65.5.

(7) **Under the terms of the bond, the bond shall be subject to and governed by the laws of the State of California.**

(d) Letter of Credit

(1) An applicant may satisfy financial responsibility requirements by obtaining and submitting to the Administrator, an irrevocable standby letter of credit in favor of the State of California. The issuing institution must be an entity which is acceptable to the Administrator and which has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a federal or state agency. The letter of credit shall:

(A) Be effective on or before the approval date of the certificate of financial responsibility;

(B) Be addressed to the Administrator;

(C) State that it is established in favor of the State of California up to the amount of ability to pay (expressed in U.S dollars) that it is intended to demonstrate; and that the funds are available to the State upon presentation of:

i. a sight draft bearing a reference number to the letter of credit; and

ii. a signed statement certifying that the amount of the draft is payable pursuant to California law;

(D) State an effective date and an expiration date. The expiration date shall be at least one year after the effective date;

(E) State that it shall be automatically extended for a period of one year unless the Administrator and the applicant are notified by certified mail at least 90 days in advance of expiration that the letter will not be renewed. In the event that such notice is provided, any unused portion of the credit shall, upon presentation of a sight draft, be available for 90 days after the applicant and the Administrator receive the notice;

(F) State that whenever the letter of credit is drawn upon, the creditor will duly honor such draft and deposit the amount of the draft directly into the standby trust of the applicant in accordance with the Administrator's instructions.

(2) **The letter of credit shall contain no additional terms or conditions which limit the issuing institution's obligation to make funds available for costs and damages arising under Government Code Section 8670.65.5.**

(3) An applicant utilizing a letter of credit to demonstrate evidence of financial responsibility shall

(A) Establish a standby trust fund;

(B) Ensure that under the terms of the letter of credit, all amounts paid pursuant to a draft by the State of California shall be deposited by the issuing institution directly into the standby trust fund in accordance with the Administrator's instructions.

(e) Guaranty:

(1) An applicant may satisfy the financial responsibility requirements determined pursuant to this chapter by obtaining a written guaranty provided that:

(A) A certified copy of the guaranty accompanies application for a certificate of financial responsibility submitted to OSPR;

(B) The guarantor, upon receiving notice from the Administrator that the applicant has failed to pay or perform pursuant to existing law, agrees to discharge the applicant's legal liability to any claim under applicable law, up to and including the amount of financial responsibility ~~guarantied~~ **guaranteed**, for cleanup and damages resulting from oil spilled or discharged in or on California marine waters, or spills which could impact California marine waters, including restoration costs, where the applicant is determined to be the responsible party; **and**

(C) ~~the~~ The guarantor complies with all of the self-insurance provisions set forth in subsection (b) of this regulation; **and**

(D) The guarantor agrees to notify the Administrator by certified mail within five (5) business days if, at any time that the guaranty is in effect, the guarantor fails to meet the self-insurance test criteria because of a material change in the guarantor's financial position; **and**

(E) The guarantor agrees to notify the Administrator in the event the guarantor elects

to terminate the guaranty prior to the expiration date. The termination date shall be 30 days after written notice that the guarantor has elected to terminate the guaranty and has so notified the certificant, is received by the Administrator, as evidenced by a United States Postal Return Receipt. However, with respect to any vessel(s) covered by the guaranty which is (are) carrying oil in bulk as cargo and which was (were) loaded prior to the above termination date, termination shall not take effect earlier than 30 days from receipt by the Administrator of the notice prescribed above and furthermore not until either (1) completion of the discharge of such cargo, or (2) until 60 days after the receipt of the prescribed notice by the Administrator, whichever is earlier; and

~~(E)~~ **(F)** **Under the terms of the guaranty,** any claim for which liability may be lawfully established may be asserted directly by the Administrator against any guarantor providing evidence of financial responsibility for a responsible party.

(G) **Under the terms of the guaranty, the guaranty shall be subject to and governed by the laws of the State of California.**

(H) **The guaranty contains no additional terms or conditions which limit the guarantor's obligation to pay for costs and damages arising under Government Code Section 8670.65.5.**

(2) Except in circumstances where the guarantor itself is a responsible party, no guarantor shall be held liable for any cleanup or restoration costs which exceed the amount of financial responsibility that the guarantor has provided.

(3) ~~Application for certification of~~ **The** guaranty shall include:

(A) Name and address of **owner or** operator ~~or user~~; and

(B) Name and principal characteristics of vessels(s) or facility(s) covered; and

(C) Name and address of guarantor; and

(D) ~~Conditions~~ **Terms** of guaranty **and qualifications of the guarantor, including the provisions set forth in subsections (1)(B) through (1)(G) above**; **and**

(E) Effective date and ~~term~~ **expiration date** of guaranty; and

(F) Dollar amounts of guaranty.

(f) Other evidence of financial responsibility. Applicants may provide other evidence of financial responsibility that is not specifically mentioned in this chapter and which is acceptable to the Administrator. Acceptable evidence pursuant to this subparagraph includes, but is not limited to written certification that the applicant is a member of a protection and indemnity club (P&I club) and that each entered vessel has been provided with cover for pollution risk **in the amount set forth in Section 792 above.** The certification that the applicant provides must be supported by documentation that is acceptable to the Administrator, including proof of entry into the P&I club, ~~and~~ **all addenda which pertain to pollution risk and deductibles, and** a copy of the applicable P&I club rules. ~~which include cover for pollution risk.~~

(1) ~~A~~ **At the Administrator's discretion, an applicant submitting evidence of P & I cover containing a** deductible provision **which is greater than $1,000,000 may be required to submit the following additional proof before applicant's evidence of financial responsibility shall be deemed** ~~in any certificate is only~~ acceptable ~~if~~:

(A) the applicant shows supplemental coverage for the amount of the deductible by means of other acceptable insurance, surety, guaranty, self-insurance, letter of credit, or other proof of financial responsibility acceptable to the Administrator; or

(B) the deductible provision provides for a loss reimbursement plan which contains language guaranteeing that the P&I club will be responsible for payment of all claims on a first dollar basis, without waiting for the member to pay the amount of the deductible.

(2) Certificants using P & I Club membership as the method of evidence of financial responsibility shall submit written documentation acceptable to the Administrator evidencing renewal of the certificant's membership in the P & I Club, within 30 days of renewing the P & I Club coverage. Acceptable written evidence includes a copy of the addendum or renewal certificate, both of which refer to the previous certificate of entry by reference and/or contains the information required by this subsection, and any additional terms or conditions which may affect cover, including the renewal and new expiration dates.

(g) Combination of methods. Any one or a combination of the above-described methods may be utilized to establish the amount of financial responsibility required pursuant to this chapter.

NOTE: Authority cited: Section 8670.37.54(b), Government Code. Reference: Section 8670.37.54, Government Code.

796. CERTIFICATION REVOCATION.

(a) A certificate may be revoked, following five (5) ~~calendar~~ **business** days written notice by the Administrator **to certificant**, for any of the following reasons:

(1) Negligently making any false material statement in connection with an application for or renewal of a certificate; or

(2) Failure to establish or maintain evidence of financial responsibility as required by this chapter.

(b) A certificate may be revoked immediately with concurrent written notice by the Administrator **to certificant** for any of the following reasons:

(1) When the holder of the certificate is no longer the owner or operator of the vessel or marine facility, or owner of the oil in question; or

(2) Willfully making any false statement in connection with an application for or renewal of a certificate.

(c) Erasures or other alterations to a certificate or copy are prohibited and automatically void a certificate or copy.

(d) Request for Reconsideration.

~~Applicants~~ **Certificants** may submit a written request to the Administrator requesting reconsideration of any decision to revoke a certificate. Requests must be submitted within ten (10) calendar days from the date the applicant receives notice of revocation. The request must contain the basis for requesting reconsideration, and, if applicable, provide evidence which rebuts the basis for the Administrator's revocation of the certificate. Upon a showing of good cause, the Administrator may reinstate the certificate pending a final determination by the Administrator. Within ten (10) calendar days from the date the request for reconsideration is received, OSPR will advise the ~~applicant~~ **certificant** of the Administrator's decision to grant or deny the request. Within 15 calendar days following the notice that the Administrator will grant reconsideration, the ~~applicant~~ **certificant** will either be sent a notice that the Administrator shall adhere to his or her earlier decision, or the notice of revocation shall be rescinded.

NOTE: Authority cited: Section ~~8670.54(b)~~ **8670.37.54(b)**, Government Code. Reference: Sections 8670.37.54-8670.37.56, Government Code.

797. REPORTING AND SUSPENSION.

(a) The ~~holder of~~ a ~~certificate~~ **certificant** shall provide written notification to the Administrator of an event which could produce a material change that affects the ~~holder of the certificate's~~ **certificant's** ability to comply with the financial responsibility requirement. Such events include, but are not limited to, an oil spill or discharge occurring within or outside of California marine waters from one or more vessels or marine facilities or other facilities for which the ~~holder of the certificate~~ **certificant** may be liable for damages, or other significant action against the ~~holder of the certificate~~ **certificant**. Additionally, ~~certificate holders~~ **the certificants** must also notify the Administrator in writing of any potential liability that could produce a material change that affects the ~~holder of the certificate's~~ **certificant's** ability to comply with the financial responsibility requirement. Written notification must be submitted within five (5) business days of knowledge of the incident or knowledge of sufficient facts which would lead a reasonably prudent person to investigate and learn of the incident. For purposes of this subparagraph, "material change" means an event or action which could cause the certificate holder to be liable for damages in an amount exceeding five percent (5%) of the total financial resources reflected by the certificate or, if owners' equity exceeds the total amount of financial resources reflected by the certificate, 5% of the owners equity.

(b) Upon notification of the oil spill or discharge or other action or potential liability, as required by subsection 797(a), the Administrator shall reevaluate the validity of the certificate of financial responsibility.

(c) Upon a determination by the Administrator that the ~~holder of the certificate~~ **certificant** lacks sufficient financial resources to assume financial responsibility for both the current spill or liability and have adequate resources remaining available to meet the requirements of this chapter, the Administrator shall suspend the certificate~~.~~ **following (5) business days written notice.**

(d) Suspension of the certificate shall continue until the responsible party demonstrates, to the satisfaction of the Administrator, that the responsible party has the financial resources needed to meet the requirements of this chapter.

NOTE: Authority cited: Section 8670.37.54(b), Government Code. Reference: Sections 8670.37.54-8670.37.56, Government Code.

Alaska State Legislature

Legislative Research Agency

130 Seward Street, Suite 218
Juneau, Alaska 99801-2196

Phone: (907) 465-3991
Fax: (907) 463-3351

April 3, 1992

MEMORANDUM

TO: Senator Sam Cotten

FROM: Glenn T. Gray GTG
Legislative Analyst

RE: **Other States' Direct Action Provisions for Oil Spill Insurers**
Research Request 92.190

This memorandum responds to your question about states which include direct action clauses in oil spill liability statutes. ("Direct action" provisions permit states to bring an action against an oil spill insurer in a state court.) The last column of the attached table answers your question about whether states differentiate between crude and refined oil products in their spill statutes.

We contacted environmental officials or assistant attorneys general from the 22 other coastal states. This telephone survey revealed that Louisiana, New Jersey, New York and Texas currently have direct action provisions for oil spill insurers. During 1991, legislatures in four coastal states either eliminated direct action requirements or exempted Protection and Indemnity (P&I) clubs from these requirements: Florida, Rhode Island, Virginia and Washington.[1] The attached table summarizes information about direct action laws and how states address crude and refined oil products in oil spill statutes.

Laws in states which currently have, or formerly had, direct action provisions for oil spill insurers are discussed below. Copies of the statutes are provided in Attachment B.

- **Florida:** Debbie Prebble, an environmental administrator for the Office of Coastal Protection, said that 1990 legislation required all oil spill insurers to provide proof of financial security and to pay damages to the Coastal Protection Trust Fund. The P&I

[1]Protection and Indemnity (P&I) clubs are mutuals made up of a number of tanker and oil companies. Many oil transporters and terminal facility operators claim that P&I clubs provide the only means for insuring against oil spills. Protection and Indemnity clubs have traditionally refused to recognize the sovereignty of states by opposing attempts to include direct action provisions in state and federal statutes. Legislative Research Memorandum 90.200 discusses P&I clubs in more depth (Attachment A).

RESEARCH REPORT

clubs, however, refused to comply with this requirement and other insurance companies would not provide vessel owners with oil spill insurance. As a result, companies had to provide proof of self-insurance. Smaller companies were able to self-insure only a few of their vessels at one time and therefore only provided proof of insurance for vessels when they were in Florida waters. Because the state was burdened with the continuous processing of insurance certificates, the law was changed in 1991 by deleting the requirement that insurers pay damages to the trust fund (FS 376.12 - 376.14).

- **Louisiana:** Tim Ahbert of the Oil Spill Coordinator's Office said that the oil spill statutes do not contain direct action provisions. Steve Hawkland, an attorney for the Secretary of State office said, however, that a general insurance statute requires direct action for all insurance providers (R.S. 22:655).

- **New Jersey:** Section 58:10-23.11s of New Jersey statutes permits the state or injured persons to bring claims "directly against the bond, insurer, or any other person providing evidence of financial responsibility."

- **New York:** According to Gordon Johnson, an assistant attorney general for New York, the state may assert claims directly against a bond or the insurer for cleanup costs, damages and civil penalties (Navigation Law Section 190).

- **Rhode Island:** Legislation passed in 1990 required evidence of financial responsibility for vessels in the amount of $1,200 per gross ton. The legislation also stated that in the event of environmental damages "the bond shall be forfeited or payment on the insurance policy made to the full extent of the costs incurred by the state and or other persons to rectify and clean up the damages . . ." Both these provisions were eliminated during the 1991 legislative session and replaced by a requirement that vessels possess a Coast Guard approved certificate of financial responsibility. According to Steve Morin, assistant to the director of the Department of Environmental Management, the legislature modified the statute after the marine transportation organization INTERTANKO directed its members to cease oil shipments to Rhode Island.

- **Texas:** Section 40.255 of the Natural Resource Code permits the state to "bring suit directly against any bond, insurer, guarantor or person providing evidence of financial responsibility . . ." Assistant Attorney General Ingrid Hansen said that the state has not yet written regulations for this statute.

clubs, however, refused to comply with this requirement and other insurance companies would not provide vessel owners with oil spill insurance. As a result, companies had to provide proof of self-insurance. Smaller companies were able to self-insure only a few of their vessels at one time and therefore only provided proof of insurance for vessels when they were in Florida waters. Because the state was burdened with the continuous processing of insurance certificates, the law was changed in 1991 by deleting the requirement that insurers pay damages to the trust fund (FS 376.12 - 376.14).

- **Louisiana:** Tim Ahbert of the Oil Spill Coordinator's Office said that the oil spill statutes do not contain direct action provisions. Steve Hawkland, an attorney for the Secretary of State office said, however, that a general insurance statute requires direct action for all insurance providers (R.S. 22:655).

- **New Jersey:** Section 58:10-23.11s of New Jersey statutes permits the state or injured persons to bring claims "directly against the bond, insurer, or any other person providing evidence of financial responsibility."

- **New York:** According to Gordon Johnson, an assistant attorney general for New York, the state may assert claims directly against a bond or the insurer for cleanup costs, damages and civil penalties (Navigation Law Section 190).

- **Rhode Island:** Legislation passed in 1990 required evidence of financial responsibility for vessels in the amount of $1,200 per gross ton. The legislation also stated that in the event of environmental damages "the bond shall be forfeited or payment on the insurance policy made to the full extent of the costs incurred by the state and or other persons to rectify and clean up the damages . . ." Both these provisions were eliminated during the 1991 legislative session and replaced by a requirement that vessels possess a Coast Guard approved certificate of financial responsibility. According to Steve Morin, assistant to the director of the Department of Environmental Management, the legislature modified the statute after the marine transportation organization INTERTANKO directed its members to cease oil shipments to Rhode Island.

- **Texas:** Section 40.255 of the Natural Resource Code permits the state to "bring suit directly against any bond, insurer, guarantor or person providing evidence of financial responsibility . . ." Assistant Attorney General Ingrid Hansen said that the state has not yet written regulations for this statute.

- **Virginia:** State statutes require oil spill insurers to provide in-state service of process and "to provide that actions may be brought on such instrument or insurance, guaranty or surety directly against the insurer . . ." (62.1-44.34:16). According to Assistant Attorney General Steve Shepard, however, regulations exempt P&I clubs from the service of process requirement.

- **Washington:** During the 1991 legislative session, Washington exempted P&I clubs from proof of financial responsibility requirements [88.40.020 (c)].

The January 1992 issue of *U.S. Law Report* says that California passed oil spill financial responsibility legislation in 1990 that was favorable to P&I clubs (Attachment C). According to Assistant Attorney General Mike Neville, California has never had a direct action provision. The California law is included with the other state laws in Attachment B.

According to Steve Morin of the Rhode Island Department of Environmental Management, P&I clubs are currently lobbying against inclusion of direct action provisions in proposed federal financial responsibility regulations which will implement the federal Oil Pollution Act of 1990.

I hope that this information answers your questions. Please contact us if we may provide additional assistance.

Attachments

Coastal States Direct Action Requirements for Oil Spill Insurers

State	Direct Action Law	Statute Number	Statutes Include Crude or Refined oil
Alabama	No direct action statutes for oil spill insurers		Not specified*
California	No direct action statutes for oil spill insurers		Both
Connecticut	No direct action statutes for oil spill insurers		Not specified
Delaware	No direct action statutes for oil spill insurers		Both
Florida	Repealed requirement in 1991	FS 376.12	Oil of any kind
Georgia	No direct action statutes for oil spill insurers		Not specified
Hawaii	No direct action statutes for oil spill insurers		Both
Louisiana	Yes – general law for all insurers	LRS 22.655	Both
Maine	No direct action statutes for oil spill insurers		Both
Maryland	No direct action statutes for oil spill insurers		Both
Massachusetts	No direct action statutes for oil spill insurers		Both
Mississippi	No direct action statutes for oil spill insurers		Not specified*
New Hampshire	No statutes regarding marine oil spill financial responsibility		Both
New Jersey	State may go directly against bond or insurer	NJSA 58:10–23.11(s)	Both
New York	State may go directly against bond or insurer	Navigation Law Sec. 190	Both
North Carolina	No direct action statutes for oil spill insurers		Both
Oregon	No direct action statutes for oil spill insurers		Both
Rhode Island	Repealed former requirement in 1991	46–12.4	Both
South Carolina	No direct action statutes for oil spill insurers		Oil of any kind
Texas	State may bring suit against insurer	Sec. 40.255(c)	Both
Virginia	Yes, exemption in regulations for P&I clubs	62.1–44.34:16	Both
Washington	P&I Clubs exempted from financial responsibility requirements	RCW 88.40.020	Both

* These state statutes prohibit releases of pollutants without specifically referencing oil.

Sources: State statutes, environmental officials and assistant attorneys general.

Prepared by the Legislative Research Agency, April 1992 (92.190)

ATTACHMENT A
"Effect of Increase Spill Liabilities on Tanker Operations"
Legislative Research Memorandum 90.200

Alaska State Legislature

Legislative Research Agency

P.O. Box Y
Juneau, AK 99811-3100
Phone: (907) 465-3991
Fax: (907) 463-3351

March 12, 1990

MEMORANDUM

TO: Senator Mike Szymanski

FROM: Glenn T. Gray
Legislative Analyst

RE: **Effect of Increased Spill Liabilities on Tanker Operations**
Research Request 90.200

You requested information concerning the effects of 1989 Alaska legislation that increased liability for tankers carrying crude oil to $500 million. Specifically you want to know: 1) if the increased liability has or is likely to result in higher insurance rates; 2) if there will be a concomitant rise in tanker tariffs; 3) if independent oil tanker companies have had difficulty obtaining insurance; and 4) if the 1989 oil spill legislation caused a reluctance for oil companies to ship crude oil to Cook Inlet.

The first section of this memorandum summarizes the answers to these questions. The next section provides background information about insurance arrangements for the tanker industry. Each of the four questions are then answered in detail under separate sections.

Summary

Insurance rates and tanker tariffs have increased in the past year; however, it is uncertain whether these increases are a direct result of Alaska's 1989 changes to oil spill liability laws. Many other factors affect insurance rates and tanker tariffs. The Exxon Valdez accident and new oil spill liability laws have had some effect on operating costs for vessel owners although these added costs may not yet be reflected in tariffs. While it is possible that some of the smaller independent tanker companies may have difficulty obtaining insurance, most of the tanker companies likely to transport Alaska oil receive at least $500 million liability coverage through a protection and indemnity club.[1] One oil company representative revealed several factors that contribute to a general reluctance to ship crude oil to Cook Inlet: uncertainty concerning future oil spill clean-up equipment requirements; possible changes to state and federal oil spill legislation; possible liability for spills after

---

[1]Shell Oil Company requires $700 million in liability coverage for transport of its oil (French 1990).

the oil is sold; and the view that selling crude oil to Cook Inlet is a low volume, low profit operation.

Background

Insurance for tanker companies operating in Alaska waters is provided through private insurance companies and through so-called protection and indemnity clubs (P&I clubs). Insurance provided by private companies generally involves a complex system of reinsurance. The coverage is eventually provided by the London insurance market through such syndicates as Lloyds of London or the Institute of London Underwriters (ILU). P&I clubs are mutuals made up of a number of tanker and oil companies. In the event of a damage claim, the P&I club reimburses the shipper. Fifteen P&I clubs throughout the world belong to the International Group of Protection and Indemnity Clubs (IGPIC) based in London. When a club member makes a claim, the club provides coverage for the first $1.6 million. Members of all of the clubs belonging to the IGPIC cover the next $10.4 million and the IGPIC provides coverage for the next $1.2 billion through reinsurance (Barker 1990).[2]

Under current Alaska state law, a person who causes an unpermitted discharge of crude oil in excess of 18,000 gallons is liable to the state for up to $500 million in civil penalties (AS 46.03.759).[3] P&I clubs provide the only available source for liability coverage as high as $500 million.[4] Companies

[2]Reinsurance is obtained through groups of insurance companies in London. The IGPIC is able to obtain a high level of reinsurance only because many companies belong to its component clubs. Normally, up to $500 million dollars of the reinsurance covers pollution claims and the remainder covers other types of claims such as damage to other ships, cargo loss and personal injury. An option for additional coverage to $700 million for pollution is available to companies who are covered by P&I clubs.

[3]Total liability for a large oil spill would far exceed the maximum $500 million civil penalty. The company would also be liable for criminal penalties; civil claims by individuals for loss of wages; damage to the environment; and costs of containment and cleanup. In other words, in the event of a large oil spill, a tanker company would be liable for much more than what a P&I company would cover.

[4]Coverage through insurance companies, other than P&I clubs, rarely exceeds five to twenty million dollars in liability coverage and many brokers are unable to obtain $20 million in coverage (French 1990). P&I clubs provide ninety percent of protection and indemnity coverage for the world's marine transportation industry (Barker 1990).

transporting crude oil, however, only have to show proof of one to twenty million dollars in liability coverage.[5]

Some independent tanker companies must obtain coverage from a state-approved insurance company, in addition to P&I club coverage, in order to comply with state liability insurance requirements. Current state law requires tanker companies to prove financial responsibility through one of four means: self-insurance, insurance, surety, or guarantee [AS 46.04.050(e)].[6] P&I clubs may not be used for the purpose of proof of insurance because P&I clubs do not recognize state sovereignty and therefore do not provide certificates of insurance required by the state.[7] Companies unable to prove financial responsibility through other accepted means (i.e., self-insurance, surety or guarantee) must have coverage through an insurance company approved by the

---

[5]AS 46.04 040 provides for several different levels of proof of financial liability for transporters of oil. Tank vessels or oil barges transporting trans-Alaska pipeline oil are required to prove that they have financial responsibility for $14 million as provided by 43 U.S.C. 1653(c)(3). Other oil barges must show financial responsibility for one million dollars and other tank vessels are required to prove financial responsibility for $20 million (unless the Clean Water Act requires a greater responsibility). SB 504 of the 16th Alaska State Legislature, if passed into law, would require a $500 million proof of financial responsibility for any tank vessel or barge carrying crude oil.

[6]SB 504 of the 16th Legislature would broaden the means for proof of financial responsibility to include other security approved by the Department of Environmental Conservation (DEC). This provision would permit the DEC to approve P&I club coverage (Mertz 1990).

[7]P&I clubs pay claims for accidents in state waters but only issue certificates of insurance to the U.S. Coast Guard. If the P&I clubs recognized state sovereignty, they could potentially have to award double claims for a single incident if it were to occur on a border between two different states (Barker 1990).

state of Alaska.[8] They also need P&I insurance to protect themselves in the event of a large oil spill.

P&I clubs do not reimburse claims for criminal penalties (Barker 1990). Civil penalties are generally covered but only if approved by the P&I club's claims committee after the claim is submitted (Willitzer 1990). Civil penalties are not covered if there was wilful misconduct leading to the incident.

Insurance Rates

Insurance rate hikes have resulted from the rising costs of claims from incidents such as the Exxon Valdez accident as well as from the recent increase in P&I club insurance coverage from $400 million to $500 million (Unsworth 1989). Since Exxon belongs to a P&I club, part of the costs related to the spill are shared by all members of P&I clubs and through IGPIC reinsurance. Thus insurance rates for all P&I club members will increase. The decision by the P&I companies to raise coverage to $500 million was not a result of Alaska oil spill legislation (French 1990; Barker 1990). The Exxon Valdez accident did, however, raise the perceived risk of operating in Alaska and this may be reflected in insurance rates.[9]

While Alaska oil spill legislation did not directly cause the rise in insurance rates, representatives of P&I clubs and Intertanko, the independent tanker industry's principal association, expressed grave concerns about effects of possible state and federal legislation. According to one P&I official, current legislation before the U.S. House of Representatives, if passed, will result in tankers becoming uninsurable and a possible boycott of tanker deliveries to the United States (Barker 1990). An official of Intertanko expressed concern

---

[8]Insurance coverage for tankers is usually provided through reinsurance by London-based companies such as the multitude of companies belonging to Lloyds of London and/or the ILU. The American alternative, the Water Quality Insurance Syndicate, does not recognize state sovereignty and only insures up to five million dollars (French 1990). The state of Alaska considers Lloyds of London an approved insurance company because it guarantees each of its sub-companies. The ILU does not guarantee it member companies and therefore each company named in an ILU policy must be approved by the state before a tanker company's coverage is accepted. While some insurance policies provide coverage on a yearly basis, spot charters are often insured on a single voyage basis. A policy for a five-day trip through Alaska waters costs between ten and fifteen thousand dollars (French 1990; Willitzer 1990).

[9]Rates are determined by such factors as past claims records, perceived risks associated with the place of operation, type of cargo being hauled, and nationality of the crew (Barker 1990).

that some states might propose legislation with unlimited liability. Should such a provision become law, tankers would be uninsurable (Uglesang 1990).

Tanker Tariffs

Tanker tariffs are negotiated on a case-by-case basis, but reference rates are provided by the Worldscale Association. This company provides base rates which are used as a bench mark when negotiating contracts. Worldscale calculates a base rate considering such expenses as fuel costs, pilotage fees and tug charges. The base rate for Valdez has remained relatively stable except for a temporary increase in January 1990 due to an increase in pilotage fees. After it was determined that Alyeska Pipeline Company was paying the increased costs and not the vessel owners, the base rate was deflated (Isman 1990). Actual market prices may differ from the base rate due to considerations not addressed in the Worldscale formula.

Patrick Callahan, an expert on Alaska tanker tariffs, said that the Alaska market differs from other markets around the world. Alaska oil must be shipped using United States tankers.[10] While Alaska legislative action may affect operating costs for tankers, tariffs are also influenced by market forces of supply and demand. The decrease in Alaska oil production resulted in a lower demand for tankers during the past year. Additionally, California has received a greater portion of Alaska oil this year while Gulf refineries have received less, adding to a lower demand for tankers. The operating costs for tankers, however, have risen dramatically due to increased delays, higher insurance premiums and increased administrative costs. The combined result of these factors are detrimental to tanker operators in Alaska; their tariffs have remained relatively stable, yet their operating costs have increased (Callahan 1990).[11]

---

[10]The Merchant Marine Act of 1920, also known as the Jones Act, requires shippers to use United States tankers to transport goods between two domestic ports. Even though Alaska oil is shipped to the Gulf of Mexico via a pipeline in Panama, the final destination is an American port and United States tankers must be used (Callahan 1990). The Jones Act results in higher tariffs than might occur elsewhere in the world (Barker 1990).

[11]Low tanker tariffs make it difficult for tanker owners to justify replacing existing vessels. Worldwide, a better market for tanker operators permit higher tariffs, but the rates are still too low to provide an incentive to replace aging tanker fleets (*Oil & Gas Journal* 1990a; *Oil & Gas Journal* 1990b; *Petroleum Intelligence Weekly* 1990; Uglesang 1990).

Availability of Insurance

Insurance appears to be available to most vessel owners (Barker 1990; Uglesang 1990). Some smaller companies may find it difficult to afford insurance, but most vessels likely to carry Alaska oil are insured by a P&I club (French 1990; Willitzer 1990). Brokers may contact many different P&I clubs to locate the best rates for their clients (Sullivan 1990).[12]

While most vessel companies are covered by P&I club insurance, they do not always have insurance through a company approved by the state of Alaska. Such vessel owners must either prove capability for self insurance, possess a surety or arrange a guarantor for insurance. For a fee, larger companies who charter independent tankers will occasionally guarantee coverage in Alaska waters for the purpose of fulfilling the state of Alaska proof of insurance requirement (Adams 1990).

Small landing craft operators carrying oil, however, may have difficulty obtaining insurance coverage. Because a tanker is considered to be any self-propelled vessel carrying bulk oil as cargo, small landing craft vessels must have the same coverage as a large tanker (Adams 1990).

Reluctance to Transport Oil to Cook Inlet

B.P. Exploration has terminated shipments of crude oil to Cook Inlet as of December 1989. According to an article in the *Anchorage Daily News*, B.P. America spokesperson Marcia Meermans, of the company's headquarters in Cleveland, stated that new Alaska oil spill legislation makes the risk of selling oil in Cook Inlet too high (Kizza 1990). Jim Palmer of B.P. Exploration, cited additional reasons for the company's reluctance to ship oil into Cook Inlet, including the view that this market was a low volume, low profit operation; a concern about possible Alaska Department of Environmental Conservation requirements for oil spill response equipment; and uncertainty about new limitations imposed by proposed state and federal oil spill legislation. B.P. Exploration is wary of even selling oil from the Valdez terminal destined for Cook Inlet because of the uncertainty of continued liability after the oil has been sold (Palmer 1990).

Gene Burden, vice-president for Administration and State Government Relations for Tesoro America, expressed concern that many factors inhibit construction of new tankers worldwide, and he fears added requirements by the state of Alaska could make it difficult for vessel owners to operate in Alaska waters. Mr. Burden notes two problems with proposed changes to state law contained in

[12]Although most of the P&I clubs belong to the IGPIC and receive reinsurance from the same policy, rate quotes for a particular tanker company may vary from one club to another.

SB 504. First, provisions in this legislation would require $500 million proof of financial responsibilty for all vessels transporting crude oil regardless of the vessel's size. Mr. Burden thinks that proof of insurance requirements should be less for smaller tankers.[13] Tankers operating in Cook Inlet tend to be much smaller than those operating in Prince William Sound. Second, Mr. Burden states that a provision in SB 504 appears to require oil terminal operators to have proof of financial responsibility for $500 million for off-loading crude oil from vessels. He thinks that this provision would be an enormous increase from present requirements.

I hope this information is useful to you. If you have any questions, please contact this agency.

---

[13] Judy Willitzer, an insurance broker for Frank B. Hall, suggested that insurance requirements for tankers be based on tonnage.

REFERENCES

Kizza, Tom, "Spill-Shy BP Avoids Inlet Refinery, *Anchorage Daily News* February 10, 1990, C1.

Oil & Gas Journal, 1990a, "Intertanko: 1988 Best for Tankers Since 1973-74," March 6, 1990, p. 29.

Oil & Gas Journal, 1990b, "Tanker Owners Get Chance to Increase Charges on Freight, May 29, 1990, p. 42.

Petroleum Intelligence Weekly, "It May be Hard to Avoid a Tanker Rate Explosion," February 12, 1990 p. 5.

Unsworth, Edwin, "Tanker Owners Face Insurance Increases Over Spill Claims," *Journal of Commerce and Commercial*, November 17, 1989, 1A.

PERSONAL COMMUNICATIONS

Adams, Glenn, Alaska Department of Environmental Conservation, telephone interviews, February 5, 1990 and February 26, 1990.

Barker, Andrew, Director of Underwriting for West of England in London, telephone interview, March 7, 1990.

Burden, Gene, Vice-President, Administration and State Government Relations, Tesoro America, Anchorage, interview, March 6, 1990.

Callahan, Patrick, Tanker broker for Mallery, Jones and Lynch of Stamford, Connecticut, telephone interview, March 8, 1990.

French, Robert, Insurance broker for Alexander and Alexander, Seattle office, telephone interview, February 26, 1990.

Isman, Thelma, staffperson for the Worldscale Association in New York, telephone interview, March 7, 1990.

Mertz, Douglas, Assistant Attorney General, Juneau, telephone interview, Mrch 8, 1990.

Palmer, Jim, Director, Government and Public Affairs, B.P. Exploration, Anchorage, telephone interview, March 5, 1990.

Sullivan, Dorothy, Vice-President, Marsh McLennan Insurance Company, Seattle, telephone interview, February 27, 1990.

Uglesang, Christian, staffperson for Intertanko in Oslo, Norway, telephone inteview, March 6, 1990.

Willitzer, Judy, Insurance broker for Frank B. Hall, San Francisco office, telephone interview, February 27, 1990.

ATTACHMENT B

Coastal State Statutes Regarding Direct Action

Discard Earlier Pocket Supplement

1992 POCKET SUPPLEMENT

ISSUED IN JANUARY, 1992

COVERING LEGISLATION THROUGH THE 1991 SESSION OF THE 1991–92 LEGISLATURE

DEERING'S GOVERNMENT CODE

ANNOTATED

OF THE STATE OF CALIFORNIA

§§ 8000–11499

Annotated and Indexed by the Publisher's Editorial Staff

Note—An updated analysis of the Government Code appears at the beginning of the supplement to the first volume.

BANCROFT-WHITNEY
Law Publishers
3250 Van Ness Avenue
P.O. Box 7005
San Francisco, CA 94120-7005
800-848-4000

ment, unless a contingency plan is approved or made

er 24, 1990.

nats

ng into consideration the state oil spill contingency regarding the adequacy of oil spill contingency plan 25503 of the Health and Safety Code. In developing e State Interagency Oil Spill Committee and the Oil

directly adjacent to marine waters may apply for a igency plan element.

this section shall include provisions for training fire equipment use and operations.

r this section shall be consistent with the local r Section 30500 of the Public Resources Code, the tingency Plan.

contingency plan element established pursuant to this that the contingency plan element is inadequate, the repared it, specifying the nature and extent of the ons. The local government agency shall submit a new turned, responding to the findings and incorporating

f local governments to determine whether a program ements is desirable and should be continued. If the redness should be improved, the administrator shall e Oil Spill Prevention and Administration Fund for

er 24, 1990.

plans and area plans: H & S C § 25503.

nteragency Oil Spill Committee

after receipt of a contingency plan prepared pursuant plan is available for review to the state agencies that Spill Committee and the Oil Spill Technical Advisory the plan within two working days after receiving a mission and the California Coastal Commission shall within the coastal zone. The San Francisco Bay view the plans for marine facilities or local govern- and 29101 of the Public Resources Code. Any state s comments to the administrator within 60 days of all comments in approving or disapproving the plan. be reimbursed from the Oil Spill Prevention and in reviewing contingency plans and participating in ency plans.

er 24, 1990.

governing adequacy of oil spill contingency plans: Gov C

uacy of oil spill contingency plan elements of area plans: Gov

gency planning and oil spill response equipment and eimbursement

State Lands Commission and the California Coastal improvements to contingency planning and oil spill

be coordinated with studies being done by the federal ional entities, and duplication with the efforts of other

n, and the California Coastal Commission may be studies under this section from the Oil Spill Prevention

ber 24, 1990.

ding

abilitation stations for sea birds, sea otters, and other d and maintained in a state of preparedness to provide and birds affected by an oilspill in marine waters.

(b) The first rescue and rehabilitation station established pursuant to this section shall be located within the sea otter range on the central coast, and the administrator shall proceed to bid on the construction contract by January 1, 1994.

(c) Not later than July 1, 1992, the administrator shall consult with the United States Fish and Wildlife Service, the National Marine Fisheries Service, * * * the California Coastal Commission, *the Marine Mammal Center, and the International Bird Rescue Center* in the design, planning, construction, and operation of the rehabilitation stations. All proposals for the rehabilitation stations shall be presented before a public hearing prior to the construction and operation of any rehabilitation station, and, upon completion of the coastal protection element of the state oilspill contingency plan, shall be consistent with the coastal protection element.

(d) (1) Five hundred thousand dollars ($500,000) of federal escrow funds received by the state pursuant to Section 8(g) of the Outer Continental Shelf Lands Act, as amended (43 U.S.C. Sec. 1337(g)), shall, upon approval in the 1991–92 Budget Act, be appropriated or allocated for appropriation, as the case may be, from the Federal Trust Fund, each year for three years for the purposes described in subdivision (a).

(2) Additional funding shall be provided for the purposes described in subdivision (a) through the budget act process upon the request by the administrator.

Added Stats 1990 ch 1248 § 17 (SB 2040), effective September 24, 1990. Amended Stats 1991 ch 614 § 1 (AB 203), effective October 6, 1991.

ARTICLE 5.5

Financial Responsibility

Editor's Notes—For severability of provisions of act, see the 1990 Note following Gov C § 8574.1.

§ 8670.37.51. (Operative January 1, 1992) Certificate of financial responsibility

(a) No vessel may be used to transport oil across marine waters of the state unless the operator has obtained a certificate of financial responsibility issued by the administrator for the vessel or for the owner of all of the oil contained in and to be transferred to or from the vessel.

(b) No operator of a marine terminal within the state may transfer oil to or from a vessel unless the operator of the marine terminal has received a copy of a certificate of financial responsibility issued by the administrator for the operator of the vessel or for all of the oil contained in and to be transferred to or from the vessel.

(c) No operator of a marine terminal within the state may transfer oil to or from any vessel which is or is intended to be used for transporting oil as cargo to or from a second vessel unless the operator of the marine terminal has first received a copy of a certificate of financial responsibility issued by the administrator for the person responsible for both the first and second vessels or all of the oil contained in both vessels, as well as all the oil to be transferred to or from both vessels.

(d) No person may operate a marine facility unless the owner or operator of the marine facility has first obtained a certificate of financial responsibility from the administrator for the marine facility.

(e) No vessel may be used to transport oil across marine waters of the state unless, at least 24 hours prior to the transport, the administrator has received both of the following:

(1) A copy of a certificate applicable to the vessel or to all of the oil in the vessel at all times during transport.

(2) A copy of a written statement by the holder of the applicable certificate authorizing its application to the vessel.

(f) This section shall become operative on January 1, 1992.

Added Stats 1990 ch 1248 § 17 (SB 2040), effective September 24, 1990, operative January 1, 1992.

§ 8670.37.52. Certificate as conclusive evidence

The certificate of financial responsibility shall be conclusive evidence that the person or entity holding the certificate is the party responsible for the specified vessel, marine facility, or oil for purposes of determining liability pursuant to this chapter.

Added Stats 1990 ch 1248 § 17 (SB 2040), effective September 24, 1990.

§ 8670.37.53. Requirements for certificate

In order to receive a certificate of financial responsibility, an applicant shall demonstrate to the satisfaction of the administrator all of the following:

(a) For a certificate for a vessel or for all of the oil contained within a vessel, the applicant shall demonstrate the financial ability to pay at least five hundred million dollars ($500,000,000) for any damages which may arise during the term of the certificate. The level of required financial responsibility shall increase to seven hundred fifty million dollars ($750,000,000) on July 1, 1995, and to one billion dollars ($1,000,000,000) on January 1, 2000. The administrator may establish a lower standard of financial responsibility for small barges. The standard shall be based on the quantity of oil that can be carried by the barge and the r[illegible] of spill from the barge into marine waters. The administrator shall not set a standard that is less than the expected costs from a reasonable worst case oil spill into marine waters.

(b) To receive a certificate for a marine facility, the applicant shall demonstrate the financial ability to pay for any damages which might arise during a reasonable worst case oil spill into marine waters that results from the operations of the marine facility. The administrator shall consider such criteria as the amount of oil that could be spilled into marine waters from the facility, the cost of cleaning up spilled oil, the frequency of operations at the facility, and the damages that could result from a spill.

The administrator may issue a certificate for a marine facility upon a lesser showing of financial resources for a period of not longer than three years if the administrator finds all of the following:

(1) The marine facility was operating on January 1, 1991.

(2) Continued operation is necessary to finance abandonment of the marine facility.

(3) The financial resources the operator is able to demonstrate are reasonably sufficient to cover the damages from foreseeable spills from the facility.

Added Stats 1990 ch 1248 § 17 (SB 2040), effective September 24, 1990.

§ 8670.37.54. Demonstration of financial responsibility; Adoption of requirements

(a) For the purposes of this chapter, financial responsibility may be demonstrated by evidence of insurance, surety bond, letter of credit, qualifications as a self-insurer, or any combination thereof or other evidence of financial responsibility.

(b) In adopting requirements under this article, the administrator may specify policy or other contractual terms, conditions, or defenses which are necessary or which are unacceptable in establishing evidence of financial responsibility, in order to effectuate the purposes of this article.

Added Stats 1990 ch 1248 § 17 (SB 2040), effective September 24, 1990.

§ 8670.37.55. Certificate requirements for owner or operator of more than one vessel

(a) An owner or operator of more than one vessel or marine facility shall only be required to obtain one certificate of financial responsibility for all of the vessels and marine facilities owned or operated.

(b) If a person holds a certificate for more than one vessel or marine facility and a spill or spills occurs from one or more of those vessels or marine facilities for which the owner or operator may be liable for damages in an amount exceeding 5 percent of the financial resources reflected by the certificate, as determined by the administrator, the certificate shall immediately be considered inapplicable to any vessel or marine facility not associated with the spill. In that event, the owner or operator shall demonstrate to the satisfaction of the administrator the amount of financial ability required pursuant to this article, as well as the financial ability to pay all damages which arise or have arisen from the spill or spills which have occurred.

Added Stats 1990 ch 1248 § 17 (SB 2040), effective September 24, 1990.

§ 8670.37.56. Suspension of certificate

If the administrator determines that, because of a spill outside of the state or some other action or potential liability, the holder of a certificate may not have the financial resources to pay damages for the spill or liability and have resources remaining available to meet the requirements of this chapter, the administrator may suspend the certificate.

Added Stats 1990 ch 1248 § 17 (SB 2040), effective September 24, 1990.

§ 8670.37.57. Maximum term of certificate

No certificate of financial responsibility shall have a term greater than two years. The administrator may issue certificates for shorter periods where appropriate.

Added Stats 1990 ch 1248 § 17 (SB 2040), effective September 24, 1990.

ARTICLE 6

The Oil Spill Prevention and Administration Fund

Section

§ 8670.38. Creation; "Fund"

(a) The Oil Spill Prevention and Administration Fund is hereby created in the State Treasury. The money in the fund is available for appropriation by the Legislature and may only be used for the purposes of this chapter, Article 3.5 (commencing with Section 8574.1) of Chapter 7, and Division 7.8 (commencing with Section 8750) of the Public Resources Code.

(b) For the purposes of this article, "fund" refers to the Oil Spill Prevention and Administration Fund.

Added Stats 1990 ch 1248 § 17 (SB 2040), effective September 24, 1990.

Editor's Notes—For severability of provisions of act, see the 1990 note following Gov C § 8574.1.

§ 8670.38.10. [Section repealed 1991.]

Added Stats 1991 ch 10 § 2 (SB 7), effective December 13, 1990, operative until July 1, 1991. Repealed, operative July 1, 1991, by its own terms. The repealed section related to fees.

§ 8670.39. Administration

(a) The administrator shal

(b) The administrator ma
necessary to carry out anc

Added Stats 1990 ch 1248 § 1

§ 8670.40. Oil spill preven

(a) The *State Board of Eq*
sufficient to carry out the
The amount of the annual
products.

(b) * * * *(1) The oil spil*
crude oil at the time that
and upon every person ow
a marine terminal from o
the owner of the crude oil
received by means of a ve
every operator of a pipeline
oil originating from a pr
pipeline operating across,
board by the terminal or
of crude oil or petroleum
preceding month. No fee s
products if the person who
fee has been collected by a
to the crude oil or petrole

(2) Every owner of crude
except that payment to a
owner from further liabili

(c) The moneys collected

(d) The *board* shall collec

(e) The fee described in th

(1) To implement oil spill
inspections and to implem

(2) To carry out studies w

(3) To finance environmen

(4) To reimburse the mem
implementation of this ch
7.8 (commencing with Sec

(5) To implement, install,
contain, and clean up oil s

(6) To reimburse the boar
Part 24 (commencing with

(f) The moneys deposited
* * *

Added Stats 1991 ch 10 § 3.5
§ 2 (AB 1409), effective Augu

Former Sections:

Former § 8670.40, similar to
1990, amended Stats 1991 ch
operative July 1, 1991, by its

Editor's Notes—For severabili

Cross References:

"Feepayer": Rev & Tax C § 4
Administration and collection
Due date for fees: Rev & Tax

Section

Official

FLORIDA STATUTES

1991

Prepared by
DIVISION OF STATUTORY REVISION
of the
Joint Legislative Management Committee

Published by the
STATE OF FLORIDA
TALLAHASSEE

cially imperative in light of the danger to the environment and resources.

(2) The Florida Coastal Protection Trust Fund is established, to be used by the department as a nonlapsing revolving fund for carrying out the purposes of ss. 376.011–376.21. To this fund shall be credited all registration fees, penalties, judgments, damages recovered pursuant to s. 376.121, other fees and charges related to ss. 376.011–376.21, and the excise tax revenues levied, collected, and credited pursuant to ss. 206.9935(1) and 206.9945(1)(a). Charges against the fund shall be in accordance with this section.

(3) Moneys in the fund that are not needed currently to meet the obligations of the department in the exercise of its responsibilities under ss. 376.011–376.21 shall be deposited with the Treasurer to the credit of the fund and may be invested in such manner as is provided for by statute. Interest received on such investment shall be credited to the fund, except as otherwise specified herein.

(4) Moneys in the Florida Coastal Protection Trust Fund shall be disbursed for the following purposes and no others:

(a) Administrative expenses, personnel expenses, and equipment costs of the department related to the enforcement of ss. 376.011–376.21 subject to s. 376.185.

(b) All costs involved in the prevention and abatement of pollution related to the discharge of pollutants covered by ss. 376.011–376.21 and the abatement of other potential pollution hazards as authorized herein.

(c) All costs and expenses of the cleanup, restoration, and rehabilitation of waterfowl, wildlife, and all other natural resources damaged by the discharge of pollutants, including the costs of assessing and recovering damages to natural resources, whether performed or authorized by the department or any other state or local agency.

(d) All provable costs and damages which are the proximate results of the discharge of pollutants covered by ss. 376.011–376.21.

(e) Loans to the Inland Protection Trust Fund created in s. 376.3071.

(f) The interest earned from investments of the balance in the Florida Coastal Protection Trust Fund shall be used first for funding the administrative expenses, personnel expenses, and equipment costs of the department relating to the enforcement of ss. 376.011–376.21. When the balance in the trust fund is greater than $30 million, the amount from interest earnings in excess of that needed for funding the department's costs previously identified shall be transferred by the department quarterly to the Save Our State Environmental Education Trust Fund created in the department; provided that the amount transferred shall not exceed $1.5 million annually.

(g) The funding of a grant program to coastal local governments, pursuant to s. 376.15(2)(b) and (c), for the removal of derelict vessels from the public waters of the state.

(h) The department may spend up to $1 million per year from the principal of the fund to acquire, design, train, and maintain emergency cleanup response teams and equipment located at appropriate ports throughout the state for the purpose of cleaning oil and other toxic materials from coastal waters. When the teams and equipment are not needed for these purposes they may be used for any other valid purpose of the department.

(i) To provide a temporary transfer of funds in an amount not to exceed $10 million to the Petroleum Exploration and Production Bond Trust Fund as set forth in s. 376.40.

(5) Any interest in lands acquired using moneys in the Florida Coastal Protection Trust Fund shall be held by the Trustees of the Internal Improvement Trust Fund, and such lands shall be acquired pursuant to the procedures set forth in s. 253.025.

(6) The department shall recover to the use of the fund from the person or persons causing the discharge or from the Federal Government, jointly and severally, all sums owed or expended from the fund, pursuant to s. 376.12(6), except that recoveries resulting from damage due to a discharge of a pollutant or other similar disaster shall be apportioned between the Florida Coastal Protection Trust Fund and the General Revenue Fund so as to repay the full costs to the General Revenue Fund of any sums disbursed therefrom as a result of such disaster. Requests for reimbursement to the fund for the above costs, if not paid within 30 days of demand, shall be turned over to the Department of Legal Affairs for collection.

History.—s. 11, ch. 70-244; s. 1, ch. 70-439; s. 2, ch. 71-137; s. 11, ch. 74-336; s. 3, ch. 80-382; s. 4, ch. 81-228; s. 82, ch. 83-310; s. 14, ch. 83-339; s. 1, ch. 83-353; s. 4, ch. 84-338; s. 6, ch. 85-252; ss. 3, 8, 34, ch. 86-159; s. 81, ch. 86-163; s. 30, ch. 87-225; s. 3, ch. 89-175; s. 5, ch. 89-358; s. 17, ch. 90-54; s. 16, ch. 90-243; s. 1, ch. 91-194.

376.12 Liabilities and defenses of terminal facilities and vessels.—

(1) Because it is the intent of ss. 376.011–376.21 to provide the means for rapid and effective cleanup and to minimize cleanup costs and damages, any vessel transporting pollutants as cargo, or its agents or servants, who permits or suffers a prohibited discharge or other polluting condition to take place within state boundaries shall be liable to the fund for all costs of cleanup or abatement, up to an amount not to exceed $10 million or $1,200 per gross ton for any such vessel of 3,000 gross tons or more, whichever is the greater, for any such vessel of less than 3,000 gross tons, $2 million or $1,200 per gross ton, whichever is greater, and for any other vessel, or its agents or servants, $500,000 or $600 per gross ton, whichever is greater. When the department can show that such discharge was the result of willful or gross negligence or willful misconduct within the privity or knowledge of the owner or operator or agent thereof, such owner or operator shall be liable to the fund for the full amount of such sums expended. When a discharge of pollutants occurs from a terminal facility, recovery of costs of abatement and cleanup shall be limited to an amount not to exceed $25 million, except that when the department can show that such discharge was the result of willful or gross negligence or willful misconduct within the privity or knowledge of the owner or operator, such owner or operator shall be liable to the fund for the full amount of such sums expended. In addition to the foregoing costs of cleanup,

owners and operators of vessels and terminal facilities shall be liable to the fund for all damages in accordance with the terms of subsections (5), (6), and (8) and ss. 376.11(6) and 376.121. The limits on liability of owners and operators of vessels and terminal facilities shall not apply if:

(a) The responsible party fails or refuses to report the incident as required by law and the responsible party knows or has reason to know of the incident; or

(b) The responsible party fails or refuses to provide reasonable cooperation and assistance requested by a state or federal on-scene coordinator in connection with cleanup activities. The responsible party must file an objection with the department if such party deems that cooperation or assistance requested by a state or federal on-scene coordinator is unreasonable. Such an objection must be filed with the department within 48 hours of the request. If such request is determined by the department to be unreasonable, the responsible party shall be reimbursed from the fund for expenses incurred in carrying out such request. The responsible party may not file an objection to a request based solely on the premise that the requested activity did not have satisfactory results.

(2) The owner or operator of any vessel transporting pollutants as cargo within state waters shall have financial security equal to or greater than the amount of liability for cleanup costs applicable to the vessel pursuant to this section. Such financial security may be in the form of a cash deposit held in escrow by the department in the Florida Coastal Protection Trust Fund, self-insurance, insurance, guaranty or surety, or any combination thereof, in a form acceptable to the department. Documented proof of such financial security shall be kept aboard the vessel at all times while in state waters and must be exhibited to any authorized law enforcement officer upon his request. Financial security shall not be canceled or withdrawn by the vessel owner or operator while the vessel is transporting pollutants as cargo within state waters. Any vessel owner or operator who violates the financial security provisions of this subsection commits a noncriminal infraction, shall be cited for such infraction, and shall be cited to appear before the county court. The civil penalty for such infraction is $25,000.

(a) Any vessel, the owner or operator of which has been cited under the provisions of this subsection, shall not depart state waters before the person cited either:

1. Pays the civil penalty; or
2. Posts a bond, which shall be equal in amount to the civil penalty. Such bond shall be forfeited if the person does not appear at the designated time and location for the court hearing.

(b) If the cited person appears before the county court, the court shall make a determination as to whether an infraction has been committed. If the court determines an infraction has been proven beyond a reasonable doubt, the court shall impose the civil penalty prescribed in this subsection and may also impose court costs and other applicable charges. If a person is found by the court to have committed the infraction, he may appeal that finding to the circuit court.

(c) The vessel owner or operator shall be responsible for the vessel and any and all costs and expenses resulting from the detainment of the vessel prior to payment of the civil penalty or the posting of the bond.

(d) Any vessel, the owner or operator of which has been cited under the provisions of this subsection, shall not depart state waters before the payment of the civil penalty or the posting of the bond. The department may authorize the master of the vessel to relocate the vessel if deemed to be in the best interest of the state. The master of such vessel which violates this subsection shall be charged with a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) If a vessel transporting pollutants as cargo within state waters is operating in violation of the financial security provisions of this section and it suffers a moderate or major discharge, the master of the vessel shall be charged with a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) The owner of a pollutant transported as cargo on any vessel suffering a discharge within state waters shall be liable for all cleanup costs within the applicable liability limits established under this section not paid for by the owner or operator of the vessel. However, the cargo owner shall not be liable under this subsection if the vessel owner or operator was in compliance with the financial security requirements of this section at the time of the discharge or failed to provide certified notification of the cancellation or withdrawal of financial security to the department and the cargo owner at least 72 hours before the vessel entered state waters.

(5) Any person claiming to have suffered damages as a result of a discharge of pollutants prohibited by s. 376.041 may, within 180 days after the date of such discharge, apply to the department for reimbursement from the Florida Coastal Protection Trust Fund. It shall be the responsibility of the claimant to provide the department with the required documentation concerning the damages suffered as a direct result of the discharge. T[illegible]e department shall prescribe appropriate forms and details for such application, which application shall include a provision requiring the applicant to make a sworn verification of the damage claim to the best of his knowledge. The director of the department may, upon petition and for good cause shown, waive the 180-day limitation for filing damage claims.

(a) The director shall establish the amount of damage award and shall certify the amount of the award and the name of the claimant to the T[illegible]asurer, who shall pay the award from the fund, sub[illegible]the provisions of subsection (9). If the claimant [illegible]th the established amount of damage, the settle[illegible]shall be binding upon both parties as to all issues [illegible] cannot be further attacked, collaterally or by separate action, in the future. If the total amount of such awards exceeds the amount available to any claimant or claimants from the fund, such claimant or claimants shall have the right to a pro rata share of all funds available in the fund until the total amount of awards is paid to the claimant or claimants.

(b) If either the claimant or the person determined by the director to be responsible for the discharge dis-agrees with the amount of the damage award, such person may request a hearing pursuant to s. 120.57. If a hearing is requested, the final order shall be issued by the Governor and Cabinet as head of the department.

(c) Each person's damage claims arising from a single occurrence shall be stated in one application. Damages omitted from any claim at the time the award is made shall be deemed waived.

(d) If a person damaged by a discharge of pollutant chooses to make a claim against the fund and accepts payment from, or a judgment against, the fund, then the department shall be subrogated to any cause of action that the claimant may have had, to the extent of such payment or judgment, and shall diligently pursue recovery on that cause of action pursuant to [2]subsection (8) and s. 376.11(6). In any such action, the amount of damages shall be proved by the department by submitting to the court a written report of the amounts paid or owed from the fund to claimants. Such written report shall be admissible in evidence, and the amounts paid from or owed by the fund to the claimants stated therein shall be irrebuttably presumed to be the amount of damages.

(e) The fund is absolutely liable for all proven damages against the fund as provided for in this section.

(f) The department shall be a necessary party to all administrative hearings and court proceedings under this section.

(6) It shall be the duty of the department in administering the fund diligently to pursue the reimbursement to the fund of any sum expended from the fund for, and any other state moneys not budgeted for but expended for, cleanup, abatement, and damages in accordance with the provisions of ss. 376.011-376.21. In any suit to enforce claims of the fund or any other claims by the state under ss. 376.011-376.21, it shall not be necessary for the department to plead or prove negligence in any form or manner. The department need only plead and prove that the prohibited discharge or other polluting condition occurred. The only defenses of a person alleged to be responsible for the discharge to an action for damages, costs, and expenses of cleanup, or abatement shall be to plead and prove that the occurrence was solely the result of any of the following or any combination of the following:

(a) An act of war.

(b) An act of government, either state, federal, or municipal.

(c) An act of God, which means only an unforeseeable act exclusively occasioned by the violence of nature without the interference of any human agency.

(d) An act or omission of a third party, without regard to whether any such act or omission was or was not negligent.

(7) The defenses provided in subsection (6) shall not apply with respect to a responsible party who fails or refuses:

(a) To report the discharge as required by law, when the responsible party knows or has reason to know of the discharge; or

(b) To provide reasonable cooperation and assistance requested by a state or federal on-scene coordinator in connection with cleanup activities. The responsible party must file an objection with the department if such party deems that cooperation or assista[nce] requested by a state or federal on-scene coordinat[or is] unreasonable. Such an objection must be filed with [the] department within 48 hours of the request. If [the] request is determined by the department to be un[rea]sonable, the responsible party shall be reimbursed [from] the fund for expenses incurred in carrying out [the] request. The responsible party may not file an objec[tion] to a request based solely on the premise that [the] requested activity did not have satisfactory results. [If the] responsible party complies with the requests of [the] state and federal on-scene coordinators and the res[pon]sible party later pleads and proves a valid defense [as] required by this section, all costs of cleanup sha[ll be] reimbursed to the responsible party from the fund.

(8) In the event the total awards against the f[und] shall exceed the present balance of the fund, the cl[aim]ants shall be paid from the future income of the fu[nd].

(9) In the event the total awards for a specific oc[cur]rence exceed the current balance of the fund, the im[me]diate award shall be paid on a prorated basis, and [the] claimants paid on a prorated basis shall be paid a [pro] rata share of all funds received by the fund until the [total] amount of the proven damages is paid to the claim[ant] or claimants. However, amounts collected by the [fund] from the prosecution of causes of action pursuant [to] paragraph (5)(d) and [2]subsection (8) shall be utilized [to] satisfy the claims as to which such prosecutions rel[ate] to the extent theretofore unsatisfied.

(10) Nothing contained herein shall be construed [to] limit the liability of vessels, terminal facilities, or the [fund] for damages.

(11) In addition to the civil penalty, the pilot and master of any vessel or person in charge of any term[inal] facility who fails to give immediate notification of a [dis]charge to the department or the nearest Coast Gu[ard] station commits a felony of the third degree, punish[able] as provided in s. 775.082, s. 775.083, or s. 775.084. H[ow]ever, a discharge of 1 gallon or less of gasoline fro[m a] vessel shall not be subject to felony penalties for fa[ilure] to comply with the state notification requirements of [this] subsection. After reporting a discharge, a vessel s[hall] remain in the jurisdiction of the department suffic[ient] time to prove financial responsibility for the dama[ges] resulting from the discharge. The pilot and master [of a] vessel which fails to remain in the jurisdiction of [the] department for a reasonable time after notice of a [dis]charge shall be guilty of a felony of the third deg[ree], punishable as provided in s. 775.082, s. 775.083, o[r s.] 775.084. In no event shall the department detain the v[es]sel longer than 12 hours after proving financial respo[nsi]bility. The department shall, by rule, require that the [reg]istrant designate a person at the terminal facility [who] shall be the person in charge of that facility for the p[ur]poses specified by this section.

History.—s. 12, ch. 70-244; s. 326, ch. 71-136; s. 12, ch. 74-336; ss. 4, [...] 80-382; s. 18, ch. 90-54; s. 1, ch. 91-135.

[1]**Note.**—*Substituted for a reference to "subsection (5)" to conform to the renu[mber]ing of subunits of s. 376.12 by s. 18, ch. 90-54, and to correct an error.*

[2]**Note.**—*Substituted for a reference to "subsection (4)" to conform to the renu[mber]ing of subunits of s. 376.12 by s. 18, ch. 90-54, and to correct an error.*

376.121 Liability for damages to natural resou[rces].— The Legislature finds that extensive damage to [the] state's natural resources is the likely result of a pollu[tant] spill and that it is essential that the state adequately assess and recover the cost of such damages from responsible parties. It is the state's goal to recover the costs of restoration from the responsible parties and to restore damaged natural resources to their prespill condition. In many instances, however, restoration is not technically feasible. In such instances, the state has the responsibility to its citizens to recover the cost of all damages to nonrestorable natural resources. To ensure that the public does not bear a substantial loss as a result of the destruction of nonrestorable natural resources, a compensation schedule shall be used to assess the cost of damages to such resources.

(1) The department shall assess and recover from responsible parties the cost of damages for the injury or destruction of natural resources, including, but not limited to, the death or injury of living things and damage to or destruction of habitat, resulting from pollutant discharges prohibited by s. 376.041. Damages, and any costs of assessing and recovering damages, received by the department shall be deposited into the Florida Coastal Protection Trust Fund pursuant to s. 376.12 and disbursed according to s. 376.11(4)(a)-(d). Whoever violates, or causes to be violated, s. 376.041 shall be liable to the state and shall pay the state the sum necessary to:

(a) Restore any injured or destroyed natural resource to its condition prior to the spill, to the extent technically feasible. Restoration shall include the cost to restock waters and coastal areas, replenish or replace natural resources, and otherwise restore any coastal waters, estuaries, tidal flats, beaches, lands adjoining the seacoast of the state, and submerged lands to their condition prior to the spill.

(b) Compensate for damages to nonrestorable natural resources in accordance with the compensation schedule authorized in paragraph (2)(b).

The determination of whether restoration is technically feasible, or whether compensation shall be made pursuant to the compensation schedule adopted pursuant to paragraph (2)(b), shall be made by the department for each species of animal and each type of habitat damaged or destroyed by the pollutant spill.

(2) The department shall, with the assistance and cooperation of the Game and Fresh Water Fish Commission and the Department of Environmental Regulation, adopt rules by July 1, 1992, to:

(a) Establish guidelines for determining the restoration value of injured or destroyed natural resources, including all living things except human beings, and coastal waters, estuaries, tidal flats, beaches, lands adjoining the seacoast of the state, and submerged lands. These guidelines shall be established using generally accepted and cost-effective resource valuation methods and restoration techniques.

(b) Establish a compensation schedule for assessing damages to nonrestorable natural resources with standards for determining the cost of any lost ecological, consumptive, intrinsic, recreational, scientific, economic, aesthetic, and educational values of such injured or destroyed resources. Nonrestorable natural resources may include all living things except human beings, coastal waters, estuaries, tidal flats, beaches, lands adjoining the seacoasts of the state, and submerged lands. The amount of compensation assessed under this schedule shall be no less than $1 per gallon of pollutant spilled or equivalent unit as determined by the department or per square foot of habitat impacted, and no greater than $1,000 per gallon of pollutant spilled or equivalent unit as determined by the department or per square foot of habitat impacted. To establish the compensation schedule, the department shall take into account:

1. Any amounts paid for partial restoration which offset the amounts which should be paid pursuant to the compensation schedule.

2. Characteristics of the pollutant spilled, such as the toxicity, dispersibility, solubility, and persistence, that may affect the severity of the effects on the receiving environment, living things, and recreational and aesthetic resources.

3. The type and sensitivity of nonrestorable natural resources affected by a spill, as determined by such factors as:

a. The location of a spill.

b. Habitat and living resource sensitivity.

c. Seasonal distribution of living resources.

d. Recreational use or aesthetic importance.

e. The proximity of a spill to important habitats for animals and living things, or to species listed as threatened, endangered, or of special concern under state or federal law.

f. Other ecological, educational, consumptive, intrinsic, scientific, and economic values of natural resources.

4. Actions taken by the party who spilled the pollutant, or any party liable for the spill, that:

a. Demonstrate a recognition and affirmative acceptance of responsibility for the spill, such as the immediate removal of the pollutant and the relative amount of pollutant removed from the environment; or

b. Enhance or impede the detection of the spill, the determination of the amount of pollutant spilled, or the extent of damage, including the unauthorized removal of evidence such as affected fish or wildlife.

(3) When assessing the amount of damages to natural resources, the department shall be assisted by representatives of the Department of Environmental Regulation, if requested by the department, as well as other state agencies and local governments which would enhance the department's damage assessment. The Game and Fresh Water Fish Commission shall assist the department in the assessment of damages to wildlife impacted by a pollutant discharge and shall assist the department in recovering the costs of such damages.

(4)(a) Moneys recovered by the department for damages to restorable natural resources shall be used for the restoration of such damaged natural resources.

(b) Compensation recovered by the department for damages to nonrestorable natural resources shall be expended only for the following purposes:

1. Developing restoration and enhancement techniques for natural resources.

2. Investigating methods for improving and refining techniques for containment, abatement, and removal of

pollutants from the environment, especially from mangrove forests, corals, seagrasses, benthic communities, rookeries, nurseries, and other habitats which are unique to Florida's coastal environment.

3. Developing and updating the "Sensitivity of Coastal Environments and Wildlife to Spilled Oil in Florida" atlas.

4. Investigating the long-term effects of pollutant spills on natural resources, including pelagic organisms, critical habitats, and marine ecosystems.

5. Developing an adequate wildlife rescue and rehabilitation program.

6. Expanding and enhancing the state's pollution prevention and control education program.

7. Restoring natural resources previously impacted by pollutant spills, but never completely restored.

8. Funding alternative projects selected by the Board of Trustees of the Internal Improvement Trust Fund. Any such project shall be selected on the basis of its anticipated benefits to the residents of this state who previously benefited from the injured or destroyed nonrestorable natural resources.

History.—s. 19, ch. 90-54.

376.13 Emergency proclamation; Governor's powers.—

(1) Whenever any emergency exists or appears imminent, arising from the discharge of oil, petroleum products or their byproducts, or any other pollutants, the Governor shall by proclamation declare the fact and that a state of emergency exists in any or all sections of the state. If the Governor is unavailable, the Lieutenant Governor shall, by proclamation, declare the fact and that a state of emergency exists in any or all sections of the state. A copy of such proclamation shall be filed with the Department of State.

(2) In performing his duties under this section, the Governor is authorized and directed to cooperate with all departments and agencies of the Federal Government, the offices and agencies of other states and foreign countries and the political subdivisions thereof, and private agencies in all matters pertaining to an emergency as described herein.

(3) In performing his duties under this section, the Governor is further authorized and empowered:

(a) To make, amend, and rescind the necessary orders, rules, and regulations to carry out this section within the limits of the authority conferred upon him and not inconsistent with the rules, regulations, and directives of the President of the United States or of any federal department or agency having specifically authorized emergency functions.

(b) To delegate any authority vested in him under this section and to provide for the subdelegation of any such authority.

(4) Whenever the Governor is satisfied that an emergency no longer exists, he may terminate the proclamation by another proclamation affecting the sections of the state covered by the original proclamation, or any part thereof. The proclamation shall be published in such newspapers of the state and posted in such places as the Governor, or any person acting in that capacity, deems appropriate.

History.—s. 13, ch. 70-244; s. 1, ch. 70-439; s. 39, ch. 83-334.

376.14 Terminal facilities and vessels; financial responsibility.—

(1) Each owner or operator of a terminal facility or vessel, including any barge, using any port in Florida shall be required to establish and maintain evidence of financial responsibility pursuant to federal laws and regulations. Such evidence of financial responsibility shall be the only evidence required by the department that such registrant or vessel has the ability to meet the liabilities which may be incurred under ss. 376.011-376.21.

(2) Any claim brought pursuant to ss. 376.011-376.21 by the fund or any damaged party may be brought directly against the bond, the insurer, or any other person providing a terminal facility or vessel with evidence of financial responsibility.

(3) Each owner or operator of a terminal facility or vessel subject to the provisions of ss. 376.011-376.21 shall designate a person in the state as his legal agent for service of process under ss. 376.011-376.21, and such designation shall be filed with the Department of State. In the absence of such designation, the Secretary of State shall be the designated agent for purposes of service of process under ss. 376.011-376.21.

History.—s. 14, ch. 70-244; s. 1, ch. 70-439; s. 13, ch. 74-336.

376.15 Derelict vessels; removal from public waters.—

(1) It is unlawful for any person, firm, or corporation to store or leave any vessel in a wrecked, junked, or substantially dismantled condition or abandoned upon any public waters or at any port in this state without the consent of the agency having jurisdiction thereof or docked at any private property without the consent of the owner of the private property.

(2)(a) The department is hereby designated as the agency of the state authorized and empowered to remove any derelict vessel as described in subsection (1) from public waters.

(b) The department may establish a program to provide grants to coastal local governments for the removal of derelict vessels from the public waters of the state. The program shall be funded from the Florida Coastal Protection Trust Fund. Notwithstanding the provisions in [1]s. 216.181(8), funds available for grants may only be authorized by appropriations acts of the Legislature.

(c) The department shall adopt by rule procedures for submitting a grant application and criteria for allocating available funds. Such criteria shall include, but not be limited to, the following:

1. The number of derelict vessels within the jurisdiction of the applicant.

2. The threat posed by such vessels to public health or safety, the environment, navigation, or the aesthetic condition of the general vicinity.

3. The degree of commitment of the local government to maintain waters free of abandoned and derelict vessels and to seek legal action against those who abandon vessels in the waters of the state.

(d) This section shall constitute the authority of the department for such removal, but is not intended to be in contravention of any applicable federal act.

(e) The Department of Legal Affairs shall represent the Department of Natural Resources in such actions.

:S
STATUTES
ANNOTATED

NEW JERSEY STATUTES ANNOTATED

Title 58

WATERS AND WATER SUPPLY

Title 59

CLAIMS AGAINST PUBLIC ENTITIES

Appendix A

EMERGENCY AND TEMPORARY ACTS

ST. PAUL, MINN.
WEST PUBLISHING CO.

ministrator is hereby authorized and empowered to compro
and settle the amount sought for costs and damages from
discharger or other responsible party and any penalty ar
under this act.

L.1976, c. 141, § 18.

[1] 58:10-23.11g.

Historical Note

Prior Laws: C. 58:10-23.8 (L.1971, c. 173, § 8).

Effective date, see Historical under § 58:10-23.11.

58:10-23.11r Awards in excess of current balanc fund; payment on pro rata basis; orities

In the event that the total awards for a specific occurrenc ceed the current balance of the fund, the immediate award be paid on a prorated basis, and all claimants paid on a pror basis shall be paid, as determined by the administrator, a rata share of all funds received by the fund until the amount of the proven damages is paid to the claimant or cl ants. The administrator may also provide through regulatio fix the priority for the payment of claims based on extr hardship.

L.1976, c. 141, § 19.

Historical Note

Effective date, see Historical Note under § 58:10-23.11.

58:10-23.11s Actions against bond, insurer or other son providing evidence of financial sponsibility

Any claims for costs of cleanup, civil penalties or damage the State, and any claim for damages by any injured pe may be brought directly against the bond, the insurer, or other person providing evidence of financial responsibility.

L.1976, c. 141, § 20.

Historical Note

Effective date, see Historical Note under § 58:10-23.11.

58:10-23.11t Rules and regulations

The commissioner, the State Treasurer and the directo spectively, are authorized to adopt, amend, repeal, and e

NEW JERSEY STATUTES ANNOTATED

Official Classification

Title 58

Waters and Water Supply

Title 59

Claims Against Public Entities

Appendix A

Emergency and Temporary Acts

1991

Cumulative Annual Pocket Part

[For Use In 1991–1992]

Replacing 1990 Pocket Part in back of volume

INCLUDING LAWS
through the
1990 First Annual Session

ST. PAUL, MINN.
WEST PUBLISHING CO.

en-
ter
No.
No.
No.

spending, and same is true of state's contribution of ten percent or more of costs of remedial action to qualify for federal funding and financing of remedial activities on temporary basis pending super fund reimbursement. Exxon Corp. v. Hunt, 4 N.J.Tax 294 (1982) affirmed 190 N.J.Super. 131, 462 A.2d 193, affirmed 97 N.J. 526, 481 A.2d 271, affirmed in part, reversed in part on other grounds 106 S.Ct. 1103, 475 U.S. 355, 89 L.Ed.2d 364, appeal after remand 109 N.J. 110, 534 A.2d 1.

3. Preemption

Use of New Jersey Spill Fund to compensate third parties for damage resulting from hazardous substance discharges, to pay personnel and equipment costs, to administer the fund, and to conduct research is beyond the scope of Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C.A. § 9614(c)], and is not preempted by section of the Act [42 U.S.C.A. § 9614(c)] prohibiting state funds that cover Superfund-eligible expenses. Exxon Corp. v. Hunt, N.J.1986, 106 S.Ct. 1103, 475 U.S. 355, 89 L.Ed.2d 364, appeal after remand 109 N.J. 110, 534 A.2d 1.

Act,
dous
ation
pora-
mer-
to be
Envi-
2 N.J.
ned as
3 A.2d

Use of New Jersey Spill Fund to finance state governmental cleanup, except for 10% state share of remedial costs mandated by Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C.A. § 9614(c)], and to reimburse third parties for cleanup costs is preempted by the Act, so long as such efforts occur at sites that are eligible for Superfund financing according to terms of National Contingency Plan. Exxon Corp. v. Hunt, N.J.1986, 106 S.Ct. 1103, 475 U.S. 355, 89 L.Ed.2d 364, appeal after remand 109 N.J. 110, 534 A.2d 1.

minis-
reim-
d other
ive En-
Liabili-
ll fund

for class by public advocate

Advocate may act to assert such claims as are ns who, in the opinion of the Public Advocate, may recovery of damages or cleanup costs provided by or this class from the fund shall be distributed by department after certification by the administrator. Public Advocate to act on behalf of such class shall be asserted by such class or individuals under the

es
note under

und; acquisition of subrogation of rights; action nsible party for reimbursement

1. **Persons entitled to indemnity**

There was no constitutional inhibition against retroactive application of 1980 amendment to Spill Compensation and Control Act to impose liability against operator of mercury processing plant for its prior discharges of mercury into waterway of state, directly via waste effluents and indirectly via

groundwater leaching and surface water runoff as the result of its dumping mercury-contaminated waste on industrial site. State, Dept. of Environmental Protection v. Ventron Corp., 182 N.J.Super. 210, 440 A.2d 455 (A.D.1981) affirmed as modified on other grounds 94 N.J. 473, 468 A.2d 150.

Under the Spill Compensation and Control Act, entities responsible for discharge of hazardous substances are not entitled to indemnification from the spill compensation fund; thus corporations which were responsible for discharge of mercury into state waterways were not entitled to be indemnified from the fund. Id.

2. Payment prior to cleanup

Department of Environmental Protection's directive requiring alleged dischargers to pay for construction of alternative water supply required by local groundwater contamination was implicitly within broad authority granted DEP under the Spill Compensation and Control Act and under the DEP's authorizing legislative, even though the Spill Act directly authorized DEP only to remove waste and bring cost recovery action against responsible parties or to direct responsible party to remove waste. Matter of Kimber Petroleum Corp., 110 N.J. 69, 539 A.2d 1181 (1988) appeal dismissed 109 S.Ct. 358, 488 U.S. 935, 102 L.Ed.2d 349.

58:10-23.11s. Actions against bond, insurer or other person providing evidence of financial responsibility

Notes of Decisions

1. **Construction and application**

Section (§ 58:10-23.11v) of Spill Compensation Fund Act providing that nothing in the Act shall be deemed to preclude pursuit of any other civil or injunctive remedy by any person is applicable where neither enforcement provision (§ 58:10-23.11q) relating to arbitration awards nor this section relating to direct claims permitted against persons who provide "financial responsibility" for those licensed under the Act, are applicable. Kessler v. Tarrats, 191 N.J.Super. 273, 466 A.2d 581 (Ch.1983) affirmed 194 N.J.Super. 136, 476 A.2d 326.

58:10-23.11t. Rules and regulations

Law Review Commentaries

Hazardous waste regulation: A prescription for clean water. Hon. Jerry Fitzgerald English (1983) 13 Seton Hall L.Rev. 229.

Notes of Decisions

Validity of regulations 3

3. **Validity of regulations**

Adoption of regulations governing expenditures under New Jersey Spill Fund and Compensation Act (§ 58:10-23.11i et seq.), after erroneously treating plaintiffs' hand-delivered written comments as untimely, did not comply with Administrative Procedure Act (§ 52:14B-1 et seq.) and thus regulations were invalid, despite Department of Treasury's contention that it had "become familiar" with plaintiffs' position before proposing regulations. Exxon Corp. v. Hunt, 190 N.J.Super. 131, 462 A.2d 193 (A.D.1983) affirmed 97 N.J. 526, 481 A.2d 271, affirmed in part, reversed in part on other grounds 106 S.Ct. 1103, 475 U.S. 355, 89 L.Ed.2d 364, appeal after remand 109 N.J. 110, 534 A.2d 1.

58:10-23.11u. Giving or causing to be given false information or other violations; penalty; enforcement; forfeiture of conveyances

a. ~~Any person who knowingly gives or causes to be given any false information as a part of, or in response to, any claim made pursuant to this act for cleanup costs, removal costs, direct damages or indirect damages resulting from a discharge who otherwise violates any of the provisions of this act or any rule promulgated thereunder shall be liable to a penalty of not more than $50,000.00 for each offense, to be collected in a summary proceeding under "the penalty enforcement law" (N.J.S. 2A:58-1 et seq.) or in a court of competent jurisdiction wherein injunctive relief has been requested. The Superior Court shall have jurisdiction to enforce "the penalty enforcement law." If the violation is of a continuing nature, each day during which it continues shall constitute an additional, separate and distinct offense.~~

~~b. If any person violates any of the provisions of this act, the department may institute civil action in the Superior Court for injunctive relief to prohibit and prevent the continuation of the violation or violations and said court may proceed in a summary manner.~~

c.

CLS™

New York Consolidated Laws Service

Cumulative Supplement

Issued December 1991

Volume 22

Multiple Dwelling Law to
Not-for-Profit Corporation Law
(§§ 1–600)

Containing all changes in the laws enacted through and including Chapter 722 of the 1991 Session of the Legislature.

By the Editorial Staff of the Publisher

For use during 1991-1992

Lawyers Cooperative Publishing
Aqueduct Building, Rochester, New York 14694

IT-68

§ 190. Claims against insurers

Any claims for costs of cleanup and removal, civil penalties or damages by the state and any claim for damages by any injured person, may be brought directly against the bond, the insurer, or any other person providing evidence of financial responsibility.

HISTORY:

Add, L 1977, ch 845, eff April 1, 1978.

RESEARCH REFERENCES AND PRACTICE AIDS:

55 NY Jur 2d, Environmental Rights and Remedies § 119.

CASE NOTES

State could maintain action against insurance company under CLS Nav § 190 even though in earlier action Special Term had determined that insurer was not liable to defend or indemnify insured—since state was not party to first action neither collateral estoppel nor "law of the case" doctrine was applicable. State v Travelers Indem. Co. (1986, 3d Dept) 120 App Div 2d 251, 508 NYS2d 698.

Special Term erred in dismissing state's suit directly against insurance company for cost of cleaning up petroleum leak traced to gas station owned by one of company's insureds since strict liability provisions of CLS Nav § 190 authorizing action directly against insurance companies were permissible and recovery would not be in nature of punitive damages or violative of public policy. State v Travelers Indem. Co. (1986, 3d Dept) 120 App Div 2d 251, 508 NYS2d 698.

Plaintiff, a company in the business of cleaning up petroleum spills hired by the State Department of Transportation to contain and clean up liquid asphalt emulsion from a tanker owned by defendant, could sue defendant directly to recover the cost of cleanup without first making a claim against the New York Environmental Protection and Spill Compensation Fund; however, a plaintiff could not sue defendant's insurer directly to recover the cost of cleanup. Domermuth Petroleum Equipment & Maintenance Corp. v Gorman Bros., Inc. (1985) 127 Misc 2d 323, 485 NYS2d 705.

State's action under CLS Nav § 190 to recover money expended for oil spill cleanup from discharger's insurer was governed by CLS CPLR § 213 6-year limitations period and accrued upon last expenditure by state for cleanup; by removing requirement on state to obtain judgment against insured prior to suit against insurer in oil spill cases, CLS Nav § 190 merely establishes new remedy and thus is not governed by CLS CPLR § 214, since test for applicability of CLS CPLR § 214 is whether liability is one which did not exist at common law, or would not exist but for statute. State v INA Underwriters Ins. Co. (1986) 133 Misc 2d 430.

State has no cause of action for recovery of penalty against insurance company for not promptly paying for damage caused by oil spill attributable to its insured; CLS Nav § 192 is designed to encourage compliance with CLS Nav Art 12 which imposes obligations upon handlers of petroleum, not their insurance companies; furthermore, insurer does not "knowingly" give "false information" by resisting payment of claim for cleanup and removal costs, and Article 12 contains no provision obligating discharger's insurer to promptly pay under its policy. State v INA Underwriters Ins. Co. (1986) 133 Misc 2d 430.

§ 190-a. Application of article

For purposes of cleanup and removal of any public or private ground water supply system contaminated by a discharge occurring either before or after the effective date of article twelve of this chapter, all relevant provisions of article twelve of this chapter shall apply.

HISTORY:

Add, L 1980, ch 649, § 4, eff June 30, 1980.

RESEARCH REFERENCES AND PRACTICE AIDS:

55 NY Jur 2d, Environmental Rights and Remedies § 116.

Law Reviews:

1984 Survey of New York Law. 36 Syracuse Law Review p. 249.

WEST'S
LOUISIANA STATUTES
ANNOTATED

REVISED STATUTES

Official Classification

Sections 22:611 to 22:730

Volume 15A

1992

Cumulative Annual Pocket Part

Replacing 1991 pocket part in back of volume

For Title 22, Revision effective January 1, 1993— See Special Pamphlet

Includes laws through the 1991 Third Extraordinary Session

ST. PAUL, MINN.
WEST PUBLISHING CO.

27

addition; "coverage" as used in policy referred to nature of risks insured against and not to parties insured. King v. Employers Nat. Ins. Co., C.A. 5 (La.)1991, 928 F.2d 1438, modified on rehearing in part.

77. —— Theft, terms in policy

Where theft exclusion provision of homeowner's policy stated that the policy did not apply "to loss away from the described premises" of property "while in any dwelling or premises thereof, owned, rented or occupied by an insured, except while an insured is temporarily residing therein," exclusion related to losses away from premises that were not described in the policy but did not relate to premises specifically listed as covered in the contract of insurance; therefore, where homeowner's policy stipulated that insured's two residences were both covered under the policy, insured was not required to actually be in residence at burglarized home when loss occurred in order for loss to be within policy coverage. Hartel v. Continental Ins. Co., App.1978, 357 So.2d 55.

91. Construction against insurer—In general

Under Louisiana law, policy ambiguities, especially with respect to exclusions, are to be resolved in favor of insured. Huey T. Littleton Claims, Inc. v. Employers Reinsurance Corp., C.A.5 (La.)1991, 933 F.2d 337, rehearing denied.

108. —— Employees, persons covered

State legislator was a "full-time employee" within meaning of state employees life insurance policy, notwithstanding insurer's claim that legislator did not work a minimum 30 hours per week and therefore did not qualify for coverage under policy rider defining a "full-time employee" as one working not less than 30 hours per week. Jetson v. CNA Ins. Companies, App. 1 Cir.1988, 536 So.2d 569, writ denied 537 So.2d 212.

118. —— Business pursuits, property or interests covered

Multiperil policy which insured savings and loan association only against such personal injury claims as arose out of its ownership, maintenance or use of insured premises, or out of its business operations at or from insured premises, did not cover claim arising out of injuries that third party sustained on property acquired by association by act of dation en paiement from one of its debtors; association never notified insurer that it wished to insure property acquired. Van Matre v. Teche Federal Sav. and Loan Ass'n, App. 1 Cir.1988, 532 So.2d 517.

125. Parties to contract and relation between them

Gulf Oil Corp. v. Mobile Drilling Barge or Vessel Margaret, D.C.1975, 441 F.Supp. 1 [Main Volume] affirmed 565 F.2d 958.

§ 655. Liability policy; insolvency or bankruptcy of insured and inability to effect service of citation or other process; direct action against insurer

A. No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person, or his or her survivors, mentioned in Civil Code Art. 2315, or heirs against the insurer.

B.(1) The injured person or his or her survivors or heirs mentioned in Subsection A, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and, such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Code of Civil Procedure Art. 42 only. However, such action may be brought against the insurer alone only when:

(a) The insured has been adjudged a bankrupt by a court of competent jurisdiction or when proceedings to adjudge an insured a bankrupt have been commenced before a court of competent jurisdiction;

(b) The insured is insolvent;

(c) Service of citation or other process cannot be made on the insured;

(d) When the cause of action is for damages as a result of an offense or quasi-offense between children and their parents or between married persons; or

(e) When the insurer is an uninsured motorist carrier.

—— Employees, persons covered

te legislator was a "full-time employee" ı meaning of state employees life insurance ·, notwithstanding insurer's claim that leg- r did not work a minimum 30 hours per and therefore did not qualify for coverage · policy rider defining a "full-time employ- 3 one working not less than 30 hours per Jetson v. CNA Ins. Companies, App. 1 88, 536 So.2d 569, writ denied 537 So.2d

—— Business pursuits, property or interests covered

tiperil policy which insured savings and ssociation only against such personal inju- ims as arose out of its ownership, mainte- or use of insured premises, or out of its ss operations at or from insured premises, t cover claim arising out of injuries that party sustained on property acquired by ation by act of dation en paiement from f its debtors; association never notified r that it wished to insure property ac- . Van Matre v. Teche Federal Sav. and Ass'n, App. 1 Cir.1988, 532 So.2d 517.

Parties to contract and relation between them

f Oil Corp. v. Mobile Drilling Barge or l Margaret, D.C.1975, 441 F.Supp. 1 [Main ıe] affirmed 565 F.2d 958.

cy of insured and inability to effect rect action against insurer

all be issued or delivered in this state, solvency or bankruptcy of the insured lamages for injuries sustained or loss any judgment which may be rendered which shall have become executory, ncy of the insured, and an action may ts of the policy by the injured person, rt. 2315, or heirs against the insurer.

or heirs mentioned in Subsection A, at ıinst the insurer within the terms and ıt against the insurer alone, or against in the parish in which the accident or n could be brought against either the of venue prescribed by Code of Civil / be brought against the insurer alone

y a court of competent jurisdiction or t have been commenced before a court

e made on the insured;

a result of an offense or quasi-offense ırried persons; or

arrier.

(2) This right of direct action shall exist whether or not the policy of insurance sued upon was written or delivered in the state of Louisiana and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the state of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if such provisions are not in violation of the laws of this state.

C. It is the intent of this Section that any action brought under the provisions of this Section shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state.

D. It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons and their survivors or heirs to whom the insured is liable; and, that it is the purpose of all liability policies to give protection and coverage to all insureds, whether they are named insured or additional insureds under the omnibus clause, for any legal liability said insured may have as or for a tortfeasor within the terms and limits of said policy.

Amended by Acts 1988, No. 934, § 1, eff. Jan. 1, 1989; Acts 1989, No. 117, § 2.

Comment—1989

This Section has been amended to provide that the reference to C.C.P. Article 42 does not include the exceptions under C.C.P. Articles 71 through 85.

Historical and Statutory Notes

1988 Legislation

The 1988 amendment rewrote this section (see main volume for prior text).

Section 2 of Acts 1988, No. 934 provides:

"This Act shall become effective on January 1, 1989, and shall apply to causes of action accruing on or after that date."

In this section as amended in 1988, a comma was inserted in subsec. A following "survivors"; and commas were inserted in both subsecs. B and D following "and"; the existing material in subsec. B was designated as paragraph B(1); and existing pars. B(1) to B(5) were redesignated as subpars. B(1)(a) to B(1)(e) respectively, with attendant capitalization and punctuation changes, all on authority of R.S. 24.253.

1989 Legislation

The 1989 amendment, in the introductory paragraph of par. B(1), inserted "only" following "Code of Civil Procedure Art. 42" at the end of the first sentence.

Acts 1989, No. 117, § 2 amended par. B(1) of this section. Section 1 of Act 117 amended C.C.P. arts. 73, 77, 593, 2416, 2633, and 4653. A Comment to this section as set forth in § 2 of Act 117 was revised on authority of R.S. 24:253, due to legislative changes in the statute text set forth in Act 117 following the drafting of the original 1989 Comment. Section 3 of Act 117 noted that the Comments in the Act were not part of the law and were not enacted into law by virtue of their inclusion in the Act.

Forms

Petition to deposit policy proceeds and implead rival claimants, see LSA–C.C.P. Form 2221.

Law Review Commentaries

Admiralty law symposium on limitation of liability: The limitation fund and its distribution. John T. Biezup and Timothy J. Abeel, 53 Tulane L.Rev. 1185 (1979).

Applicability of direct action statute and foreign insurers statutory consent to suit. 52 Tulane L.Rev. 610 (1978).

Augmented awards: the efficient evolution of punitive damages. Thomas C. Galligan, Jr., 51 La.L.Rev. 3 (1990).

Civil procedure—work of Louisiana appellate courts, 1977–1978. Frank L. Maraist, 39 La. L.Rev. 903 (1979).

Comparative fault and multiple party litigation in Louisiana: A sampling of the problems. Martha Chamallas, 40 La.L.Rev. 373 (1980).

Comparative negligence: Its development in the United States and its present status in Louisiana. John W. Wade, 40 La.L.Rev. 299 (1980).

CHAPTER

91-026

JT COMM. LEGISLATIVE SERVICES
LAW REVISION OFFICE

91 -- H 6019 SUBSTITUTE A

Rhode Island

R8439/SUB A

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 1991

AN ACT

RELATING TO WATERS AND NAVIGATION - CONTAMINANTS

Introduced By: Representative Christopher Boyle

Date Introduced: February 13, 1991

Referred To: Joint Committee on Environment and Energy

It is enacted by the General Assembly as follows:

SECTION 1. Section 46-12.4-1 of the General Laws in Chapter 46-12.4 entitled "The Contaminants from Seagoing Vessels Act" is hereby amended to read as follows:

46-12.4-1. ~~Contaminants from seagoing vessels. --~~ Contaminants from tank vessels. -- The owners, operators and/or their agents of any ~~oil--tanker~~ tank vessel, as defined in section 1001 (34) of public law 101-380 as passed by the United States Congress, which transports petroleum products for commercial purposes ~~and which is a seagoing vessel as defined in section 46-9-2~~ entering the waters or waterways of this state and transporting any petroleum product shall possess a valid certificate of financial responsibility issued by the U.S. Coast Guard * or, for vessels less than 300 gross tons, other evidence of financial responsibility in accordance with the Federal Oil Pollution Act Sections 1004 1016 as ~~the certification of a performance bond or other~~ evidence of financial responsibility applicable to ~~or liability insurance with the director of the department of environmental management in the amount of twelve hundred ($1200) dollars per gross ton of weight of the vessel and its cargo to insure~~ payment of any judgment entered on behalf of the state of Rhode Island and Providence Plantations or any

Committee amendment 3/21/91

---

*

or for vessels less than 300 gross tons, or other evidence of financial responsibility in accordance with the Federal Oil Pollution Act Sections 1004 and 1016 person aggrieved pursuant to the provisions of chapter 12.3 of title 46. ~~In the event the vessel causes damage to the environment, the bond shall be forfeited or payment on the insurance policy made to the full extent of the costs incurred by the state and/or other persons to rectify and clean up the damage to the environment and natural resources of the state and to the extent of any award made pursuant to the provisions of chapter 12.3 of title 46 or any other law for the compensation of persons sustaining injury to the person, damage to their property and/or economic injury resulting therefrom.~~ Any seagoing tank vessel ~~as defined in section 46-9-2~~ entering waters or waterways of this state without such valid certificate of financial responsibility

or, for vessels less than 300 gross tons, other evidence of financial responsibility in accordance with the Federal Oil Pollution Act Sections 1004 and 1016

coverage shall be fined not more than one hundred thousand dollars ($100,000) or twice the amount required to rectify any environmental damage caused by said vessel, whichever is greater.

committee amendment 2/21/91

The provisions of this section shall not be construed to apply to the owner or operator of a terminal facility situated within the state, which has no ownership interest in the seagoing tank vessel merely because said terminal is the destination of the vessel.

The department of environmental management is hereby authorized to promulgate rules and regulations necessary to implement the provisions of this section.

SECTION 2. This act shall take effect upon passage.

=====
R9439/SUB A
=====

Vernon's

TEXAS CODES ANNOTATED

Volume 1

NATURAL RESOURCES CODE

Sections 1.001 to 80

1992

Cumulative Annual Pocket Part

Replacing 1991 Pocket Part in back of volume

For Use In 1991–1992

Includes
Laws through the 1991 Second Called Session of the 72nd Legislature
Court Constructions through 810 S.W.2d 499

ST. PAUL, MINN.
WEST PUBLISHING CO.

27

(A) send the amount of the penalty to the commissioner for placement in an escrow account; or

(B) post with the commissioner a supersedeas bond in a form approved by the commissioner for the amount of the penalty, the bond to be effective until judicial review of the order or decision is final.

(3) A person who fails to comply with Subdivision (2) of this subsection waives the right to judicial review. On failure to comply with the order or Subdivision (2) of this subsection, the commissioner may refer the matter to the attorney general for collection and enforcement.

(4) Judicial review of the order or decision of the commissioner shall be under Section 19, Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes).

(h)(1) If a penalty is reduced or not assessed, the commissioner shall:

(A) remit to the person charged the appropriate amount of any penalty payment plus accrued interest; or

(B) execute a release of the bond if a supersedeas bond has been posted.

(2) Accrued interest on amounts remitted by the commissioner shall be paid for the period beginning on the date the penalty is paid to the commissioner and ending on the date the penalty is remitted at a rate equal to the rate charged on loans to depository institutions by the New York Federal Reserve Bank.

(i) Payment of an administrative penalty under this section shall preclude, in any action brought under this chapter, collection of a civil penalty for the violation specified in the commissioner's order.

Added by Acts 1991, 72nd Leg., ch. 10, § 1, eff. March 28, 1991.

§ 40.255. Actions

(a) The commissioner may seek injunctive relief to prevent a violation of this chapter from continuing or occurring.

(b) All actions on behalf of the state to enforce this chapter or recover civil penalties, unpaid administrative penalties, claims of the fund, response costs, and damages arising under this chapter shall be brought by the attorney general at the direction of the commissioner. In any such action in which the state prevails, the state shall be entitled to recover reasonable attorney fees.

(c) The commissioner may bring suit directly against any bond, insurer, guarantor, or person providing evidence of financial responsibility to a person liable for costs, damages, or other sums under this chapter.

(d) Each owner or operator of a terminal facility or vessel subject to the provisions of this chapter shall designate a person in the state as his legal agent for service of process, and such designation shall be filed with the secretary of state. In the absence of such designation, the secretary of state shall be the designated agent for purposes of service of process under this chapter.

Added by Acts 1991, 72nd Leg., ch. 10, § 1, eff. March 28, 1991.

§ 40.256. Individual Cause of Action

The remedies in this chapter are cumulative and not exclusive. This chapter does not require pursuit of any claim against the fund as a condition precedent to any other remedy, nor does this chapter prohibit any person from bringing an action at common law or under any other law not inconsistent with this chapter for response costs or damages resulting from a discharge or other condition of pollution covered by this chapter. No such action shall collaterally estop or bar the commissioner in any action brought by the commissioner under this chapter.

Added by Acts 1991, 72nd Leg., ch. 10, § 1, eff. March 28, 1991.

CODE OF VIRGINIA

1950

1991 Cumulative Supplement

ANNOTATED

Prepared under the Supervision of

The Virginia Code Commission

BY

The Editorial Staff of the Publishers

Under the Direction of

A. D. KOWALSKY, S. C. WILLARD, W. L. JACKSON,
M. A. SANCILIO, S. B. LYONS AND T. R. TROXELL

VOLUME 9

1987 REPLACEMENT

Annotated through South Eastern Reporter, 2d Series, through Volume 400, page 617.

Place in Pocket of Corresponding Volume of Main Set. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

THE MICHIE COMPANY
Law Publishers
CHARLOTTESVILLE, VIRGINIA

transferred in or by any facility or vessel covered by the plan that will necessitate a change in the plan and shall update the plan periodically as required by the Board, but in no event more frequently than once every thirty-six months. The Board, on a finding of need, may require an oil discharge exercise designed to demonstrate the facility's or vessel's ability to implement its oil discharge contingency plan either before or after the plan is approved.

C. The Board, after notice and opportunity for a conference pursuant to § 9-6.14:11, may modify its approval of an oil discharge contingency plan if it determines that:

1. A change has occurred in the operation of any facility or vessel covered by the plan that necessitates an amended or supplemented plan;

2. The facility's or vessel's discharge experience or its inability to implement its plan in an oil discharge exercise demonstrates a necessity for modification; or

3. There has been a significant change in the best available technology since the plan was approved.

D. The Board, after notice and opportunity for hearing, may revoke its approval of an oil discharge contingency plan if it determines that:

1. Approval was obtained by fraud or misrepresentation;

2. The plan cannot be implemented as approved; or

3. A term or condition of approval has been violated. (1990, c. 917.)

Editor's note. — Acts 1990, c. 919, cl. 2 provides that the Board shall promulgate regulations implementing this section on or before January 1, 1992, and that subsection A of this section shall become effective on July 1, 1992. Clause 3 of this act also stated that the Board should regard certain considerations in adopting such regulations.

§ 62.1-44.34:16. Financial responsibility. — A. **(For effective date see Editor's note)** The operator of any tank vessel entering upon state waters shall deposit with the Board cash or its equivalent in the amount of $500 per gross ton of such vessel. Any such cash deposits received by the Board shall be held in escrow in the Virginia Underground Petroleum Storage Tank Fund.

B. If the Board determines that oil has been discharged in violation of this article or that there has been a substantial threat of such discharge from a vessel for which a cash deposit has been made, any amount held in escrow may be used to pay any fines, penalties or damages imposed under this chapter.

C. The Board shall exempt an operator of a tank vessel from the cash deposit requirements specified in this section if the operator of the tank vessel provides evidence of financial responsibility pursuant to the terms and conditions of this subsection. The Board shall adopt requirements for operators of tank vessels for maintaining evidence of financial responsibility in an amount equivalent to the cash deposit which would be required for such tank vessel pursuant to this section. Financial responsibility may be demonstrated by self-insurance, insurance, guaranty or surety, or any combination thereof, under the terms the Board may prescribe. To obtain an exemption from the cash deposit requirements under this section: the operator and insurer, guarantor or surety shall appoint an agent for service of process in the Commonwealth; any insurer must be authorized by the Commonwealth to engage in the insurance business; and any instrument of insurance, guaranty or surety must provide that actions may be brought on such instrument of insurance, guaranty or surety directly against the insurer, guarantor or surety for any violation of this chapter by the operator up to, but not exceeding, the amount insured, guaranteed or otherwise pledged. An operator whose financial responsibility is accepted by the Board under this

l covered by the plan that will
l update the plan periodically as
nore frequently than once every
ng of need, may require an oil
the facility's or vessel's ability to
either before or after the plan is

ty for a conference pursuant to
l discharge contingency plan if it

of any facility or vessel covered
or supplemented plan;
rience or its inability to imple-
demonstrates a necessity for

the best available technology

ty for hearing, may revoke its
an if it determines that:
srepresentation;
proved; or
een violated. (1990, c. 917.)

shall become effective on July 1, 1992.
3 of this act also stated that the Board
regard certain considerations in adopt-
h regulations.

— A. **(For effective date see**
sel entering upon state waters
lent in the amount of $500 per
s received by the Board shall be
Petroleum Storage Tank Fund.
discharged in violation of this
hreat of such discharge from a
e, any amount held in escrow
damages imposed under this

a tank vessel from the cash
the operator of the tank vessel
pursuant to the terms and
hall adopt requirements for
ence of financial responsibility
ich would be required for such
ncial responsibility may be
guaranty or surety, or any
d may prescribe. To obtain an
nder this section: the operator
an agent for service of process
horized by the Commonwealth
ny instrument of insurance,
ns may be brought on such
directly against the insurer,
pter by the operator up to, but
ed or otherwise pledged. An
pted by the Board under this

subsection shall notify the Board at least thirty days before the effective date of a change, expiration or cancellation of any instrument of insurance, guaranty or surety.

D. Acceptance of proof of financial responsibility shall expire:

1. One year from the date on which the Board exempts an operator from the cash deposit requirement based on evidence of self-insurance, except that the Board may establish by regulation a different expiration date for acceptance of evidence of self-insurance submitted by public agencies;

2. On the effective date of any change in the operator's instrument of insurance, guaranty or surety; or

3. Upon the expiration or cancellation of any instrument of insurance, guaranty or surety.

Application for renewal of acceptance of proof of financial responsibility shall be filed thirty days before the date of expiration.

E. The Board, after notice and opportunity for hearing, may revoke its acceptance of evidence of financial responsibility if it determines that:

1. Acceptance has been procured by fraud or misrepresentation; or

2. A change in circumstances has occurred that would warrant denial of acceptance of evidence of financial responsibility under this section or the requirements established by the Board pursuant to this section.

F. It is not a defense to any action brought for failure to comply with the cash deposit requirement or to provide acceptable evidence of financial responsibility that the person charged believed in good faith that the tank vessel or the operator of the tank vessel had made the required cash deposit or possessed evidence of financial responsibility accepted by the Board. (1990, c. 917.)

Editor's note. — Acts 1990, c. 917, cl. 4 provides that the Board shall promulgate regulations implementing this section on or before Jan. 1, 1992, and that subsection A of this section shall become effective 90 days after the effective date of such regulations. Clause 4 also provides that in promulgating such regulations, the Board shall provide that, if evidence of financial responsibility provided to the federal government or any other state meets the requirements of subsection C of this section, comments shall be accepted by the Board in full or partial satisfaction requirements of subsection A of this section as appropriate.

§ 62.1-44.34:17. Exemptions. — Sections 62.1-44.34:15 and 62.1-44.34:16 do not apply to a facility having a maximum storage or handling capacity of less than 25,000 gallons of oil or to a tank vessel having a maximum storage, handling or transporting capacity of less than 15,000 gallons of oil. (1990, c. 917.)

§ 62.1-44.34:18. Discharge of oil prohibited; liability for permitting discharge. — A. The discharge of oil into or upon state waters, lands, or storm drain systems within the Commonwealth is prohibited. For purposes of this section, discharges of oil into or upon state waters include discharges of oil that (i) violate applicable water quality standards or a permit or certificate of the Board or (ii) cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

B. Any person discharging or causing or permitting a discharge of oil into or upon state waters, discharging or causing or permitting a discharge of oil which may reasonably be expected to enter state waters, or causing or permitting a substantial threat of such discharge and any operator of any facility, vehicle or vessel from which there is a discharge of oil into or upon state waters, or from which there is a discharge of oil which may reasonably be expected to enter state waters, or from which there is a substantial threat

Washington

(8) "Hazardous substances" means any substance listed in Table 302.4 of 40 C.F.R. Part 302 adopted August 14, 1989, under section 101(14) of the federal comprehensive environmental response, compensation, and liability act of 1980, as amended by P.L. 99–499. The following are not hazardous substances for purposes of this chapter:

(a) Wastes listed as F001 through F028 in Table 302.4; and

(b) Wastes listed as K001 through K136 in Table 302.4.

(9) "Inland barge" means any barge operating on the waters of the state and certified by the coast guard as an inland barge.

(10) "Navigable waters of the state" means those waters of the state, and their adjoining shorelines, that are subject to the ebb and flow of the tide and/or are presently used, have been used in the past, or may be susceptible for use to transport intrastate, interstate, or foreign commerce.

(11) "Office" means the office of marine safety established by RCW 43.21I.010.

(12) "Oil" or "oils" means any naturally occurring liquid hydrocarbons at atmospheric temperature and pressure coming from the earth, including condensate and natural gasoline, and any fractionation thereof, including, but not limited to, crude oil, petroleum, gasoline, fuel oil, diesel oil, oil sludge, oil refuse, and oil mixed with wastes other than dredged spoil. Oil does not include any substance listed in Table 302.4 of 40 C.F.R. Part 302 adopted August 14, 1989, under section 101(14) of the federal comprehensive environmental response, compensation, and liability act of 1980, as amended by P.L. 99–499.

(13) "Offshore facility" means any facility, as defined in subsection (7) of this section, located in, on, or under any of the navigable waters of the state, but does not include a facility any part of which is located in, on, or under any land of the state, other than submerged land.

(14) "Onshore facility" means any facility, as defined in subsection (7) of this section, any part of which is located in, on, or under any land of the state, other than submerged land, that because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters of the state or the adjoining shorelines.

(15)(a) "Owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, the vessel; (ii) in the case of an onshore or offshore facility, any person owning or operating the facility; and (iii) in the case of an abandoned vessel or onshore or offshore facility, the person who owned or operated the vessel or facility immediately before its abandonment.

(b) "Operator" does not include any person who owns the land underlying a facility if the person is not involved in the operations of the facility.

(16) "Passenger vessel" means a ship of greater than three hundred or more gross tons or five hundred or more international gross tons carrying passengers for compensation.

(17) "Ship" means any boat, ship, vessel, barge, or other floating craft of any kind.

(18) "Spill" means an unauthorized discharge of oil into the waters of the state.

(19) "Tank vessel" means a ship that is constructed or adapted to carry, or that carries, oil in bulk as cargo or cargo residue, and that:

(a) Operates on the waters of the state; or

(b) Transfers oil in a port or place subject to the jurisdiction of this state.

(20) "Waters of the state" includes lakes, rivers, ponds, streams, inland waters, underground water, salt waters, estuaries, tidal flats, beaches and lands adjoining the seacoast of the state, sewers, and all other surface waters and watercourses within the jurisdiction of the state of Washington. [1991 c 200 § 702.]

Effective dates——Severability——1991 c 200: See RCW 90.56.901 and 90.56.904.

88.40.020 Evidence of financial responsibility for vessels. (1) Any inland barge that transports hazardous substances in bulk as cargo, using any port or place in the state of Washington or the navigable waters of the state shall establish evidence of financial responsibility in the amount of the greater of one million dollars, or one hundred fifty dollars per gross ton of such vessel.

(2)(a) Except as provided in (c) of this subsection, a tank vessel that carries oil as cargo in bulk shall demonstrate financial responsibility to pay at least five hundred million dollars.

(b) The administrator by rule may establish a lesser standard of financial responsibility for barges of three hundred gross tons or less. The standard shall set the level of financial responsibility based on the quantity of cargo the barge is capable of carrying. The administrator shall not set the standard for barges of three thousand gross tons or less below that required under federal law.

(c) The owner or operator of a tank vessel who is a member of an international protection and indemnity mutual organization and is covered for oil pollution risks up to the amounts required under this section is not required to demonstrate financial responsibility under this chapter.

(3) A cargo vessel or passenger vessel that carries oil as fuel shall demonstrate financial responsibility to pay the greater of at least six hundred dollars per gross ton or five hundred thousand dollars.

(4) The documentation of financial responsibility shall demonstrate the ability of the document holder to meet state and federal financial liability requirements for the actual costs for removal of oil spills, for natural resource damages, and necessary expenses.

(5) The office may by rule set a lesser amount of financial responsibility for a tank vessel that meets standards for construction, propulsion, equipment, and personnel established by the office. The office shall require as a minimum level of financial responsibility under this subsection the same level of financial responsibility required under federal law.

(6) This section shall not apply to a covered vessel owned or operated by the federal government or by a state or local government. [1991 c 200 § 703; 1990 c 116 § 31; 1989 1st ex.s. c 2 § 3.]

Effective dates——Severability——1991 c 200: See RCW 90.56.901 and 90.56.904.

Findings——Severability——1990 c 116: See notes following RCW 90.56.210.

88.40.025 Evidence of financial responsibility for onshore or offshore facilities. An onshore or offshore facility shall demonstrate financial responsibility in an amount determined by the department as necessary to compensate the state and affected counties and cities for damages that might occur during a reasonable worst case spill of oil from that facility into the navigable waters of the state. The department shall consider such matters as the amount of oil that could be spilled into the navigable waters from the facility, the cost of cleaning up the spilled oil, the frequency of operations at the facility, the damages that could result from the spill and the commercial availability and affordability of financial responsibility. This section shall not apply to an onshore or offshore facility owned or operated by the federal government or by the state or local government. [1991 c 200 § 704.]

Effective dates——Severability——1991 c 200: See RCW 90.56.901 and 90.56.904.

88.40.030 Establishing evidence of financial responsibility——Documentation. Financial responsibility required by this chapter may be established by any one of, or a combination of, the following methods acceptable to the office of marine safety or the department of ecology: (1) Evidence of insurance; (2) surety bonds; (3) qualification as a self-insurer; or (4) other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States. Documentation of such financial responsibility shall be kept on any covered vessel and filed with the office at least twenty-four hours before entry of the vessel into the navigable waters of the state. A covered vessel is not required to file documentation of financial responsibility twenty-four hours before entry of the vessel into the navigable waters of the state, if the vessel has filed documentation of financial responsibility with the federal government, and the level of financial responsibility required by the federal government is the same as or exceeds state requirements. The owner or operator of the vessel may file with the office a certificate evidencing compliance with the requirements of another state's or federal financial responsibility requirements if the state or federal government requires a level of financial responsibility the same as or greater than that required under this chapter. [1991 c 200 § 705; 1990 c 116 § 32; 1989 1st ex.s. c 2 § 4.]

Effective dates——Severability——1991 c 200: See RCW 90.56.901 and 90.56.904.

Findings——Severability——1990 c 116: See notes following RCW 90.56.210.

88.40.040 Failure to meet requirements——Denial of entry to state waters——Suspension of operation. (1) The office shall deny entry to the waters of the state to any vessel that does not meet the financial responsibility requirements of this chapter. Any vessel owner or operator that does not meet the financial responsibility requirements of this chapter and any rules prescribed thereunder or the federal oil pollution act of 1990 shall be reported by the office to the United States coast guard.

(2) The office shall enforce section 1016 of the federal oil pollution act of 1990 as authorized by section 1019 of the federal act.

(3) Any onshore or offshore facility owner or operator who does not meet the financial responsibility requirements of RCW 88.40.025 and any rules adopted by the department or office shall be reported to the secretary of state. The secretary of state shall suspend the facility's privilege of operating in this state until financial responsibility is demonstrated. [1991 c 200 § 706; 1989 1st ex.s. c 2 § 5.]

Effective dates——Severability——1991 c 200: See RCW 90.56.901 and 90.56.904.

88.40.050 Repealed. See Supplementary Table of Disposition of Former RCW Sections, Supplement Volume 9A.

Chapter 88.44
OIL SPILL FIRST RESPONSE

Sections

88.44.005 Purpose. The natural waters of Washington state hold a dual purpose. First, Washington state's waters are one of the most abundantly alive water bodies in the world. The amount of biota, diversity of species, and unique character of habitat makes these waters a natural wonder. Second, these

ATTACHMENT C
"1991's Oil Spill Legislative and Regulatory Scene"
***U.S. Law Report* - January 1992**

U.S. LAW REPORT

in this issue ... january 1992, volume 2, number 1

Special Issue: A Look Back at 1991's Oil Spill Legislative and Regulatory Scene

- The Independent Liquid Terminals Association;
- The American Association of Port Authorities;
- The American Petroleum Institute;
- The Oil Companies' International Marine Forum;
- The National Ocean Industries Association;
- American Waterways Operators;
- The International Tanker Owners Pollution Federation;
- The International Association of Independent Tanker Owners;
- The Transportation Institute;
- The American Institute of Merchant Shipping;
- The Remedial Contractors Institute;
- The Spill Control Association of America;
- The National Response Corporation;
- The Coastal States Organization;
- The Prince William Sound Regional Citizens' Advisory Committee;
- The Natural Resources Defense Council; and
- The states of California, Louisiana, Maryland, and Michigan

Meanwhile, the American Society of Testing and Materials' Committee on Hazardous Substances and Oil Spill Response (F-20) is developing standards for response equipment. Committee Chairman Harry Whittaker of Environment Canada has solicited for proposals. Work groups within the committee will meet in Washington, DC, in mid-January.

Agencies Complete Five-Year Research and Development Plan

At a congressional hearing in June 1991 on oil spill research and development issues, a member of the interagency coordinating committee commented on how well the various federal agencies worked together this past year in developing the five-year plan required by the Oil Pollution Act of 1990 (OPA 90), despite their separate agendas. The interagency committee includes members of the US Coast Guard (USCG), the Environmental Protection Agency (EPA), and the Minerals Management Service (MMS). Though the plan has not yet been submitted to Congress (perhaps early in 1992), the agencies' priorities are well-known, since much of the work is already underway: the EPA is focusing on dispersants, technology for inland spill containment, and especially bioremediation; MMS projects involve remote sensing, at-sea verification of dispersants and slick burning, strategies for shoreline cleanup, and the reopening of the Oil and Hazardous Materials Simulated Environmental Test Tank, which has been closed for many years; and the USCG has joined with the National Oceanic and Atmospheric Administration on a few studies involving spill response and data collection (see *OSLR*, July 1991). The committee had its last meeting in December 1991.

Activity in the States

Considering the direction the Oil Pollution Act of 1990 (OPA 90) took toward state preemption, vessel and facility owners and operators in the US know that simply complying with federal laws and regulations is not enough. Though some states enacted legislation similar to OPA 90 and have taken the wait-and-see approach regarding the promulgation of regulations, many others this past year did not wait for federal agencies to resolve certain issues and adopt regulations. Discouraged industry folk in states like Alaska and New Jersey, for example, must already contend with newly adopted, strict state regulations that may, in the end, vary from federal regulations, making compliance no small task.

A number of states, coastal states in particular, were quite aggressive in 1991. Some states — such as Louisiana, Texas, and Washington — enacted comprehensive pieces of oil spill legislation in 1991. Other states — such as Alaska, California, Florida, Maryland, and New Jersey — focused on promulgating regulations pursuant to comprehensive oil spill acts passed in 1990.

Rather than go the route of enacting a comprehensive package, a number of state legislatures and agencies simply addressed specific issues. The Marine Spill Response Corporation (MSRC), for example, was quite successful in its efforts to persuade states to adopt the federal standards for responder immunity (see chart in this issue). Similarly, states like California, Washington, Florida, and Virginia adopted financial responsibility requirements favorable to the P&I clubs, despite the ongoing dispute over the proposed federal regulations. And states like Washington and Florida are developing compensation formulas for natural resource damages way ahead of the National Oceanic and Atmospheric Administration.

In addition to individual state initiatives, discussions of joint efforts across state borders ensued throughout the year. Though the Pacific Ocean Resources Compact (between Alaska, Washington, Oregon, California, and Hawaii) never got off the ground (only Oregon passed a bill to ratify it; see *OSLR*, June 1991), the Gulf states (Texas, Louisiana, Mississippi, Alabama, and Florida) showed interest in signing a memorandum of understanding to pool their resources to prepare and respond to spills more efficiently in the Gulf region (see *OSLR*, November 1991). The governors of the Great Lakes states are also working together to improve oil spill preparedness and response capabilities in their part of the nation. According to an *OSLR* source, they are examining their oil spill laws, comparing their regulations to proposed federal regulations, and are discussing the possibility of initiating new legislation in 1992.

Following is a summary of those states that actively engaged in oil spill legislative and regulatory activities in 1991. See the accompanying chart for information on states not mentioned below.

Alaska Adopts Country's Toughest Regulations

Not surprisingly, Alaska had a busy year in 1991, not unlike 1990, and not unlike what officials expect for 1992. Alaskans introduced more than 20 bills and resolutions to the Alaska legislature in 1991 covering various topics such as the Exxon Valdez settlement, contingency planning, financial responsibility, vessel design, and marine pilots. Of these, the legislature and the governor passed only a few (see *OSLR*, July 1991), including: 1) SB 263, signed May 29, 1991, postponed for one year financial responsibility requirements (outlined in HB 567) for companies that transport or store noncrude oil; 2) SB 165, signed June 17, 1991, allowed the commissioner of transportation and public facilities to use money from the state oil spill fund (known locally as the 470 Fund) to construct or refurbish one or more of the vessels of the Alaska marine highway system to provide assistance in response to an oil spill (designs have been drawn, say officials); and 3) HB 196, signed July 2, 1991, limits a responder's immunity, among other things, to 15 days, which makes it the strictest spill responder immunity bill in the country. HB 196, which was changed quite a bit from its original draft, is effective for only one year. It requires the Citizens Oversight Council on Oil and Other Hazardous Substances to review the issue of responder immunity and report to the legislature by January 15 (on schedule, said officials). A bill similar to the original HB 196 (SB 270), which was also introduced before the 1991 session, will likely be addressed in 1992.

Pursuant to bills passed in 1990, Alaskan officials were also busy promulgating regulations. In 1990, Alaska passed HB 567, a comprehensive bill that established requirements in three main areas: spill response standards, prevention, and financial responsibility. The Alaska Department of Environmental Conservation (ADEC) released a draft of the regulations on July 8, 1991 (see *OSLR*, August 1991). Entitled "Oil and Hazardous Substances Pollution Control Regulations," they elicited more than 800 comments (see *OSLR*, October 1991). When the department released its final draft on October 26, 1991, ADEC Commissioner John Sandor called them "the toughest in the nation — if not the world" (see *OSLR*, December 1991). The regulations likely affect more than 300 tankers, barges, terminals, and onshore facilities, all of which must meet strict requirements for a response within the first 72 hours of a spill. The final draft has not yet been signed by the lieutenant governor.

California Appoints New Oil Spill Administrator

California was the first state to enact a comprehensive spill bill after the enactment of the Oil Pollution Act of 1990 (OPA 90). The Lempert-Keene-Seastrand Oil Spill Prevention and Response Act (SB 2040), enacted in September 1990, tasked state officials with promulgating regulations and standards for such issues as contingency plans and financial responsibility. Although agencies successfully completed some requirements, progress overall has been slow due to "the politics in California," said one official. In fact, the governor waited until the end of 1991 to appoint an oil spill administrator. Peter Bontadelli, who was previously the director of the

State Oil Spill Legislation and Regulations: 1991

State	Lead State Agency	Oil Spill Legislation	Oil Spill Rules and Regulations	Spill Bills Passed in 1991
Alabama (AL)	Dept. of Environmental Management, Water Division	Title 22 (Health, Mental Health, & the Environment), Ch. 22 (the Water Pollution Control Act) and Ch. 22A (the Environmental Management Act) of the Code of AL, 1975, as amended.	Administrative Code, Division 6, Water Quality Program, Vol. I.	HB 279 on responder immunity standards signed July 11 (now Ch. 91-470). No new spill bills expected in 1992.
Alaska (AK)	Dept. of Environmental Conservation, Oil Spill Response Center	Chapters 04 and 08, Title 46 (Water, Air, Energy, and Environmental Conservation) of the Alaska Statutes.	New regulations released Oct 26. They await signature from the lieutenant governor.	SB 263 on financial responsibility requirements signed May 29; SB 165 on the refurbishment of existing vessels for spill response signed June 17; HB 196 on responder liability signed July 2.
Arizona (AZ)	Dept. of Environmental Quality	Title 49 of the AZ Revised Statutes.	Title 18 of the AZ Administrative Code.	None.
Arkansas (AR)	Dept. of Pollution Control & Ecology	Section 82-1901, et seq., AR Statutes (Water & Air Pollution Control Act).	Regs 7,8 of the Dept. of Pollution Control & Ecology.	None.
California (CA)	Dept. of Fish & Game	The Lempert-Keene-Seastrand Oil Spill Prevention and Response Act (SB 2040) passed Sept 2, 1990. It amended, repealed, or added sections to California's Water Code, Public Resources Code, Harbors and Navigation Code, and Government Code.	Financial responsibility regulations released Aug 15 (see *OSLR*, Sept 1991).	SB 200 on VTS requirements signed Oct 13; AB 134 on the VTS in Los Angeles signed Oct 13; AB 1409 on collecting fees signed Aug 1; AB 100 on safety requirements at facilities signed Oct 13.
Colorado (CO)	The Oil & Gas Commission for production facility spills; the Public Utilities Commission for pipeline spills; and the Dept. of Health, Water Quality Control Commission for spills in water	Colorado Water Quality Control Act (25-8-201, 204); the Oil and Gas Conservation Act, 1953 (34-60-106, Sections 1c and 9).	CO Rules and Regulations, 119, 323, 324 A and B, 329.	None. HB 1234 to increase the Emergency Response Fund was postponed indefinitely.
Connecticut (CT)	Dept. of Environmental Protection, Bureau of Waste Management, Oil & Chemical Spill Response Division	Sec. 22a.448 through .453 of Connecticut's Water Pollution Statutes.	Regulations for inland terminals are expected in 1992.	HB 7096 on responder immunity standards signed June 24; HB 7100 on the spill emergency fund signed June 26.
Delaware (DE)	Dept. of Natural Resources & Environmental Control, Division of Air & Hazardous Waste	Ch. 62 of the Delaware General Laws.	None.	SB 6 on responder immunity signed in January.
Florida (FL)	Dept. of Natural Resources, Division of Law Enforcement, Pollutant Spill Section	The Pollutant Spill Prevention and Control Act, signed June 11, 1990; now ch. 90-54, Laws of Florida, soon to be in Part I of Ch. 376 of the Florida Statutes.	Draft regulations released Sept 13. Final regulations expected in 1992 (see *OSLR*, Dec 1991).	SB 646 on financial responsibility requirements signed May 28.
Georgia (GA)	Dept. of Natural Resources, Environmental Protection Division	Title 12, Chapters 5 and 14 of the Official Code of Georgia Annotated.	Georgia's Administrative Code, 12-8-71.	SB 142, which amends Ch. 14, Title 12, signed in March.
Hawaii (HI)	Dept. of Health, Environmental Health Administration	Water Pollution Law (342D) and 343; Environmental Response Law (128D).	State contingency plan being written.	SB 1756 to amend the Environmental Response Law signed in April.
Idaho (ID)	Dept. of Health and Welfare, Division of Environmental Quality	The Environmental Health & Protection Act of 1972.	Water Quality Standards & Wastewater Treatment Requirements (Title 1, Section 2).	None.

State Oil Spill Legislation and Regulations: 1991, continued

State	Lead State Agency	Oil Spill Legislation	Oil Spill Rules and Regulations	Spill Bills Passed in 1991
Illinois (IL)	Emergency Services & Disaster Agency	IL Revised Statutes, Ch. 85, Section 1700 et seq.; Ch. 111.5, Section 1001E et seq. (Environmental Protection Act of 1990).	None.	None.
Indiana (IN)	Dept. of Environmental Management	Indiana Code 13-7-1 through 13-7-7.	The Spill Rule: 327 IAC (Indiana Administrative Code) 2-6-1 and 2.	None.
Iowa (IA)	Dept. of Natural Resources	Ch. 455B of the Code of Iowa.	Ch. 133 of the Iowa Administrative Code.	None.
Kansas (KS)	Kansas Corp. Commission; the Division of Emergency Preparedness; Dept. of Health & Environment	KSA 48-904 through 939, annotated (Kansas Emergency Preparedness Act).	KAR 82-3-603.	None.
Kentucky (KY)	Dept. of Environmental Protection, Division of Water	Kentucky Revised Statutes, Ch. 224.	Kentucky Water Quality Regulations, Title 401 KAR, Ch. 5, et al.	None.
Louisiana (LA)	Dept. of Environmental Quality is the technical agency	The Oil Spill Prevention and Response Act (HB 5) establishes a new chapter of the Louisiana Revised Statutes of 1950 (Ch. 19, Title 30, Subtitle II).	Draft regulations expected in 1992.	HB 5, a comprehensive bill on prevention and response, signed April 23 (see *OSLR*, May 1991).
Maine (ME)	Dept. of Environmental Protection	Maine Revised Statutes Annotated, Title 38 (the Waters and Navigation Law), Ch. 3, Subch. 11-A, Sections 541-560.	DEP regulations, Ch. 600. New regulations are being drafted.	LD 77 on prevention and response signed June 21; LD 246 on an oil spill commission signed July 8; LD 74 on responder immunity standards signed June 20; LD 1826 on underground tanks signed June 24; and LD 1675 on underground tanks signed June 20.
Maryland (MD)	Dept. of the Environment, Hazardous & Solid Waste Management Administration, Oil Control Section	Annotated Code of MD, Environment Article, Section 4-401 through 419 (Oil Pollution and Tank Management), as amended by HB 392 (Oil Discharges and Spills -- Prevention and Response), which passed April 24, 1990.	Title 26.10.02 through .11, which went into effect Feb 4 (for underground storage tanks). Draft regulations for vessels and aboveground tanks released Oct 4. Final regulations expected in early 1992.	None.
Massachusetts (MA)	Dept. of Environmental Protection	MA General Law Ch. 21E (Oil & Hazardous Materials Release, Prevention, & Response Act).	310 CMR (Code of MA Regulations) 40.0: MA Contingency Plan.	None. Responder immunity bill signed Dec 30.
Michigan (MI)	Dept. of Natural Resources, Environmental Response Division	Act 307 (the MI Environmental Response Act), as amended by the "Polluter Pays" bills, which went into effect on July 1.	Administrative Rules for PA 307.	None. A few bills remain in committee.
Minnesota (MN)	MN Pollution Control Agency	Sections 115.061 and .071 of the MN Statutes.	None.	SF 891 on procedures for prevention and response signed May 18.
Mississippi (MS)	Oil & Gas Board and the Dept. of Environmental Quality	Air & Water Pollution Control Law; Water Pollution Abatement Loan Program; Water Pollution Control Revolving Fund Act; Underground Storage Tank Act of 1988.	Oil & Gas Board Statewide Rules and Regulations 45 and 63.	SB 2987 on responder immunity standards signed April 12.

State Oil Spill Legislation and Regulations: 1991, continued

State	Lead State Agency	Oil Spill Legislation	Oil Spill Rules and Regulations	Spill Bills Passed in 1991
Oregon (OR)	Dept. of Environmental Quality	Oregon Revised Statutes 468.780 through .833 and 466.605 through .680.	Administrative rules 340.108 and 340.47. Amendments to rules passed Nov 8 (not yet available). Standards for contingency plans expected by July 1992.	SB 242 on contingency plans signed July 22; SB 500 on states compact signed July 18; HB 3348 on responder liability signed Sept 29.
Pennsylvania (PA)	Dept. of Environmental Resources	The Clean Streams Law, 35 PS (PA Statutes).	Title 25, Ch. 101 (Special Water Pollution Regulations of PA Code).	None.
Rhode Island (RI)	Dept. of Environmental Management	Title 46, Chapters 12.3 through 12.7 of the RI General Laws.	None.	HB 6019 on financial responsibility signed April 30.
South Carolina (SC)	Dept. of Health & Environmental Control	Chapters 48-1-10 through 350, and 48-43-510 through 850 of the SC Code of Laws, 1976.	None.	None. Responder immunity bill expected in 1992.
South Dakota (SD)	Dept. of Environment & Natural Resources	Ch. 34A of SD Codified Law.	Ch. 74 of the Administrative Rules.	None.
Tennessee (TN)	Dept. of Military, Emergency Management Agency; Dept. of Conservation	Title 69, Ch. 3 of the TN Code Annotated (Water Quality Control Act of 1977, as amended).	Rule 1200-4-1 of the TN Dept. of Conservation, Division of Waste Pollution Control.	None.
Texas (TX)	Texas General Land Office	Section 1, Subtitle C, Title II, Natural Resources Code, Ch. 40 (The Oil Spill Prevention and Response Act of 1991 [SB 14].)	Expected early in 1992.	SB 14, a comprehensive prevention and response bill, signed March 28 (see *OSLR*, April 1991).
Utah (UT)	Bureau of Water Pollution Control	Water Pollution Control Act, Ch. 126, 26-11.	Administrative Rule 448, Section 1-2.6.	None.
Vermont (VT)	Dept. of Environmental Conservation, Hazardous Materials Division	Title 10.	Sections 1941 (the Petroleum Cleanup Fund); 1410 (Private Right of Action); 6604 (Solid Waste Law); 1283 (Environment Contingency Fund) of the VA Statutes Annotated.	None.
Virginia (VA)	State Water Control Board	State Water Control Law, Articles 11 and 12.	Final response regulations adopted Dec 9.	None. Legislation on prevention expected in 1992.
Washington (WA)	Dept. of Ecology (for spill response) and the Office of Marine Safety for spill prevention for vessels	HB 1027 (Act Relating to Oil & Hazardous Substances), which will be codified into the Revised Code of WA 90.56, plus Chs. 82 and 88.16, .40, and .44.	Statewide master spill prevention and contingency plan, facility contingency plan and response contractor standards, and a proposed preassessment screening and oil spill compensation schedule for determining damages to natural resources released in the fall (see *OSLR*, Dec 1991).	HB 1027, a comprehensive bill on prevention and response, signed May 15 (see *OSLR*, June 1991).
West Virginia (WV)	Division of Energy, Oil & Gas Section	Ch. 20, Article 5A; and Ch. 22B, Article 7 of the Code of WV.	38 CSR (Code of State Regulations) 11.	None.
Wisconsin (WI)	Dept. of Natural Resources	Chapters 29.29, 144, and 147.23 of the WI Statutes.	NR 158, part of the WI Administrative Code.	None.
Wyoming (WY)	Dept. of Environmental Quality, Water Resources Division	Title 35, Ch. 11, Article 3 of the WY Statutes (WY Environmental Quality Act).	Ch. 4 of the Water Quality Rules and Regulations	None.

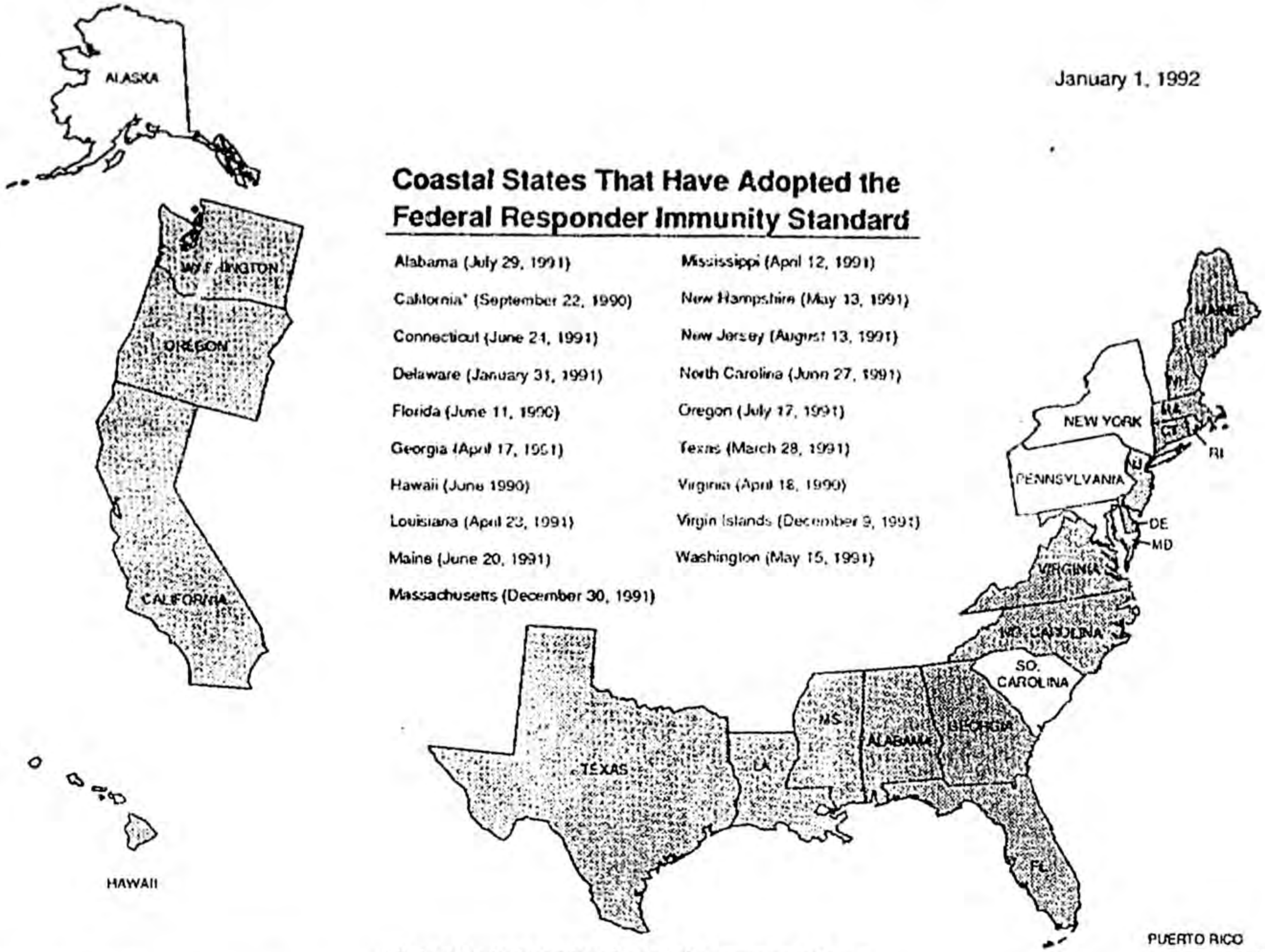
State Oil Spill Legislation and Regulations: 1991, continued

State	Lead State Agency	Oil Spill Legislation	Oil Spill Rules and Regulations	Spill Bills Passed in 1991
Missouri (MO)	Dept. of Natural Resources, Division of Emergency Response	Chapters 260 (Environmental Control) and 644 (Water Pollution) of the revised statutes of MO.	Code of State Regulations, Title 10, Division 24, Department of Natural Resources.	SB 45 on civil penalties signed May 12.
Montana (MT)	Dept. of Health & Environmental Sciences, Solid & Hazardous Waste Bureau	The MT Comprehensive Environmental Cleanup & Responsibility Act as amended in 1989 (Sections 75-10-701 through 724); and the Water Quality Act (Sections 75-5-101 and 102).	Administrative Rules of MT, Title 16, Ch. 20 (Water Quality).	HB 228 on cost recovery passed before the session ended.
Nebraska (NE)	Dept. of Environmental Control	The Petroleum Release Remedial Action Act, Ch. 66; Petroleum Products & Hazardous Substances Storage & Handling Act, Ch. 81, and Environmental Protection Act, 81-1505.	Rules & Regulations for Petroleum Release Remedial Action Reimbursement Fund, Title 200, NE Administrative Code.	None.
Nevada (NV)	Dept. of Environmental Protection; Dept. of Military, Division of Emergency Management	Chapter 459 of the NV Revised Statutes.	Chapter 445 and 459 of the NV Administrative Code.	None.
New Hampshire (NH)	Dept. of Environmental Services, Water Supply & Pollution Control Division	Revised Statute Annotated Title 10 (Public Health), Ch. 146-A and 146-D.	NH Code of Administrative Rules, Part Env-Ws 412 (for groundwater pollution).	HB 565 on spill response signed May 13.
New Jersey (NJ)	Dept. of Environmental Protection	NJ Statutes Annotated, Title 58:10-23.11 (includes the Spill Compensation and Control Act, enacted in July 1990).	NJ Administrative Code, 7:1E (Discharges of Petroleum and Other Hazardous Substances). New regulations went into effect Sept 3 (see *OSLR*, Oct 1991).	AB 4752 on responder liability signed Aug 13.
New Mexico (NM)	Oil & Conservation Division; Environmental Dept.	Chapter 70 (Oil & Gas) and Chapter 74-6 (Water Quality Act) of NM Statutes Annotated.	Part 1-203, Water Quality Control Commission Regulations; Rule 3, Oil and Conservation Division Rules and Regulations.	None.
New York (NY)	Dept. of Environmental Conservation	Navigation Law (Article 12); Environmental Conservation Law (Articles 3,17).	Parts 30-32 and 610 of the NY Codes, Rules, and Regulations.	None. AB 5327/SB 3429 on responder liability pending.
North Carolina (NC)	Dept. of Environment, Health & Natural Resources, Division of Environmental Management	NC General Statutes, Ch. 143-215.75 through .94 (the Oil Pollution & Hazardous Substances Control Act of 1978), which includes HB 1177 and SB 977 passed in 1989.	None. Revision of state contingency plan in the works.	HB 520 on responder liability standards signed June 27.
North Dakota (ND)	Dept. of Health & Consolidated Laboratories	Ch. 61-28 of ND's Century Code (Control, Prevention, and Abatement of Pollution of Surface Waters).	Surface Water Quality Standards (Rule 33-16-02).	None.
Ohio (OH)	Environmental Protection Agency, Division of Emergency & Remedial Response	Chapters 3750 and 6111 of the OH Revised Code.	Draft regulations expected in January 1992.	None.
Oklahoma (OK)	OK Corp. Commission; Dept. of Pollution Control; Dept. of Health/Water Resources Board	Titles 17, 52, 63, 82 of the OK Statutes.	None.	None.

January 1, 1992

Coastal States That Have Adopted the Federal Responder Immunity Standard

Alabama (July 29, 1991)
California* (September 22, 1990)
Connecticut (June 21, 1991)
Delaware (January 31, 1991)
Florida (June 11, 1990)
Georgia (April 17, 1991)
Hawaii (June 1990)
Louisiana (April 23, 1991)
Maine (June 20, 1991)
Massachusetts (December 30, 1991)
Mississippi (April 12, 1991)
New Hampshire (May 13, 1991)
New Jersey (August 13, 1991)
North Carolina (June 27, 1991)
Oregon (July 17, 1991)
Texas (March 28, 1991)
Virginia (April 18, 1990)
Virgin Islands (December 9, 1991)
Washington (May 15, 1991)



* Federal standard was adopted, but only for a maximum of 90 days.

Indicates states that have passed responder immunity legislation.

Source: Marine Spill Response Corporation

California Department of Fish & Game (DF&G), begins his first day as oil spill administrator on January 2. The new director of Fish & Game is Boyd Gibbons.

The first deadline assigned by SB 2040 was July 1991 for the establishment of harbor safety committees and the date by which vessels and facilities were required to submit interim contingency plans. The harbor committees are currently reviewing vessel operations and safety procedures in the San Francisco and Los Angeles harbors; safety plans for those harbors are due by January 1992. The last task completed in 1991 by state officials involved financial responsibility requirements. On August 15, 1991, DF&G issued regulations on certification procedures so that vessels and facilities could become certified by January 1, when financial responsibility requirements under SB 2040 became operative (see **OSLR**, September 1991). California's financial responsibility regulations were lauded by the protection and indemnity (P&I) clubs.

Though the majority of spill issues were covered in SB 2040, California's legislature passed a few minor spill bills in 1991, including: SB 200, signed October 13, which covers requirements for vessel traffic service (VTS) systems in accordance with USCG requirements; AB 134, signed October 13, which authorizes a VTS service for the Los Angeles-Long Beach Harbor area; AB 1409, signed August 1, which prescribes procedures for collecting oil spill prevention and administration fees specified in SB 2040; and AB 100, signed October 13, called the *California Oil Refinery and Chemical Plant Safety Preparedness Act of 1991*.

Connecticut Passes Small Percentage of Spill Bills

Though the topic of oil pollution came up more than once before Connecticut's legislature, only two of the seven or so spill bills introduced in 1991 passed (see **OSLR**, August 1991). In addition to joining many other coastal states that passed responder immunity standards similar to the federal standards (HB 7096; PA 289), Connecticut's legislature approved a bill to establish a methodology to calculate the cost of administering the state emergency spill response fund (HB 7100; PA 372). Governor Lowell Weicker signed the two bills at the end of June.

The spill bills that died in committee covered a variety of issues. For example: HB 5031 would have required the development of standards for the use of bioremediation to mitigate heating oil contamination; HB 6628 would have allowed municipalities to get reimbursed for cleanup costs involving underground storage tanks; HB 6647 would have provided indemnity against contamination to waterways by vessels carrying petroleum products; HB 489 would have allowed the commissioner of environmental protection to use the Underground Storage Tank Petroleum Cleanup Fund to investigate and remediate spills from underground tanks; and HB 5264 would have prevented certain companies from directly or indirectly charging their customers for the cleanup of oil spills. A few of these bills will likely be reintroduced in 1992.

While Connecticut's legislature focused on new spill bills, staff at the state Department of Environmental Protection (DEP) worked (and continue to work) on draft regulations for inland terminals. At one point, the DEP extended the deadline for these regulations, which will focus on licensing requirements and spill prevention responsibilities, from July 1, 1991, to October 1, 1991. But DEP officials were backlogged in 1991 due to budgetary restraints and consequently missed the October deadline. According to one DEP spokesperson, a draft of the regulations will likely appear by next spring.

Florida Implements 1990 Spill Act

Florida's 1991 spill activities, like California's, focused on implementing a comprehensive spill bill passed in 1990. Florida's *Pollutant Spill Prevention and Control Act* was signed June 11, 1990. Pursuant to that act, Florida's Department of Natural Resources (DNR) released draft regulations on September 13, 1991, that covered a lot of ground, including such issues as: annual fees; reimbursement for state cleanup costs; notification procedures; changed boundary lines; prevention and response certificates; contingency plan requirements; and financial responsibility requirements (see **OSLR**, October 1991).

The industry's reaction to the draft thus far has been relatively mild. Most of the negative comments about the draft voiced at the few workshops DNR held in the fall focused on problems with definitions and deadlines. Encouraging comments, on the other hand, focused on the draft's financial responsibility language, which, in accordance with SB 646, describes certification requirements that are acceptable to protection and indemnity (P&I) clubs. The governor signed SB 646 on May 28, 1991.

According to a DNR spokesperson, the next draft of the regulations will be released in early 1992, after which DNR may hold one more public meeting, and may change the regulations again. The regulations will go into effect 20 days after they are signed by the governor. (Also watch in January for a bill likely to be introduced to the legislature regarding a formula to calculate damages to natural resources: see *OSLR*, December 1991).

Louisiana Enacts Spill Bill in One Week

Despite the large volume of oil stored and transported in and around Louisiana, the state had (until 1991) few laws of its own regarding major oil spills. Realizing the potential consequences of this situation, Louisiana's legislature took only one week in 1991 to discuss, amend, and pass a comprehensive piece of spill legislation. Louisiana's Oil Spill Prevention and Response Act (HB 5) was enacted April 23, 1991 (see *OSLR*, May 1991). It complements the Oil Pollution Act of 1990 (OPA 90), and has similar, if not identical, language to the Oil Spill Prevention and Response Act of 1991 enacted in Texas on March 28, 1991 (see *OSLR*, April 1991). Louisiana's act covers a broad range of issues, including: a statewide oil spill contingency plan; the state's response efforts after a spill; prevention and response certificates; liability and compensation; a state oil spill contingency fund; and an interagency council of oil spill experts.

About four months after the act passed, former Louisiana Governor Buddy Roemer took the first step toward implementing the act and appointed Bruce Hammatt as the new executive director of the state's Oil Spill Commission. Hammatt, whose staff works out of the governor's mansion, is responsible for promulgating regulations pursuant to the act. According to a spokesperson on Hammat's staff, a draft of those regulations will likely be released in a few months. "We had high hopes for January," she said, "but we are still trying to get back on our feet since the election. The regulations have been put on hold until the transition takes place." Hammatt and his staff will likely hold their next meeting on the regulations in mid-January.

Maine's Commission Judges Effectiveness of Laws

Oil spill legislative activities in the state of Maine often seem to attract a lot of attention, if only because of Maine's senator, George Mitchell, whose notion of state preemption triumphed in the debate that led to the enactment of the Oil Pollution Act of 1990 (OPA 90). True to its environmentally strong reputation, Maine passed five new spill laws in 1991. Two of them pertain to Maine's underground oil storage laws (LD 1826, signed June 24, 1991, and LD 1675, signed June 20, 1991); and one of them provides limited immunity for responders (LD 74, signed June 20, 1991). The fourth bill (LD 77, signed June 21, 1991) ensures that Maine's Department of Environmental Protection (DEP) is adequately equipped to prevent and respond to oil spills, and that the state's oil cleanup fund will be reimbursed in the event of a spill. LD 77 additionally requires a number of state departments to develop state contingency and wildlife rehabilitation plans. According to the act, the DEP must complete the contingency plan by April 30, 1992.

The last spill bill that was signed (LD 246, July 8, 1991) reestablished the Commission to Study Maine's Oil Spill Cleanup Preparedness until June 30, 1992. The commission, which was reestablished until June 30, is charged with monitoring the implementation and effectiveness of Maine's oil spill statutes. The group met five times in the fall, and released its interim progress report in December 1991 (though it's dated November 1, 1991). Following are some of its findings:

- Delayed funding approval has hampered the development of the state contingency plan, a sensitive identification system, and wildlife rehabilitation plan (all required by LD 77).
- The private sector has significantly invested in response organizations since the incorporation of Clean Casco Bay, Inc., and the establishment of the Marine Spill Response Corporation.

- Lack of proposed federal regulations under OPA 90 makes it difficult to see how the federal Oil Spill Liability Trust Fund may affect the Maine Coastal and Inland Surface Oil Cleanup Fund.
- Several provisions of Maine law relating to spill prevention are inadequate, inappropriate, or redundant. Maine law should be amended to: provide a penalty for vessels failing to engage a licensed marine pilot when required; repeal a requirement for the DEP to receive a copy of every vessel contingency plan; and repeal a requirement that the marine spill contingency plan be amended by rule.
- The issue of financial assurance requirements for oil terminals should be tabled until the federal government specifies decreased limits of liability under OPA 90.
- The state should not invest its resources in a computerized spill trajectory tracking and forecasting system at this time. Those resources are better used now by identifying what Geographic Information System (GIS) information gaps exist, and then collecting that information to enter into the GIS.
- More information — such as the quality of the ships still serving Maine's ports — is needed to determine whether Maine's unlimited liability law should be changed.
- Maine's law is inconsistent in dealing with the liability of responsible parties when it comes to reimbursing the state fund. The statute does not mention those specific costs for which the commissioner can seek reimbursement. Plus, the statute does not clearly state that studies paid for by the fund are specifically related to a particular spill, and include damage assessment costs.

Maryland Regulations Address Vessels and Aboveground Tanks

Maryland's Department of the Environment (DOE) was busy in 1991 writing and reviewing comments on oil spill regulations. The first set of spill regulations that went into effect on February 4, 1991, focused on underground storage tanks, pursuant to HB 392 ("Oil Discharges and Spills — Prevention and Response"), which passed April 24, 1990. Eight months later, on October 4, 1991, the DOE released for public comment draft regulations for vessels and aboveground tanks. The regulations cover a number of issues, including: training, contingency plans, prevention and containment equipment, notification, financial responsibility, and limited responder immunity (see ***OSLR***, November 1991).

Because the draft regulations were heavily criticized by industry, the DOE extended its comment period until December 6, 1991, one month after a hearing on the subject. Industry representatives at the hearing felt that the perceived benefits of many provisions in the draft did not justify the costs. Many of them suggested that the state should defer to the federal government on such issues as double hulls and financial responsibility (see ***OSLR***, December 1991). The DOE will likely address these concerns in the final regulations, expected early in 1992.

In the interim, a DOE spokesperson told ***OSLR*** that a number of people are gearing up to introduce amendments to Maryland's oil pollution law this year to address such issues as responder immunity and liability limits. Problems have come about, he said, because Maryland's oil pollution laws were passed before the Oil Pollution Act of 1990.

New Jersey Adopts Aggressive Regulations

New Jersey's Department of Environmental Protection (DEP) ruffled a few feathers in 1991 when it adopted new regulations on September 3, 1991, entitled "Discharges of Petroleum and Other Hazardous Substances." Promulgated in accordance with July 1990 amendments to New Jersey's Spill Compensation and Control Act, the regulations affect nearly 900 facilities.

The DEP released the first draft of the regulations on May 6, 1991. A month later, a number of industry representatives spoke out at a public hearing on the regulations sponsored by the DEP (see ***OSLR***, August 1991). Their complaints focused on compliance problems, specifically problems with the draft's training, mapping, and notification requirements. Despite the negative comments, though, the DEP made few significant changes in the final version, with the exception of the mapping requirements. (To avoid duplication, the DEP allowed companies to obtain information from state agencies to draw up maps of sensitive areas that could be affected by a spill.) The 15-minute notification requirement following the discovery of a spill remained unchanged (see ***OSLR***, October 1991).

New Jersey's legislature in 1991 dealt only with the issue of responder immunity (AB 4752, signed August 13, 1991).

Oregon Is Only State to Pass Compact Bill

Oregon's legislature meets every other year and therefore won't meet again until 1993. Consequently, legislators successfully pushed through three spill bills in 1991 that might otherwise have been postponed, such as SB 500 (signed July 18, 1991), which ratifies the Pacific Ocean Resources Compact. Oregon at this point is the only state to have ratified the compact (see ***OSLR***, June 1991). The other two bills establish responder immunity standards (HB 3348, signed September 29, 1991) and contingency plan requirements (SB 242, signed July 22, 1991).

Oregon's Department of Environmental Quality (DEQ) released amendments to its existing oil spill regulations on November 8, 1991 (minor changes due to a few technical errors, said a DEQ spokesperson), which will be released shortly. In addition, the DEQ is currently developing standards for the contingency planning requirements outlined in SB 242. These standards will likely be released in July.

Texas Puts General Land Office in Charge

The responsibility for marine oil spill prevention and response switched hands in Texas this past year. The Texas legislature passed a comprehensive piece of oil spill legislation on March 28, 1991, entitled the "Oil Spill Prevention and Response Act of 1991" (SB 14), which, among other things, gave the Texas General Land Office (GLO) the responsibility for implementing the act and generally overseeing prevention and response activities — activities that were previously carried out by the Texas Water Commission (see ***OSLR***, April 1991).

SB 14 complements the Oil Pollution Act of 1990 in many respects. The bill features language on such issues as liability, enforcement, limited immunity for responders, a new coastal protection fund, inspections and drills, financial responsibility, contingency plans, and research and development. It directs the GLO to develop a statewide spill contingency plan and promulgate regulations on various issues in the act.

Shortly after the GLO hired 30-year US Coast Guard veteran Tim McKinna as the new director for the state's oil spill prevention and response program on July 11, 1991, it released draft regulations (on August 9, 1991) that provide a general outline of prevention, response, liability, and compensation requirements (see ***OSLR***, September 1991). The final regulations are expected by February, followed by a 30-day period "to correct glaring mistakes," said McKinna.

Virginia Meets January Deadline for Spill Regulations

The State Water Control Board in Virginia released two final spill regulations on December 9, 1991, which will go into effect in January: "Oil Discharge Contingency Plans and Administrative Fees for Approval" (VR 680-14-07) and "Tank Vessel Financial Responsibility Requirements and Administrative Fees for Approval" (VR 680-14-08). The board released drafts of these regulations on July 29, 1991 (see ***OSLR***, August 1991).

Before the September 30, 1991, deadline for comments, the board sponsored three workshops to address various concerns regarding the regulations (see ***OSLR***, October 1991). In the end, the board included a number of changes that made the final version of the contingency planning regulation stricter than the draft. The final financial responsibility requirements, however, varied little from the draft, except that the fees for approval are lower and the final version accepts "certificates of entry" as proof of liability coverage.

The majority of changes to the contingency planning regulations focus on leak detection as a result of comments by Attorney General Mary Sue Terry. Terry is expected to introduce legislation in 1992 aimed at improved spill prevention measures at tank farms, oil terminals, and pipeline facilities. It has also been suggested, said board spokesperson David Ormes, that the legislature consider extending the deadline for the approval of contingency plans from July 1, 1992 to July 1, 1993 to allow time for the federal government to promulgate regulations. At this point, said Ormes, the US Coast Guard said Virginia's regulations look as though they will complement the federal regulations. The main objectors to the regulations are still the small operators, said Ormes.

Washington Forms New Marine Safety Office

This past year saw plenty of action in Washington State regarding oil spill legislation and regulations. The momentum actually began to build on May 15, 1991, when Washington Governor Booth Gardner signed — but vetoed three sections of — HB 1027, one of the most detailed spill bills in the country (see ***OSLR***, June 1991). Prompted by recommendations from the States/British Columbia Oil Spill Task Force, the bill features a number of significant changes to the state's approach to spill prevention and response, including: the establishment of a $25 million response fund; limited immunity for responders; the addition of a citizens' advisory committee that reports to the governor; financial responsibility requirements acceptable to the protection and indemnity (P&I) clubs; and new requirements for prevention plans and contingency plans. In addition, HB 1027 established the Office of Marine Safety to focus on the prevention of spills from vessels, which took some of the burden off the Department of Ecology (DOE). The DOE is currently responsible for responding to spills and ensuring that preventive measures are in place at facilities. (Around the first of October 1991, Gardner appointed Barbara Herman as the new administrator of the Marine Safety Office. Herman was formerly the chief litigator for the state of Alaska in the Exxon Valdez case.)

By the fall, the DOE had completed the first set of tasks required by the act (which was, in fact, months after HB 1027's deadline of July 1, 1991). DOE staff released one volume of its statewide master spill prevention and contingency plan, facility contingency plan and response contractor standards, and a proposed preassessment screening and oil spill compensation schedule for determining damages to natural resources (the first such formula to be developed by a state agency; see ***OSLR***, December 1991).

Hotline

Included with this issue for subscribers only are Virginia's new regulations: "Tank Vessel Financial Responsibility Requirements and Administrative Fees for Approval," and "Oil Discharge Contingency Plans and Administrative Fees." For any other document mentioned in this year-end issue, consult the ***OSLR Legislative Sourcebook*** or call the Oil Spill Hotline at Tel: (617) 641-5110 or 648-8700; Fax: (617) 648-8707. A happy, healthy New Year from the staff of the ***Oil Spill US Law Report.***

Editor: Amy M. Stolls

Publisher: Karen Fine Coburn

Subscription Manager: Kim Leonard

Contributing Editors: Faith Yando, Dagmar Schmidt Etkin, Jeff Welch

Production Editor: Karen Kunkel Pasley

When changing your address, please include both old and new addresses with ZIP code numbers, accompanied by mailing label from a recent issue.

Oil Spill US Law Report is published monthly by Cutter Information Corp., 37 Broadway, Arlington, MA 02174-5539, USA: Tel: (617) 648-8700, Fax: (617) 648-8707, Telex: 650 100 9891.

Subscriptions: $767 per year; $867 outside North America. ISSN 1055-9175.

OSLR is available electronically, online, on NewsNet® and Predicasts®. For access information, call NewsNet at (215) 527-8030, or Predicasts at (216) 795-3000.

Alaska State Legislature

Legislative Research Agency

130 Seward Street, Suite 218
Juneau, Alaska 99801-2196

Phone: (907) 465-3991
Fax: (907) 463-3351

March 13, 1992

MEMORANDUM

TO: Senator Sam Cotten

FROM: Glenn T. Gray GTG
Legislative Analyst

RE: **Direct Action Provisions in Other State's Oil Spill Laws**
Research Request 92.190 (Preliminary Information)

You asked how many states have direct action clauses in their oil spill liability statutes. Direct action provisions permit states to bring an action directly against an insurer in a state court.

Environmental officials or attorneys from 11 of the 22 coastal states we contacted have provided information about direct action provisions in state statutes. Of these 11 states, 8 have never had direct action clauses in their oil spill liability statutes (Alabama, Connecticut, Delaware, Georgia, Maryland, New Hampshire, Oregon and South Carolina). Florida, New York and Virginia either currently have or have had direct action statutory provisions.

- **Virginia:** Steve Shepard, an assistant attorney general for Virginia, said that his state currently requires insurance companies to provide instate "service of process." Protection and Indemnity (P&I) clubs, however, are exempted from this requirement (62.1-44.34:16). Protection and Indemnity clubs are mutuals made up of a number of tanker and oil companies.

- **New York:** According to Gordon Johnson, an assistant attorney general for New York, state statutes permit the state to assert claims directly against a bond or the insurer (Navigation Law Section 190).

- **Florida:** Debbie Prebble, an environmental administrator for the Office of Coastal Protection, said that in 1990 the legislature required all insurance companies to provide proof of financial security. The P&I clubs, however, refused to comply with this requirement and other insurance companies would not provide the necessary insurance. As a result, companies had to provide proof of self-insurance. Smaller companies were able to self-insure only for a few of their vessels at one time and therefore only provided proof of insurance for vessels when they were in Florida waters. Because the state was burdened with the continuous processing of insurance certificates, the law was changed in 1991 (FS 376.14).

Copies of the statutes from these three states are attached.

Information about direct action provisions in oil spill statutes from the 11 coastal states not addressed in this memorandum will be forwarded to you when we receive them.

Attachments

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

REPLY TO:

☑ 1031 W 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

☐ KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

☐ P.O. BOX K - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

March 11, 1992

Senator Sam Cotten
Senator Lyman F. Hoffman
Senate Select Committee on Oil and Gas
P.O. Box V
Juneau, AK 99811

Dear Senators Cotten & Hoffman:

In response to questions raised by your staff in the March 5 work session on SB 405, we enclose some materials of potential interest to you.

With regard to questions concerning the public policy considerations behind direct action statutes, we enclose two articles which discuss those issues. Note, <u>The Direct Action Statute and Ocean Marine Insurance: Can Protection and Indemnity Insurers Convince the Courts "To Manacle An Old And Beaten Enemy,"</u> 37 Loyola Law Review 121, 122-23 (1991); Comment, <u>Direct Actions Against Marine Insurers: A Call for Uniform Legislation</u>, 21 Willamette Law Review 279, 280-90 (1985). We have also forwarded separately copies of our office's research binders setting forth the legislative history of Alaska's financial responsibility statutes.

Finally, with regard to questions about the trust fund established by the federal Oil Pollution Act of 1990 ("OPA 90"), we enclose several commentaries on the Act. Several are written by American private maritime attorneys and one by a director of one of the British P&I Clubs. Once the OPA 90 regulations are adopted by the federal government, injured Alaskan private claimants would have access to the fund for oil pollution damages recognized in the act. Claims will be first submitted to the responsible parties for the spill and subsequently to the federal fund.

LAW OVERVIEW

Supreme Court. Powell's reply might simply be that where the other institutions show no significant success at social reform, the court has a proper role to play.

5) *Goal Concensus*: While final conclusions in the area of sentencing can be stated generally, the cases discussed suggest that the length of imprisonment which is disproportional in a particular case is not self-evident. Perhaps that is why the Supreme Court has held that the right to counsel is triggered by any actual imprisonment,[127] and the possibility of actual imprisonment for more than six months is enough to trigger a defendant's right to a trial by jury.[128] But in order to persuade a court to examine whether an actual sentence is cruel and unusual, only a sentence of death or life imprisonment seems to qualify.

Most of the justifications offered by Judge Neely seem supportive of a high ranking for the proportionality issue put forth in these non-capital punishment cases. Justice Powell's objective analysis indicates that proportionality review does not "place an impossible administrative burden on the judicial system,"[129] and the process of sentencing review on a case by case basis seems to require "only the exercise of judicial responsibility."[130]

---

127. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).
128. *See* Baldwin v. New York, 399 U.S. 66, 73-74 (1969).
129. NEELY, *supra* note 1, at 168.
130. *Id.* at 169.

COMMENTS

WILLAMETTE LAW REVIEW
21:2 Spring 1985

DIRECT ACTIONS AGAINST MARINE INSURERS: A CALL FOR UNIFORM LEGISLATION

INTRODUCTION

Suppose that a seaman has been disabled by an injury occuring during the course of his employment on board ship. The cause of the injury was an inadequately maintained hatch-cover through which he fell. The seaman brings an action against his employer, the vessel owner, and obtains a favorable judgment and a sizable damages award. The employer, however, is financially insolvent and can pay nothing on the judgment. The seaman then discovers that injuries to employees on the vessel were covered by a marine protection and indemnity policy issued to his employer. Consequently, he brings an action directly against his employer's insurance company to recover the judgment from the proceeds of the policy.

Whether the injured seaman described above will be able to recover on the judgment depends almost entirely on the fortuitous circumstances of where the vessel was located when the injury occurred, and where the insurance contract was made or delivered. For example, should the seaman have had the misfortune to be injured in New York waters, with those injuries covered by a marine insurance policy issued in New York, he will almost certainly remain unrecompensed.[1] At the same time, his fellow seaman down the coast in Louisiana, on identical facts except for geographic location, would enjoy a relatively

---

1. *See infra* notes 105-129 and accompanying text.

effortless recovery.[2]

The focus of this Comment is on whether an injured seaman, such as the one just described, can successfully bring an action against his insolvent employer's insurer in the absence of an applicable direct action statute. This Comment provides an overview of the law of marine insurance and traces the development of direct action statutes. The interplay between those statutes and traditional principles of marine insurance is also examined. The Comment concludes that a seaman's chances of recovery against a maritime insurer are slight in the absence of a statute authorizing direct action. It further discusses the need for legislative action in this area in light of the apparent inequity described in the preceding paragraph.

I. Background

A. *Overview of Marine Protection and Indemnity Insurance*

1. *History and Definition*

Marine insurance is "a contract whereby, the insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure."[3] There are three basic types: hull and machinery insurance, cargo insurance, and protection and indemnity insurance.[4] This Comment focuses on protection and indemnity insurance.

The business of marine insurance dates back to antiquity and was well established in England by the seventeenth century.[5] In its original form it consisted merely of a protection agreement among individual shipowners. Typically, a vessel owner in England would meet with other vessel owners at a local coffee house and circulate around the table a list of the items to be insured. Any vessel owner wishing to insure an item or liability would simply write his name under it. From this practice the term "underwriter" developed.[6]

These insurance underwriters normally assumed only a part of the risk from collision and assumed none of the risk for personal injury. To protect themselves against the risk of liability for personal injury, the vessel owners organized mutual protection "clubs."[7] The members of these clubs mutually agreed to pay the losses of their members, based on the proportionate amount of ship tonnage each member had entered with the club.[8]

The unique feature of these clubs was that the vessel owners paid no rated premium for a specific amount of insurance coverage. Instead, each vessel owner was guaranteed indemnification for all losses sustained out of funds collected from other members of the club.[9] This type of club is still active in Great Britain.[10] However, in this country almost all marine insurance is now handled by corporations.[11]

The typical marine protection and indemnity (P & I) policy grew out of the early British mutual protection clubs.[12] This type of policy protects the vessel owner (the assured) on claims against it or the injured vessel. Normally it covers only third party claims, *i.e.*, it pays for damage done to others by the vessel owner or his agents.[13]

It is important to distinguish P & I insurance from other liability insurance. An ordinary liability policy obligates the insurer to pay any damages for which the insured is legally liable.[14] A P & I policy, on the other hand, is a form of indemnity insurance. It obligates the insurer to reimburse or indemnify the assured only to the extent that the assured has actually paid damages.[15] The crucial distinction between the two types of policies is that a cause of action on a liability policy accrues as soon as liability attaches, whereas no cause of action accrues on an indemnity policy until the liability has been discharged by the assured. Thus, the assured must have suffered an actual monetary loss before the insurer is obligated to pay on the policy.[16]

2. *See infra* notes 38-66 and accompanying text.

3. BRITISH MARINE INSURANCE ACT, 1906 § 1.

4. THE FLORIDA BAR, MARITIME LAW & PRACTICE 287 (1980).

5. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 54-55 (2d ed. 1975). Protection and Indemnity insurance, however, dates back only to the mid-nineteenth century. Reynardson, *The History and Development of P & I Insurance: The British Scene*, 43 TULANE L. REV. 457, 467 (1969).

6. Kierr, *The Effect of Direct Action Statutes on P & I Insurance, On Various Other Insurances of Maritime Liability, and On Limitation of Shipowners' Liability*, 43 TULANE L. REV. 638, 644 (1969).

7. *Id.*

8. MARITIME LAW & PRACTICE, at 291.

9. Kierr, *supra* note 6, at 655.

10. G. GILMORE & C. BLACK, *supra* note 5, at 76.

11. *Id.* at 55.

12. Houdlett, *Direct Action Statutes & Marine P & I Insurance*, 3 J. MAR. L. & COM. 559, 560 (1972).

13. L. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 240 (1973).

14. Ahmed v. American Steamship Owners Mut. Protection & Indem. Ass'n., 444 F. Supp. 569, 571, 1978 A.M.C. 586, 587 (N.D. Cal. 1978).

15. *Id.* at 571, 1978 A.M.C. at 587.

16. *Id.* at 571, 1978 A.M.C. at 588.

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

REPLY TO:

☑ 1031 W 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

☐ KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

☐ P.O. BOX K - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

March 11, 1992

Senator Sam Cotten
Senator Lyman F. Hoffman
Senate Select Committee on Oil and Gas
P.O. Box V
Juneau, AK 99811

Dear Senators Cotten & Hoffman:

In response to questions raised by your staff in the March 5 work session on SB 405, we enclose some materials of potential interest to you.

With regard to questions concerning the public policy considerations behind direct action statutes, we enclose two articles which discuss those issues. Note, The Direct Action Statute and Ocean Marine Insurance: Can Protection and Indemnity Insurers Convince the Courts "To Manacle An Old And Beaten Enemy," 37 Loyola Law Review 121, 122-23 (1991); Comment, Direct Actions Against Marine Insurers: A Call for Uniform Legislation, 21 Willamette Law Review 279, 280-90 (1985). We have also forwarded separately copies of our office's research binders setting forth the legislative history of Alaska's financial responsibility statutes.

Finally, with regard to questions about the trust fund established by the federal Oil Pollution Act of 1990 ("OPA 90"), we enclose several commentaries on the Act. Several are written by American private maritime attorneys and one by a director of one of the British P&I Clubs. Once the OPA 90 regulations are adopted by the federal government, injured Alaskan private claimants would have access to the fund for oil pollution damages recognized in the act. Claims will be first submitted to the responsible parties for the spill and subsequently to the federal fund.

LAW OVERVIEW

We trust that this material will be of assistance to you.

Sincerely,

CHARLES E. COLE
Attorney General

By Breck Tostevin
Assistant Attorney General

BCT/jv

Enclosures (6)

cc: Deborah Behr, DOL/Juneau (w/o enc)
Paul Fuhs, Office of the Governor (w/o enc)

Supreme Court. Powell's reply might simply be that where the other institutions show no significant success at social reform, the court has a proper role to play.

5) *Goal Concensus*: While final conclusions in the area of sentencing can be stated generally, the cases discussed suggest that the length of imprisonment which is disproportional in a particular case is not self-evident. Perhaps that is why the Supreme Court has held that the right to counsel is triggered by any actual imprisonment,[127] and the possibility of actual imprisonment for more than six months is enough to trigger a defendant's right to a trial by jury.[128] But in order to persuade a court to examine whether an actual sentence is cruel and unusual, only a sentence of death or life imprisonment seems to qualify.

Most of the justifications offered by Judge Neely seem supportive of a high ranking for the proportionality issue put forth in these non-capital punishment cases. Justice Powell's objective analysis indicates that proportionality review does not "place an impossible administrative burden on the judicial system."[129] and the process of sentencing review on a case by case basis seems to require "only the exercise of judicial responsibility."[130]

127. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).
128. *See* Baldwin v. New York, 399 U.S. 66, 73-74 (1969).
129. NEELY, *supra* note 1, at 168.
130. *Id.* at 169.

COMMENTS

WILLAMETTE LAW REVIEW

21:2 Spring 1985

DIRECT ACTIONS AGAINST MARINE INSURERS: A CALL FOR UNIFORM LEGISLATION

INTRODUCTION

Suppose that a seaman has been disabled by an injury occuring during the course of his employment on board ship. The cause of the injury was an inadequately maintained hatch-cover through which he fell. The seaman brings an action against his employer, the vessel owner, and obtains a favorable judgment and a sizable damages award. The employer, however, is financially insolvent and can pay nothing on the judgment. The seaman then discovers that injuries to employees on the vessel were covered by a marine protection and indemnity policy issued to his employer. Consequently, he brings an action directly against his employer's insurance company to recover the judgment from the proceeds of the policy.

Whether the injured seaman described above will be able to recover on the judgment depends almost entirely on the fortuitous circumstances of where the vessel was located when the injury occurred, and where the insurance contract was made or delivered. For example, should the seaman have had the misfortune to be injured in New York waters, with those injuries covered by a marine insurance policy issued in New York, he will almost certainly remain unrecompensed.[1] At the same time, his fellow seaman down the coast in Louisiana, on identical facts except for geographic location, would enjoy a relatively

1. *See infra* notes 105-129 and accompanying text.

effortless recovery.[2]

The focus of this Comment is on whether an injured seaman, such as the one just described, can successfully bring an action against his insolvent employer's insurer in the absence of an applicable direct action statute. This Comment provides an overview of the law of marine insurance and traces the development of direct action statutes. The interplay between those statutes and traditional principles of marine insurance is also examined. The Comment concludes that a seaman's chances of recovery against a maritime insurer are slight in the absence of a statute authorizing direct action. It further discusses the need for legislative action in this area in light of the apparent inequity described in the preceding paragraph.

I. Background

A. *Overview of Marine Protection and Indemnity Insurance*

1. *History and Definition*

Marine insurance is "a contract whereby, the insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure."[3] There are three basic types: hull and machinery insurance, cargo insurance, and protection and indemnity insurance.[4] This Comment focuses on protection and indemnity insurance.

The business of marine insurance dates back to antiquity and was well established in England by the seventeenth century.[5] In its original form it consisted merely of a protection agreement among individual shipowners. Typically, a vessel owner in England would meet with other vessel owners at a local coffee house and circulate around the table a list of the items to be insured. Any vessel owner wishing to insure an item or liability would simply write his name under it. From this practice the term "underwriter" developed.[6]

These insurance underwriters normally assumed only a part of

2. *See infra* notes 38-66 and accompanying text.

3. British Marine Insurance Act, 1906 § 1.

4. The Florida Bar, Maritime Law & Practice 287 (1980).

5. G. Gilmore & C. Black, The Law of Admiralty 54-55 (2d ed. 1975). Protection and Indemnity insurance, however, dates back only to the mid-nineteenth century. Reynardson, *The History and Development of P & I Insurance: The British Scene*, 43 Tulane L. Rev. 457, 467 (1969).

6. Kierr, *The Effect of Direct Action Statutes on P & I Insurance, On Various Other Insurances of Maritime Liability, and On Limitation of Shipowners' Liability*, 43 Tulane L. Rev. 638, 644 (1969).

the risk from collision and assumed none of the risk for personal injury. To protect themselves against the risk of liability for personal injury, the vessel owners organized mutual protection "clubs."[7] The members of these clubs mutually agreed to pay the losses of their members, based on the proportionate amount of ship tonnage each member had entered with the club.[8]

The unique feature of these clubs was that the vessel owners paid no rated premium for a specific amount of insurance coverage. Instead, each vessel owner was guaranteed indemnification for all losses sustained out of funds collected from other members of the club.[9] This type of club is still active in Great Britain.[10] However, in this country almost all marine insurance is now handled by corporations.[11]

The typical marine protection and indemnity (P & I) policy grew out of the early British mutual protection clubs.[12] This type of policy protects the vessel owner (the assured) on claims against it or the injured vessel. Normally it covers only third party claims, *i.e.*, it pays for damage done to others by the vessel owner or his agents.[13]

It is important to distinguish P & I insurance from other liability insurance. An ordinary liability policy obligates the insurer to pay any damages for which the insured is legally liable.[14] A P & I policy, on the other hand, is a form of indemnity insurance. It obligates the insurer to reimburse or indemnify the assured only to the extent that the assured has actually paid damages.[15] The crucial distinction between the two types of policies is that a cause of action on a liability policy accrues as soon as liability attaches, whereas no cause of action accrues on an indemnity policy until the liability has been discharged by the assured. Thus, the assured must have suffered an actual monetary loss before the insurer is obligated to pay on the policy.[16]

7. *Id.*

8. Maritime Law & Practice, at 291.

9. Kierr, *supra* note 6, at 655.

10. G. Gilmore & C. Black, *supra* note 5, at 76.

11. *Id.* at 55.

12. Houdlett, *Direct Action Statutes & Marine P & I Insurance*, 3 J. Mar. L. & Com. 559, 560 (1972).

13. L. Buglass, Marine Insurance and General Average in the United States 240 (1973).

14. Ahmed v. American Steamship Owners Mut. Protection & Indem. Ass'n., 444 F. Supp. 569, 571, 1978 A.M.C. 586, 587 (N.D. Cal. 1978).

15. *Id.* at 571, 1978 A.M.C. at 587.

16. *Id.* at 571, 1978 A.M.C. at 588.

2. *Choice of Law*

In the early part of this country's history federal maritime law governed disputes involving marine insurance contracts.[17] Regulation of the insurance industry in general, however, was controlled by the laws of the various states.[18] This practice of reserving the resolution of marine insurance claims to federal maritime law was changed in 1954 by the United States Supreme Court's decision in *Maryland Casualty Co. v. Cushing*.[19] In that case the Court allowed a state direct action statute to alter the effect of a marine insurance policy.[20] A year later, the Court's opinion in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.* eliminated any lingering doubt as to the applicability of state law in the field of marine insurance.[21] In *Wilburn* the Court held that a marine fire insurance policy should be construed in compliance with Texas law, in the absence of a controlling rule in the body of federal maritime law.[22]

Lower courts have read *Wilburn* as standing for the proposition that where no well-settled federal maritime rule applies, maritime insurance contracts are to be governed by state law.[23] As a result, state direct action statutes have been applied to marine insurance policies.[24]

Under *Wilburn*, federal choice of law rules control whether a particular state's direct action statute is applicable to a marine insurance policy.[25] In accordance with those rules courts have applied the law of the state with the most significant relationship to the insurance contract.[26]

17. *See, e.g.*, Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1871).

18. Staring, *A Proposal to Reduce Confusion in the Law of Marine Insurance*, 5 MAR. LAW. 21, 22 (1980).

19. 347 U.S. 409 (1954).

20. *Id.*

21. 348 U.S. 310 (1955).

22. *Id.* at 316.

23. *See* Miller v. American Steamship Owners Mut. Protection and Indemnification Co., 509 F. Supp. 1047, 1050-51 (S.D.N.Y. 1981); *Ahmed*, 444 F. Supp. at 571, 1978 A.M.C. at 588.

24. *See* Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969); *see also* Maryland Cas. v. Cushing, 347 U.S. 409.

25. *Ahmed*, 444 F. Supp. at 571, 1978 A.M.C. at 588.

26. *Id.* (relying on the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971), which lists the factors to be taken into account as: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.").

B. *Development of Direct Action Statutes*

At common law, in the absence of a contractual or statutory provision authorizing a direct action against a liability insurer, an injured person had no right of action against an insurer.[27] This rule was based on the lack of privity between the two parties.[28] Consequently, an injured party could not maintain an action directly against an insurer to recover on a judgment rendered against the assured, even if the assured were insolvent and unable to satisfy the judgment.[29]

Many legislators found this result unjust. The fund created by the payment of insurance premiums was not used, even though the very situation it was designed to avoid had occurred — the victim of the assured's negligence was left uncompensated.[30] In response, a number of states passed statutes permitting a plaintiff to proceed against an insurer after first obtaining a final judgment against the assured.[31] The philosophy behind such statutes is that liability insurance is actually for the benefit of the injured party, rather than for the protection of the assured.[32] The statutes are basically "an application of the principle of contract law that a third party beneficiary may sue to enforce a contract made for his benefit even though not himself a party to the agreement."[33]

The provisions and effect of statutes permitting a direct suit by a third party against an insurance company vary significantly from state to state.[34] In some jurisdictions the statute merely prohibits the insertion of "no action"[35] clauses into insurance policies. Other statutes allow a direct action against the insurer only when the assured is insol-

27. *See, e.g.*, Severson v. Estate of Severson, 627 P.2d 649, 651 (Alaska 1981); Olokele Sugar Co. v. McCabe, Hamilton & Renny Co., 53 Hawaii 69, 71, 487 P.2d 769, 770 (1971).

28. 627 P.2d at 651; 53 Hawaii at 71, 487 P.2d at 770.

29. Cucurillo v. American Steamship Owners Mut. Protection and Indem. Ass'n., 1969 A.M.C. 2334, 2335 (N.Y. Sup. Ct. 1969); *see, e.g.*, 25 HALSBURY'S LAWS OF ENGLAND ¶ 704 (4th ed. 1978).

30. Johnston, *The Louisiana Direct Action Statute*, 43 LA. L. REV. 1455, 1457 (1983).

31. Kierr, *supra* note 6, at 650-51.

32. L. BUGLASS, *supra* note 13, at 270; Houdlett, *supra* note 12, at 561.

33. Johnston, *supra* note 30, at 1456.

34. Houdlett, *supra* note 12, at 560.

35. A "no action" clause in an insurance policy limits coverage to loss "actually sustained and paid by" the assured. Johnston, *supra* note 30, at 1457. A typical no action provison was contained in the insurance policy at issue in Maryland Cas. Co. v. Cushing. *See infra* notes 40-51 and accompanying text. The clause provided that "no action shall lie against the company to recover upon any claim or loss . . . unless brought after the amount of such claim or loss shall have been fixed and rendered certain either by final judgment . . . after trial or the issue or by agreement between the parties with the written consent of the Company . . . ." 347 U.S. at 411 n.3.

vent or only when there has first been judgment against the assured. The most sweeping statute provides for an original proceeding directly against an underwriter with the insurance company named as defendant.[36] The broadest and most notable of the latter is the Louisiana statute and its offspring in Puerto Rico.[37]

II. Marine P & I Insurance and Direct Action Statutes

A. *Louisiana*

Louisiana, as noted above, has the most comprehensive direct action statute in the country.[38] The statute provides that an injured party may bring an action against an insurer alone without joining the assured as a party defendant, "whether the policy of insurance . . . was written and delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided that the accident or injury occurred within the State of Louisiana."[39]

The Louisiana statute faced its first clash with traditional principles of maritime law in *Maryland Casualty Co. v. Cushing*.[40] In that case, five seamen drowned in Louisiana waters when their vessel capsized. The vessel owner and charterer petitioned the District Court to limit their liability under the federal Limitation of Liability Act.[41] That Act allows vessel owners, under certain circumstances, to limit their liability for claims arising in connection with the vessel to the value of their interest in the vessel plus pending freight.[42] It further provides for a concursus of all claims against the vessel owner arising from a particular cause of action.[43]

Representatives of the five drowned seamen subsequently brought an action against the liability underwriters of the vessel owner and charterer pursuant to the Louisiana Direct Action Statute, seeking recovery on a $170,000 P & I policy.[44] The district court dismissed the action on the ground that the statute was inapplicable to marine insur-

36. Houdlett, *supra* note 12, at 562.
37. Kierr, *supra* note 6, at 651.
38. *Id.*
39. La. Rev. Stat. Ann. § 22:655 (West 1978).
40. 347 U.S. 409.
41. 46 U.S.C.A. §§ 183, 186 (West 1958).
42. Courts have interpreted the statute to mean the value of the vessel and her freight after the accident. *See, e.g.*, 347 U.S. at 414 n.4.
43. 46 U.S.C.A. §§ 183, 186.
44. 347 U.S. at 410-11.

ance policies. The court reasoned that application of the statute would "not only work material prejudice to the characteristic features of the general maritime law but would also contravene the essential purpose expressed by an Act of Congress in a field already covered by that Act.[45] The Fifth Circuit Court of Appeals reversed.[46]

The United States Supreme Court granted review to determine whether the direct action statute was in conflict with the federal maritime law, and in particular with the Limitation of Liability Act.[47] However, the Court soon "found itself . . . hopelessly divided" in its attempt to reconcile the federal Act with the Louisana Statute.[48] Justice Frankfurter, in an opinion joined by three other members of the Court, would have dismissed the action on the ground that the direct action statute disturbed the traditonal uniformity of maritime law.[49] Justice Black and three other justices believed that there was no conflict between the Limitation Act and the Louisiana statute. They concluded that both the limitation proceeding and the action against the insurer could proceed concurrently.[50] The ninth member of the Court, Justice Clark, provided a solution to the impasse, although not a resolution to the conflict. He opined that conflict between the Liability Act and the direct action statute could be avoided by merely staying the action against the insurance company until the limitation proceeding was concluded.[51]

The issue of whether the direct action statute conflicted with the Limitation Act was resolved in the fifth circuit by *Olympic Towing Corp. v. Nebel Towing Co.*[52] In that case, Olympic brought suit against both Nebel and its insurer to recover damages sustained in the sinking of Olympic's vessel. The sinking was caused by the improper navigation of Nebel's vessel. The fifth circuit arrived at three conclusions. First, the court held that the Louisiana direct action statute unquestionably applied to marine insurance policies.[53] Second, the court held that the statute applied to protection and indemnity, as well

45. *Id.* at 411-12 (referring to the Limitation of Liability Act, 46 U.S.C.A. § 183).
46. *Id.* at 412.
47. *Id.*
48. Koesler v. Harvey Applicators, Inc., 416 F. Supp. 872, 873 (E.D. La. 1976) (quoting G. Gilmore & C. Black, *supra* note 5, at 908).
49. 347 U.S. at 422.
50. *Id.* at 436.
51. *Id.* at 427.
52. 419 F.2d 230 (5th Cir. 1969), *cert. denied*, 397 U.S. 987 (1970).
53. *Id.* at 236 (*citing* Coleman v. Jahncke Serv., Inc., 341 F.2d 956 (5th Cir. 1965)).

as liability policies.[54] Hence, an insurer could be obligated to pay on an indemnity policy even though the assured had suffered no monetary loss. Finally, the court held that limitation of liability was a defense personal to the vessel owner and unavailable to the insurer.[55] Thus an insurer could be liable for a greater amount than the assured could be forced to pay. Implicit in the opinion was the court's conclusion that the direct action statute did not disrupt the requisite uniformity of the general maritime law.[56]

Olympic Towing firmly established that the Louisiana direct action statute applies to both indemnity and liability marine insurance policies.[57] It further established that an insurance company cannot limit its liability to the maximum amount the assured could have been obligated to pay after a successful limitation action. Hence, the benefits of the statute to a seaman injured in the territorial waters of Louisiana are clear. However, whether a seaman injured just outside Louisiana waters may avail himself of the benefits of the direct action statute has been more difficult to determine.

In *Continental Oil Co. v. London Steam-ship Owners Mutual Insurance Assoc.*, the fifth circuit held that Louisiana's direct action statute did not apply to a suit involving a collision between a vessel and a fixed production platform on the outer continental shelf off the coast of Louisiana.[58] The basis for the decision was that under the Outer Continental Shelf Lands Act,[59] the law of the adjacent state is applicable where that state law has been adopted as the law of the United States. The court held that the Louisiana statute had not been so adopted and therefore could not be utilized by the plaintiff.[60] This decision has been followed in later cases.[61] For example, in *Koesler v. Harvey Applicators, Inc.* the court denied recovery under the Louisiana statute to a seaman for personal injuries suffered on the outer continental shelf.[62]

The courts have, however, allowed application of the direct ac-

54. *Id.* at 237.
55. *Id.* at 238.
56. *Koesler*, 416 F. Supp. at 873.
57. *See also* American Sugar Co. v. Vainqueur Corp., 1970 A.M.C. 405 (E.D. La. 1970) (holding that the marine indemnity policy was written for the benefit of public protection; therefore, the right of direct action under Louisiana's statute should not have been denied to plaintiff).
58. 417 F.2d 1030, 1040 (5th Cir. 1969).
59. 43 U.S.C.A. § 1331 (West 1984).
60. 417 F.2d at 1037-40.
61. *See* Nations v. Morris, 483 F.2d 577 (5th Cir. 1973).
62. 416 F. Supp. at 875-76.

tion statute for injuries suffered outside state territorial waters where the Outer Continental Shelf Lands Act was not a factor. In *Sassoni v. Savoie*, the court held that the Louisiana statute was applicable to a seaman's suit for injuries sustained on the high seas.[63] In that case, the insurance contract originated with a New Orleans insurance company and was issued to a Louisiana resident. The injured seaman was also a resident of Louisiana, and the fishing vessel on which he was injured operated out of a Louisiana port.[64] The court reasoned that the state had a clear interest in permitting its injured citizens to sue a tortfeasor's insurer directly when both the tortfeasor and insurer do business in the state. It further observed that to allow recovery for injuries on the high seas would do no more injury to the uniformity of federal maritime law than would allowing recovery for injuries sustained in territorial waters.[65]

Sassoni has been interpreted as providing a right of direct action when either (a) the accident takes place in Louisiana, or (b) the insurance contract is written or delivered in the state.[66] Therefore, the hypothetical seaman described previously could recover his judgment against his employer's insurer if his injury occurred within Louisiana territorial waters, or if he was injured on the high seas and his employer's insurance contract had sufficient connection with the state of Louisiana.

B. Puerto Rico

At this time Puerto Rico is apparently the only maritime jurisdiction which has adopted a direct action statute patterned after Louisianna's.[67] Puerto Rico's statute provides that an insurer insuring against loss through liability for the bodily injury or death of a third person becomes absolutely liable whenever a loss covered by the policy occurs. The insurer's obligation does not depend upon prior payment by the assured of an adverse judgment.[68] Thus the indemnity aspect of a P & I policy is abrogated.

The statute further provides that any individual sustaining losses has the option of a direct action against the insurer under the terms of

63. 327 F. Supp. 474, 476 (E.D. La. 1971).
64. *Id.* at 475-76.
65. *Id.* at 475.
66. L. Buglass, *supra* note 13, at 270-71.
67. *See* Kierr, *supra* note 6, at 663 n.121.
68. P.R. Laws Ann. tit. 26 § 2001 (1976).

the policy.[69] The statute was amended in 1957 to bring it directly in line with the Louisiana statute.[70] Therefore, under the Puerto Rico statute the defense of limitation of liability is unavailable to the insurer.[71] This is a significant benefit to an injured seaman since his employer's insurance policy may be worth much more than the value of the vessel and pending freight after a maritime accident.[72]

More importantly, Puerto Rico, like Louisiana, has eliminated the indemnity limitation in a P & I policy. In *Gonzalez v. Carribbean Carriers, Ltd.* a longshoreman was injured aboard a vessel and was totally disabled.[73] He brought suit against both the vessel owner and its P & I carrier.[74] The vessel owner was apparently insolvent. The insurance company moved for summary judgment, contending that the P & I policy issued to the vessel owner was not a liability policy within the meaning of the direct action statute. The insurer's position was consistent with the traditional view toward P & I policies. The insurer argued that no action could be brought against it until the assured became obligated to pay, and did in fact pay.[75] The court, however, denied the insurer's motion, reasoning that the legislature had not intended to deny recovery to those covered by marine indemnity policies while extending it to others.[76]

Gonzalez indicates that had the hypothetical seaman been injured in Puerto Rican waters, he would be permitted to seek recovery directly from the indemnity insurer, regardless of the fact that his insolvent employer had paid nothing on the judgment.

C. *California*

Although Louisiana and Puerto Rico provide the most comprehensive rights of direct action, the hypothetical injured seaman would also be likely to recover under a more limited direct action statute. A number of states provide for direct action against an insurance company where the assured is insolvent.[77]

69. *Id.* at § 2003(1) (1977).
70. Torres v. Interstate Fire & Cas. Co., 275 F. Supp. 784, 788 (D.P.R. 1967).
71. *Id.* at 789.
72. Recall that the value of the vessel plus pending freight is the maximum amount for which the vessel owner-employer could be held liable after a successful limitation proceeding. 46 U.S.C.A. § 183.
73. 379 F. Supp. 634, 635 (D.P.R. 1974).
74. *Id.* at 635.
75. *Id.* at 637.
76. *Id.* at 637-38.
77. Houdlett, *supra* note 12, at 561.

A California statute, for example, provides that the insolvency or bankruptcy of the assured will not release the insurer from payment of damages. When judgment is secured against the assured an action may be brought against the insurer by the judgment creditor to recover on the judgment.[78] The purpose of the provision is to protect an injured person when the tortfeasor is bankrupt or insolvent. In effect, it creates a contractual relationship for the benefit of any person who is negligently injured by an insured tortfeasor.[79]

The California statute has been construed to allow recovery for an injured seaman on a marine indemnity policy. In *Williams v. Steamship Owners Mutual Underwriting Association*, a seaman was injured by a fall into a manhole on a vessel's passageway.[80] The vessel was covered by a marine insurance policy issued in California. The seaman obtained a judgment against the vessel owner, and subsequently brought an action against the insurer based on the California statute.[81] The insurer argued that because the policy was one of indemnity it was liable on the policy only to the vessel owner and "then only in the event and to the extent" that the vessel owner paid a claim.[82] The court found that the California direct action statute applied to the policy.[83] As a result, the indemnity policy was, in effect, converted into a liability policy upon which the seaman had a statutory right to sue.[84]

As the discussion above indicates, the hypothetical seaman could recover on his judgment by bringing an action against his employer's insurer if the action is within the scope of one of the true direct action statutes,[85] or if the action is within the scope of a limited statute such

78. CAL. INS. CODE § 11580 (West Supp. 1984).
79. Zahn v. Canadian Indem. Co., 57 Cal. App. 3d 509, 512-13, 129 Cal. Rptr. 286, 287-88 (1976) (quoting Johnson v. Holmes Tuttle Lincoln-Mercury, 160 Cal. App. 2d 290, 298, 325 P.2d 193, 198 (1958)).
80. 45 Wash. 2d 209, 212, 273 P.2d 803, 805 (1954).
81. *Id.*
82. *Id.* at 227, 273 P.2d at 813-14.
83. *Id.* at 228, 273 P.2d at 814 (relying on the fact that the vessel was out of a San Francisco port and that the insurance policy was "executed, issued, and delivered in the State of California").
84. *Id.* at 232, 273 P.2d at 816. The defendant insurance company also claimed that because the insurance policy was a maritime contract, application of the California statute was unconstitutional since Art. III, § 2 of the United States Constitution mandates that such contracts be interpreted according to the general admiralty law. *Id.* at 229-30, 273 P.2d at 815. The court, citing *Maryland Casualty*, *see supra* notes 40-51 and accompanying text, found no constitutional prohibition against applying the statute and held that the seaman was entitled to maintain an action thereon. *Id.* at 232, 273 P.2d at 816.
85. Examples of these are the Louisiana and Puerto Rico statutes.

as the one in California. The next question then, is whether the injured seaman might enjoy a similar recovery where neither type of statute is available.

III. Direct Actions In The Absence Of Statute

Federal Admiralty law provides no general right to sue an insurance company directly.[86] This is the starting point in examining whether an injured seaman who has secured a judgment against his insolvent employer may proceed against his employer's insurer. At the same time, marine liability policies typically provide that the company will pay the insured after the insured has become legally liable to the claimant, and then only after the insured has actually paid the claimant.[87] Thus, the rule has been that if an assured becomes insolvent and incapable of responding to judgment against him, the injured party is denied the benefit of the proceeds of the assured's insurance policy.[88]

Where the traditional situation just described has not been altered by statute, courts have differed in their responses to attempted direct actions by seamen against marine insurers. The courts of at least one state have been willing to create a judicial remedy for the injured party under certain circumstances.

A. *Joinder in Florida*

In the leading case of *Shingleton v. Bussey*, the Florida Supreme Court established the rule that a plaintiff, as a third party beneficiary of an automobile liability policy, had a direct cause of action against the insurer and could join the insurer as a party defendant.[89] The court found that public policy mandated liability insurance policies be construed as "quasi-third party beneficiary" contracts which give the "injured third party an unquestionable right to bring a direct action against the insurance company."[90] The basis for the joinder was Florida Rule of Civil Procedure 1.210(a), which states that "any person may be made defendant who has or claims an interest adverse to the plaintiff."[91] A year later the Florida court expanded the *Shingleton* holding to apply to forms of liability insurance other than automobile policies.[92]

The *Shingleton* rule has since been modified by the Florida legislature.[93] F.S.A. 627.7262 (West 1984) provides that no action may be maintained against a liability insurer by a person not an insured under the policy until that person first obtains a judgment against the insured. However, the cases decided under *Shingleton* continue to be of interest as an illustration of one jurisdiction's approach to delineating the relationship between an injured party and the tortfeasor's insurer.

Following *Shingleton*, the courts considered application of the joinder rule in cases involving marine insurance policies. In *Brent Towing Co. v. M/V Ruth Brent*, a federal trial court refused to allow joinder of an insurer on maritime personal injury and death claims.[94] The decedent's representative in that case had attempted to join the insurer in a limitation of liability proceeding. The court held that there was no authority for the attempted action, citing the general rule that in admiralty proceedings an insurer may not be joined as a party defendant.[95] The court further stated that, for the sake of maintaining uniformity in admiralty practice, the general rule of non-joinder should be followed "unless clear grounds for exception exists."[96]

Although federal courts had refused to permit joinder of an insurer on personal injury claims[97] and on claims arising out of torts on the high seas,[98] a federal district court in Florida did recently allow joinder of a liability insurer on a cargo claim. In that case a tortious act occurring in Florida waters resulted in loss of cargo on the high seas.[99] In making its decision, the court focused primarily on whether Florida's right of direct action conflicted with the general maritime law.[100] It concluded that "the constitutional imperative for the uniformity of Admiralty" was not offended by application of the judicially recognized right of action against insurers in maritime claims arising on inland waters of Florida.[101]

---

86. *See, e.g.*, Continental Oil Co. v. Bonanza Corp., 677 F.2d 455, 460 (5th Cir. 1982).
87. A. Parks, The Law of Tug, Tow & Pilotage 802 (2d ed. 1982).
88. *Id.* at 302-03.
89. 223 So. 2d 713, 715 (Fla. 1969).
90. *Id.*
91. Fla. R. Civ. Pro. 1.210(a).
92. Beta Eta House Corp. v. Gregory, 237 So. 2d 163, 165 (Fla. 1970) (expanding the rule to allow joinder of liability insurance carrier for fraternity house).
93. Van Bidder v. Hartford Accident & Indem. Insurance Co., 439 So. 2d 880, 882 (Fla. 1983) (upholding the constitutionality of Fla. Stat. Ann. § 627.7262 (West 1984)).
94. 414 F. Supp. 131, 132 (N.D. Fla. 1975).
95. *Id.* at 133.
96. *Id.*
97. *Id.* at 132-33.
98. *See* Bangladesh Agricultural Dev. Corp. v. Millbank Shipping, Inc., 1983 A.M.C. 2631, 2632 (M.D. Fla. 1983) and cases cited therein.
99. *Bangladesh Agricultural Dev. Corp.*, 1983 A.M.C. at 2632.
100. *Id.*
101. *Id.* at 2633.

In at least one Florida state court decision, the right of joinder was used to allow direct action on a marine protection and indemnity policy for personal injury claims. In *Quinones v. Coral Rock, Inc.* the trial court had held that an insurer could not be joined as a real party in interest in an action against vessel owners.[102] The lower court's decision was based on its interpretation of the policy as one of pure indemnity, *i.e.*, one which became applicable only after the assured had paid an adverse judgment. The appellate court reversed. It construed the policy to be one of indemnity for liability only, rather than one of indemnity against loss paid. Therefore it allowed the joinder. By so construing the policy, the court sought to maintain consistency in the decisional law and implement the policies espoused in *Shingleton*.[103]

As indicated above, the third party beneficiary concept of *Shingleton* has been statutorily modified to provide "that an injured party has no beneficial interest in a liability policy" until he first obtains a judgment against the insured.[104] The cases decided prior to the modification, however, demonstrated a general willingness on the part of the Florida judiciary to provide access to the marine insurance fund of an assured tortfeasor. Though the federal courts were less willing to apply the joinder rule to marine insurers, where the tortious act occurred within Florida waters it appears recovery was permissible. On balance, it seems likely that the policies behind the *Shingleton* decision will continue to persuade the courts to allow joinder of a marine insurer once the plaintiff has obtained a judgment against the assured. The argument for permitting such joinder on an action to recover on a judgment would be especially strong where the assured is insolvent, leaving the injured seaman with an empty judgment.

Although Florida seamen have met with some success in recovering directly from a marine insurer, even in the absence of legislative authorization for such actions, seamen elsewhere have not met with similar success.

B. *New York's Anti-Direct Action Statute*[105]

Section 167(1) of New York's Insurance Law authorizes an in-

102. 258 So.2d 485, 486 (Fla. App. 1972).
103. *Id.*
104. 439 So. 2d at 882.
105. New York's direct action statute has limited application, leading some commentators to refer to it as an anti-direct action statute. Houdlett, *supra* note 12, at 570.

jured party to sue an insurer directly if the assured is insolvent.[106] Unfortunately for injured seamen, however, Section 167(4) specifically excludes from the direct action provision "insurance against the perils of navigation"[107] and "marine protection and indemnity insurance."[108] Despite Section 167(4) injured seamen have attempted to recover directly against an insurer, and have consistently met with failure in both the state and federal courts.

The hardship the New York rule imposes on seamen becomes immediately apparent by examining the state court decisions. In *Cucurillo v. American Steamship Owners Mutual Protection and Indemnity Association*, the plaintiff obtained a judgment against a steamship company, which subsequently went bankrupt.[109] The plaintiff then brought an action against the company's insurer.[110] The court identified the insurance policy as one of indemnification, by virtue of a clause in the policy providing that "[t]he Association agrees to indemnify the assured against loss . . . which the Assured shall become liable to pay and shall pay . . . ."[111] Consequently, the court found New York's right of direct action inapplicable since Section 167(4) expressly excludes marine P & I policies. Acting in accordance with the general rule which prohibits suits on insurance policies by those not a party to the insurance contract, "save where a contrary result is dictated by statute," the court dismissed the plaintiff's complaint.[112]

In a more recent case, the widow of a crew member of a tug which was lost off the coast of New Jersey brought an action in a New York court. She sought a declaratory judgment regarding coverage on an insurance contract issued to the decedent's employers.[113] The tug was covered by a marine protection and indemnity policy at the time of the accident. The court concluded that the decedent's widow was clearly prohibited by Section 167(4) of the New York Insurance Law from bringing the declaratory action.[114]

106. N.Y. Ins. Law § 167(1)(a), 167(1)(b) (McKinney Supp. 1984).
107. *Id.* at § 112(2)(c)(1).
108. *Id.* at § 46(21).
109. 1969 A.M.C. 2334, 2335 (N.Y. 1969).
110. *Id.* at 2335.
111. *Id.*
112. *Id.* at 2336.
113. Cowan v. Continental Ins. Co., 86 A.D.2d 646, 647, 446 N.Y.S.2d 412, 413 (N.Y. App. Div. 1982).
114. *Id.* at 647, 446 N.Y.S.2d at 414. The court further found, however, that Connecticut had the most significant contacts with the litigation and that therefore Connecticut law should be applied. Connecticut had a direct action statute authorizing direct recovery against an insurer by

New York plaintiffs attempting to recover on a judgment by bringing an action against the tortfeasor's insurer have fared no better in the federal courts. In *Ahmed v. American Steamship Owners Mutual Protection and Indemnity Association*, the plaintiffs were merchant seamen who suffered personal injuries in the course of employment on board ship.[115] Default judgments were entered against the plaintiffs' employer, but were never satisfied due to the employer's insolvency. The plaintffs subsequently filed an action in California federal district court to recover the judgment from their employer's insurer.[116] The court ruled that the insurance policies involved were clearly ones of indemnity and that New York law was applicable.[117] Therefore, the court found itself bound by the *Cucurillo* rule that "an insurer is not directly liable to a judgment creditor of an insolvent insured under an indemnity insurance contract."[118] The court entered judgment for the insurance company.[119]

While the West Coast courts were busy with the *Ahmed* claims, the Second Circuit was also occupied by claims involving New York's insurance law. In *Wabco Trade Co. v. S.S. Inger Skou*, the plaintiffs sought to bring suit directly against a carrier's insurance company to recover on a judgment obtained against the carrier for loss of goods.[120] The suit was based upon New York Civ. Prac. Law and Rules Section 5201(a) which provides that "[a] money judgment may be enforced against any debt . . . unless it is exempt from application to the satisfaction of a judgment. A debt may consist of a cause of action which could be assigned or transfered . . . ."[121] The Second Circuit, reversing the district court,[122] held that the specific prohibition in Section 167(4) relating to direct actions against marine insurers superseded the more general provisions of the rules of civil procedure. Hence, it found that, notwithstanding civil practice rule 3201(a), Section 167(4) precludes enforcement of a judgment against an assured by direct action against an insurer.[123]

The futility of seeking direct recovery under New York insurance law is spelled out most clearly in *Miller v. American Steamship Owners Mutual Protection and Indemnity Co.*[124] Plaintiff Miller was a seaman injured while employed aboard vessel. The injuries were covered by a marine indemnity policy issued by the defendant insurer to the vessel owner.[125] Plaintiff obtained a judgment against the vessel owner and was awarded approximately $20,000 in damages. The vessel owner was insolvent and consequently paid nothing on the judgment.

Miller, relying on New York's general policy of protecting intended beneficiaries of insurance policies, expressed in N.Y. Ins. Law Section 167, sought to recover against the vessel owner's insurer.[126] The court explicitly recognized that under the circumstances the assured could never pay on the judgment.[127] Despite this fact, the court observed that New York policy in favor of direct actions is not strong.[128] Therefore, in reliance on rule 167(4), the court granted the insurer's motion for summary judgment.[129]

C. Other Jurisdictions

The majority of cases in which an injured seaman has sought to recover directly against an insurer without benefit of an authorizing statute have been brought under the laws of Florida and New York. A few cases have arisen in other jurisdictions, however, and they provide an overview of the attitude of courts in general to such actions.

At least a few courts have attempted to abrogate the inequity created by a seaman's inability to collect on a judgment while insurance proceeds are left untouched. They have done so by refusing to give

---

a judgment creditor of an insured defendant. Since the plaintiff had not yet obtained a judgment against the tug's owner, the court held that the Connecticut statute could not be applied.

115. 444 F. Supp. 569, 1978 A.M.C. 586 (N.D. Cal. 1978), *aff'd in part*, Ahmed v. American Steamship Mut. Protection & Indem. Ass'n, 640 F.2d 993, 1981 A.M.C. 897 (9th Cir. 1981), *appeal after remand*, 701 F.2d 824, 1983 A.M.C. 2712 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 98 (1983).

116. *Id.* at 570, 1978 A.M.C. at 586-87.

117. *Id.* at 571-72, 1978 A.M.C. at 588-89.

118. *Id.* at 572, 1978 A.M.C. at 590.

119. *Id.* The court noted that the result was harsh and suggested that were the court "free to inject its own notions of public policy" the outcome would have been different. *Id.* at 572-73, 1978 A.M.C. at 590. The decision was affirmed on appeal. However, the Ninth Circuit remanded the case in part to allow plaintiffs to develop their claim, raised on appeal, that § 167(4) violates the equal protection clause of the 14th Amendment. 640 F.2d at 996, 1981 A.M.C. at 901. On remand the court found no denial of equal protection. 1982 A.M.C. 1228 (N.D. Cal. 1982), *aff'd*, 701 F.2d 824, 1983 A.M.C. 2712 (9th Cir.), *cert. denied*, 104 S. Ct. 98 (1983).

120. 663 F.2d 369, 370 (2d Cir. 1981).

121. *Id.*

122. 508 F. Supp. 94 (S.D.N.Y. 1980).

123. 663 F.2d at 371.

124. 509 F. Supp. 1047 (S.D.N.Y. 1981).

125. *Id.* at 1048.

126. *Id.* at 1049.

127. *Id.* at 1048.

128. *Id.* at 1049.

129. *Id.* at 1052.

effect to the indemnity limitation in a P & I policy.[130] Thus, the Massachusetts court in *Saunders v. Austin W. Fishing Corp.*, enabled seamen in two different cases to recover against an indemnity insurer.[131]

In both cases, the plaintiffs were crewmembers on fishing vessels who were injured due to the negligence of the vessel owners. Both seamen obtained judgments against the vessel owners. In each case, however, the owner's sole asset was his vessel, which had been sunk for several years.[132] The injuries were covered by P & I policies issued to the vessel owners, and each seaman sought to apply the proceeds of the policies to his judgment.[133] The company which had issued the policies claimed that payment of the judgment by the assureds was a condition precedent to recovery.[134] The court, however, found a Massachusetts statute applicable. The statute provided that, on a motor vehicle liability policy, satisfaction by the insured of a final judgment would not be a condition precedent to the duty of the insurance company to make payment.[135] The court ruled that the statute invalidated the indemnity limitation in the policies of marine insurance, and allowed the seamen to recover.[136]

Other courts have not been as willing to find a route of recovery for seamen in the absence of a direct action statute. A federal district court in Pennsylvaina addressed the issue of direct recovery in *Pettus v. Jones and Laughlin Steel Corp.*[137] In that case the plaintiff seamen brought an action for personal injuries suffered while engaged in assembling a fleet of barges. The court, in dicta, stated that in Pennsylvania an injured person has no right of direct action against the insurer of a tortfeasor where such a right is not created in the policy itself or by statute. It indicated that where a plaintiff does not fall within the "highly circumscribed" right authorized by statute, the recovery sought will be denied.[138]

130. *See Quinones*, 258 So. 2d 485, discussed *supra* at notes 102-103 and accompanying text, where the court interpreted a P & I policy as one of indemnity against liability only, so as to allow application of Florida's right of joinder.

131. 352 Mass. 169, 224 N.E.2d 215, 1967 A.M.C. 984 (1967).

132. *Id.* at 170-71, 224 N.E.2d at 216-17, 1967 A.M.C. at 984-85.

133. *Id.*

134. *Id.* at 171, 224 N.E.2d at 217, 1967 A.M.C. at 986.

135. *Id.*

136. *Id.* at 173-74, 224 N.E.2d at 217-18, 1967 A.M.C. 987-88. *See also* Orin Ins. Co. v. Fireman's Ins. Co. of Newark, 46 Cal. App. 3d 374, 120 Cal. Rptr. 222 (1975) (construing P & I policy as one of indemnity for liability rather than indemnity for loss).

137. 322 F. Supp. 1078, 1972 A.M.C. 170 (W.D. Pa. 1971).

138. *Id.* at 1081, 1972 A.M.C. at 174.

The Pennsylvania court in *Pettus* above cited a district court of Hawaii decision which expressed a similar viewpoint.[139] In the Hawaii case, claimants relied on cases decided under Louisiana's direct action statute in their attempt to have defendant's insurance coverage added to the security posted by the defendant. The court denied claimant's motion, observing that "Hawaii has no direct action statute even remotely comparable to Louisiana's."[140] In the opinion of the Hawaii court, although questions involving the application of personal injury liability insurance pose "some perplexing problems," any change in this area would best be accomplished by legislation on a nationwide basis.[141]

Several years later, the Supreme Court of Hawaii had an opportunity to address the same issue.[142] That court also concluded that where there is no statutory or contractual authorization for direct action against a tortfeasor's insurer, the court should deny recovery and allow the legislature to resolve the problem.[143]

The issue of direct recovery against marine insurers has also arisen in Texas. In *Continental Oil Co. v. Bonanza Corp.*, plaintiffs brought suit against the owners and insurers of a vessel to recover damages incurred following the sinking of the vessel.[144] The district court found that the plaintiffs could proceed directly against the insurer based on privity of contract between plaintiffs and the insurance company, since plaintiffs were named in the policy as additional assureds. The court further found that plaintiffs had standing to proceed against the insurers as third party beneficiaries of the contract, since the insurance contract was obtained pursuant to the requirements of the charter party between plaintiffs and the vessel owners.[145] On appeal, however, the decision was reversed.[146] The Fifth Circuit Court noted that the policy involved was written as an indemnity contract; therefore, even the assured could not bring an action against the insurance company until the assured had actually paid money on the liability.[147] The court held that because federal admiralty law gives no general right to bring a direct action against an insurance company,

139. *In re* Pacific Inland Navigation Co., 263 F. Supp. 915 (D. Hawaii 1967).

140. *Id.* at 919.

141. *Id.*

142. *Olokele Sugar Co.*, 53 Hawaii 69, 487 P.2d 769.

143. *Id.* at 72, 487 P.2d at 771.

144. 511 F. Supp. 62 (S.D. Tex. 1980).

145. *Id.* at 65.

146. 677 F.2d 455 (5th Cir. 1982).

147. *Id.* at 459.