

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672  
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and Texas similarly refuses to permit a direct action against an insurance company, the injured party could not recover directly against the insurer.<sup>148</sup>

The above cases are illustrative of the courts' general response to attempted direct actions on marine policies where there is no statute authorizing such action. The attempted actions have not, as a rule, been well received. This response is common within the field of insurance law generally and not only within the narrow field of marine insurance.<sup>149</sup>

This reluctance to permit direct recovery in the absence of an authorizing statute does not mean, however, that the courts have been unsympathetic to the plight of the injured seaman confronted with a judgment-proof tortfeasor. The court for the northern district of California, while following the New York rule prohibiting direct action, indicated that the result was harsh and against the court's own notion of public policy.<sup>150</sup> Similarly, in *Williams* the Washington court, in giving effect to a California statute authorizing direct action, observed that direct action against a marine liability insurer was consistent with Washington public policy.<sup>151</sup> The Ninth Circuit expressed the general attitude of many courts in this way: "it is a revered canon of maritime jurisprudence that 'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when

not required to withhold it by established and inflexible rules.'"<sup>152</sup>

It appears fairly clear, however, that regardless of the courts' sympathy for the plight of the injured seaman, there is little chance they will create a right of direct action based on notions of public policy and equitable considerations.<sup>153</sup> This conclusion is rendered more certain by the courts' repeated expressions that creation of such a remedy is best left to the legislature.<sup>154</sup>

#### IV. CONCLUSION AND RECOMMENDATION

The courts have indicated that an injured seaman is highly unlikely to succeed in recovering directly against a marine insurer where there is no statute authorizing such action. The questions remaining are whether he should be able to, and if not, whether Congress should enact legislation enabling all seamen, such as the hypothetical one in this Comment, to recover on a marine insurance policy.

##### A. Judicially Sanctioned Recovery

It has long been acknowledged that Admiralty jurisdiction "has a special solicitude for seamen."<sup>155</sup> Over the years Congress and the federal courts have formulated a variety of general policies which are protective of seamen in personal injury litigation.<sup>156</sup> Moreover, in at least one judge's opinion, both Congress and the courts favor a right of direct action for seamen in the absence of any conflicting policy.<sup>157</sup> At first glance, therefore, it seems anomalous that no judicial decision has

148. *Id.* at 460. Although the court refused to permit recovery by the injured party based on the vessel owners status as an assured, it did allow the injured party to sue the insurance company based on that party's independent status as an assured under the policy. *Id.*

149. See, e.g., *Severson v. Estate of Severson*, 627 P.2d at 651; *Zahn v. Canadian Indem. Co.*, 57 Cal. App. 3d at 13, 129 Cal. Rptr. at 288; *Blessing v. Ocean Accident & Guarantee Corp.*, 152 Or. 632, 636-37, 54 P.2d 300, 302 (1936). There are few cases where, in the absence of a statutory or contractual basis affording a right of direct action, the courts have created such a right. Cf. *New Jersey Fidelity & Plate Glass Ins. Co. v. Clark*, 33 F.2d 235 (9th Cir. 1929) (allowing direct action based on provisions of indemnity policy and statute authorizing direct action in the event of bankruptcy); *Finkelburg v. Continental Cas. Co.*, 126 Wash. 543, 219 P. 12 (1923) (allowing direct action against indemnity insurer of insolvent assured based on terms of the policy). But cf. *Florida's* judicially created right of joinder based on rules of civil procedure, *supra* notes 89-104 and accompanying text. It is unlikely that many other jurisdictions will follow Florida's lead. See *St. Paul Fire & Marine Ins. Co. v. Mannie*, 91 F.R.D. 219 (D.N.D. 1981) (adopting majority rule disallowing joinder of claim against insurer in declaratory judgment action where forum state does not allow direct actions against insurers). The federal rules of civil procedure and the rules of states based on the federal rules have no provision comparable to the Florida joinder rule upon which the direct actions have been brought. See *Magras v. Puerto Rican Am. Ins. Co.*, 551 F. Supp. 427, 428 n.1 (D.V.I. 1982).

150. *Ahmed*, 444 F. Supp. at 572-73, 1978 A.M.C. at 590.

151. *Williams*, 45 Wash. 2d at 228-29, 273 P.2d at 814.

152. *Ahmed*, 640 F.2d at 996, 1981 A.M.C. at 901 (quoting *Moragne v. States Marine Lines*, 398 U.S. 375, 387, 1970 M.M.C. 967, 977 (1970)).

153. Several jurisdictions have adopted the third party beneficiary analysis of the RESTATEMENT (SECOND) OF CONTRACTS §§ 302-15 (1981) as a basis for a direct action against a liability insurer. See *Magras v. Puerto Rican Am. Ins. Co.*, 551 F. Supp. at 428. Under that doctrine, however, the rights of the injured party are no greater than those of the assured. *Id.* Thus, the doctrine is of no assistance in recovery upon an indemnity policy where the assured has paid nothing on the loss, since the assured must suffer a monetary loss before his rights on the policy are triggered. The third party beneficiary doctrine was therefore expressly rejected in the context of marine indemnity policies. See *Continental Oil*, 677 F.2d at 456-60.

154. See, e.g., *Miller*, 509 F. Supp. at 1052.

155. *Ahmed*, 640 F.2d at 996, 1981 A.M.C. at 901; *Miller*, 509 F. Supp. at 1051 (seamen in personal injury cases "have been observed to 'win' with such regularity that the guiding principle in these cases 'is not so much a rule of federal supremacy as a rule that seamen are to have the advantage in any court of whatever rules of law, substantive or procedural, may be most favorable to them.'").

156. *Miller*, 509 F. Supp. at 1051.

157. *Id.* at 1052.

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yet created such a right where no statute or procedural rule provides one.

Upon closer examination, however, it appears that the courts have been wise in refusing to allow their concern for the welfare of seamen to lead them into creating a right of direct action. The creation of such a right would raise several difficult questions regarding its application to marine indemnity policies. Among the questions likely to arise are whether the limitation of liability defense is available to the insurer, whether the action against the insurer should be stayed pending outcome of the limitation proceeding,<sup>158</sup> whether insurers can avail themselves of other defenses generally considered personal to the assured,<sup>159</sup> and whether actions should be permitted on claims not arising out of torts committed on the territorial waters of a particular court's jurisdiction.<sup>160</sup>

Probably the most difficult of these questions would be those arising out of the inevitable clash with the Limitation of Liability Act.<sup>161</sup> The fifth circuit has determined that the Act has no application in actions against insurers. In that circuit, therefore, an insurer cannot limit its liability to the maximum amount for which the insured could be held liable, nor need a direct action be stayed when joined with a limitation proceeding.<sup>162</sup> The United States Supreme Court, however, has yet to address the issue and reach a definitive resolution of the problem.<sup>163</sup> The Court's difficulty in grappling with these issues in *Maryland Casualty* suggests the possibility of great confusion developing, should lower courts create a judicial right of direct action.

Another difficult problem certain to follow from a judicially created right of action is determination of the scope of the right, e.g., whether both the tortious act and the injury must occur within the jurisdiction or whether it is sufficient that the tortious act occurred there. Conflicting precedents regarding such issues in states with statutorily created causes of action have led to strained decision-making in those jurisdictions.<sup>164</sup> This type of difficulty would, it seems, be com-

pounded by a judicially created right of action formed on a case by case basis.

Courts upon creating a right of direct action, would inevitably supply differing answers to the questions posed above, as well as to the multitude of other questions bound to arise from a new cause of action. This fact plainly denotes the wisdom of the courts in refraining from creating such a right of action. Significant variance between the application of the right of action between jurisdictions would lead to problems of forum shopping,<sup>165</sup> as well as increased jurisdictional and conflict of law litigation.<sup>166</sup>

Uniformity of law is a paramount principle in Admiralty jurisdiction.<sup>167</sup> Judicial decisions creating disparate rights of direct action, with potentially unequal application of that right, would seriously disrupt that uniformity.

#### B. Legislative Action

Although the potential for conflict with traditional maritime principles suggests that judicial creation of a right of direct action would be unwise, it does not form a similar bar to legislative action. Congress, in providing a right of action, could delineate the scope and appropriate application of the right, as well as determine its relationship to Limitation of Liability proceedings. A Congressional resolution of this issue is desirable in view of the extensive reliance by marine industries upon indemnity insurance<sup>168</sup> and the disparate recovery currently afforded seamen faced with insolvent tortfeasors.

Admiralty's demand for uniformity could be satisfied by legislation either prohibiting or providing for direct actions against marine indemnity insurers. The history of seamen's personal injury actions in this country, however, militates in favor of legislation providing for such a right of action.

Prior to Congress's enactment of the Jones Act<sup>169</sup> a seaman could not bring a negligence action against his employer. The defense of the fellow servant rule inevitably quashed such an attempt.<sup>170</sup> The purpose and effect of the Jones Act was to extend the seaman's right to

158. *Cf. Tokyo Marine & Fire Ins. Co. v. Aetna Cas. & Sur.*, 322 F.2d 113 (5th Cir. 1963); *Torres v. Interstate Fire & Cas. Co.*, 275 F. Supp. 784 (D. P.R. 1967).

159. See *Kierr*, *supra* note 6, at 664-65.

160. See, e.g., *Bangladesh*, 1983 A.M.C. 2631; *Koester*, 416 F. Supp. 892.

161. 43 U.S.C.A. § 183.

162. *Olympic Towing*, 419 F.2d 230. See also *Torres v. Interstate Fire*, 275 F. Supp. 784.

163. See *Maryland Cas. v. Cushing*, 347 U.S. 409.

164. See *Koester*, 416 F. Supp. at 876.

165. *Staring*, *supra* note 17, at 26.

166. *Kierr*, *supra* note 6, at 653 (in reference to Louisiana's Direct Action statute).

167. *Wilburn Boat Co. v. Fireman's Ins. Co.*, 348 U.S. 310, 323 (1955).

168. See *Miller*, 509 F. Supp. at 1052.

169. 46 U.S.C.A. § 688 (West 1975).

170. See, e.g., *The Osceola*, 189 U.S. 158 (1903) (all crew members are fellow servants for whose negligence a seaman cannot recover).

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damages for personal injuries arising out of his employment to injuries for which the negligence of the ship's officers or members of the crew were responsible.<sup>171</sup>

It is inequitable to permit the seaman's federally created remedy for the negligence of an employer to be defeated in some jurisdictions by the employer's insolvency. The concern for the welfare of the injured seaman which prompted Congress to enact the Jones Act should now prompt Congress to enact legislation permitting seamen to recover on the judgments the Jones Act made possible. In the words of Justice Black, a direct action statute "is in harmony with the humane policy of the maritime law. Seamen have traditionally been wards of admiralty, and admiralty has been increasingly solicitous to provide compensation for accidents occurring in their dangerous work. Thus both the general trend of the law and the specific bent of admiralty support the policy [of permitting recovery]."<sup>172</sup>

The importance of providing a remedy for seamen with negligence claims against insolvent employers is recognized by the English insurance law. By statute it expressly permits direct recovery against an insurer where an injured party would otherwise receive no recovery due to the insolvency of the assured.<sup>173</sup> The Third Parties (Rights Against Insurers) Act of 1930, upon the bankruptcy of the assured, vests in the injured party the right of the assured to be indemnified by the insurer.<sup>174</sup> The Act is applicable to maritime liability policies.<sup>175</sup>

The fact that England has created a national right of direct action and applied it to marine policies indicates that the conflict between such a right and traditional principles of maritime insurance is not insurmountable, and may be resolved by a comprehensive, well-planned Act.

The English Act further militates in favor of a federally created right of direct action in this country due to the close relationship between the American and British insurance markets. American courts have traditionally sought consistency with the English law of maritime insurance.<sup>176</sup> Moreover one commentator has noted that:

if the American marine insurance industry is to assume the international posture to which it is entitled by its economic base, laws regu-

lating the most substantial features of marine insurance policies must be harmonized not only within the United States, but also with England and major foreign underwriting nations. Otherwise, the American marine insurance industry is subject to disfavor for rules that remain inconsistent with other markets and whose uncertainties increase the likelihood of lawsuits when questions arise.<sup>177</sup>

All the factors mentioned above point forcefully in the direction of a federally enacted right of direct action for seamen's claims. Certainly, however, an argument can be made on the other side. Factors militating against enactment of a federal direct action statute include the possibility that jurors will be prejudiced by the presence of an insurer in the courtroom,<sup>178</sup> and the unique nature of the traditional P & I club.<sup>179</sup>

Neither of these factors compels a conclusion that direct action is inappropriate. First, virtually all marine risks are insured<sup>180</sup> and the majority of modern jurors must surely be aware of this.<sup>181</sup> Therefore, it is unlikely that a direct action against an insurer would lead a jury to augment the damages award merely because the defendant is an insurer.

The second factor admittedly poses a more complex issue. In its traditional form the maritime indemnity policy is insured by a non-profit club made up of shipowner members.<sup>182</sup> In such a situation there may not be a certain premium paid by the assured for a specific amount of insurance; but rather, the assured may be guaranteed indemnification for all judgments he must pay.<sup>183</sup> Thus, it has been suggested that imposition of an insolvent club member's liability on the other members through a direct action statute would "unduly burden" the association.<sup>184</sup> This distinction between marine indemnity policies and other types of insurance policies might prove a persuasive argument against creating a federal right of direct action were it not for the fact that nearly all pure indemnity clubs are in England. In the United States the insurer is almost always a corporation.<sup>185</sup>

171. *Williams*, 45 Wash. 2d at 215-16, 273 P.2d at 807.

172. *Maryland Casualty*, 347 U.S. at 438 (Black, J., dissenting).

173. 25 Halsbury's Laws of ENGLAND ¶ 706 (4th ed. 1978).

174. *Id.*

175. *ARNOLD'S LAW OF MARINE INSURANCE & AVERAGE* 1356, Vol. II (16th ed. 1981).

176. See, e.g., *Wilburn Boat Co.*, 348 U.S. at 325 (Reed, J., dissenting).

177. *Staring*, *supra* note 17, at 27.

178. *Olokele*, 53 Hawaii at 71-72, 487 P.2d at 770-71.

179. See *Ahmed*, 1982 A.M.C. at 1231.

180. *Maryland Casualty*, 347 U.S. at 419.

181. *Kiert*, *supra* note 6, at 656.

182. *Ahmed*, 1982 A.M.C. at 1231.

183. *Kiert*, *supra* note 6, at 655.

184. *Ahmed*, 1982 A.M.C. at 1231. See *ARNOLD'S LAW OF MARINE INSURANCE & AVERAGE*, *supra* note 168, at 1356 for a discussion of the problem under English law.

185. G. GILMORE & C. BLACK, *supra* note 5, at 56.

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On balance, the factors supporting congressional action to provide injured seamen with a right of direct recovery far outweigh those against it. Adoption of a uniform nationwide Act would put an end to the uncertainty imposed upon seamen by the vagaries of differing state laws, and conform to this country's long tradition of uniformity in maritime rights and remedies. At the same time, it would further Admiralty's historic policy of protecting and advancing the welfare of American seamen.

DEBORAH K. PERIMAN

## HANGING IN THE BALANCE: NINTH CIRCUIT ANALYSIS OF CRUEL AND UNUSUAL PUNISHMENT CLAIMS

### INTRODUCTION

The eighth amendment to the United States Constitution<sup>1</sup> prohibits cruel and unusual punishment. Although prisoners may lose many rights as a result of incarceration, they retain their rights under the eighth amendment.<sup>2</sup> Historically, courts have been very reluctant to strictly enforce this constitutional provision.<sup>3</sup> Federal courts, however, recently have embarked on a crusade to protect prisoners' rights. These courts employ two different approaches to cruel and unusual punishment claims relating to overall prison conditions. All federal jurisdictions, except the Ninth Circuit, which have considered the question employ a "totality of the circumstances" analysis.<sup>4</sup> The Court of Appeals for the Ninth Circuit applies a "discrete conditions" approach, although it appears to combine this test with the totality analysis.<sup>5</sup> This Comment will explore the historical treatment of comprehensive challenges to the eighth amendment,<sup>6</sup> examine the differences between the two tests applied in this area,<sup>7</sup> and analyze the approach taken by the Court of Appeals for the Ninth Circuit.<sup>8</sup>

### I. HISTORY

Traditionally, federal judges took a "hands off" approach<sup>9</sup> to claims alleging violations of the eighth amendment, concluding that the complex area of running prisons should be left to prison adminis-

1. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

2. See Thornberry & Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 HASTINGS L.J. 313, 315 (1983).

3. See *infra* notes 9-22 and accompanying text.

4. See *infra* notes 23-37 and accompanying text.

5. See *infra* notes 56-93 and accompanying text.

6. See *infra* notes 9-22 and accompanying text.

7. See *infra* notes 23-55 and accompanying text.

8. See *infra* notes 56-178 and accompanying text.

9. FITCH, *CIVIL RIGHTS OF INMATES* 3 (1961). See also *Banning v. Loney*, 213 F.2d 771, 771 (10th Cir. 1953), cert. denied, 348 U.S. 859 (1954) (courts have no power to interfere with prison administrative matters).

Indeed, as Lord Donaldson, M.R., has suggested, if such a defendant defies the order of the court, the defence to the action may be disregarded and final judgment entered. A final judgment may be sought to be registered in most countries and, if registered, enforced. However, there is the unresolved difficulty as to whether registration of the judgment would be refused on the basis that natural justice had been denied to the defendant by the refusal to entertain the defence. Furthermore, as pointed out earlier, the defendant may be able to rely upon defences propounded by other parties to the proceedings. That, of course, may not necessarily be a bad thing, because presumably, if the defences are good, then a *Mareva* injunction would very likely have been inappropriate.

Consideration will have to be given by judges to the enforcement of foreign interlocutory orders in the nature of *Mareva* injunctions, even absent treaty obligations. The European Judgments Convention<sup>83</sup> achieves this. In a sense, this has an undesirable side effect. It means that, if a *Mareva* injunction is granted by a Commonwealth country and the order can obtain recognition in England, then, by force of the European Judgments Convention, enforceability can be obtained throughout the area of the European Economic Community. To operate in this back door way would bring the law into disrepute. If the target be, say, assets in Germany, and a *Mareva* injunction granted, say, in New Zealand, it would not get recognition in Germany of its own force. It is inappropriate that, by obtaining registration in England, the plaintiff should, so to speak by a back door method, obtain enforcement in Germany. On the other hand, it is interesting to notice the repeated suggestions by Kerr, L.J., in *Babanaft*<sup>84</sup> that the Convention evidences international reciprocity in the recognition and enforcement of judgments and orders issued in foreign jurisdictions. I understand Sir Michael to be saying that, even though a country may not be a subscriber to the Convention, its national courts may regard it as expressing international consensus and give effect to it.

The position as to third parties is quite unsatisfactory. Both the *Babanaft* and the Donaldson provisos expressly exclude third parties from the obligation to comply. It has a sweet air of illogicality to make an order *in personam* against a defendant on whose part there has been shown a *prima facie* intention to avoid satisfying the court's possible ultimate judgment and excuse from the obligation to comply the only honest persons who may otherwise be expected to comply.

Unscrupulous—indeed, at times, fraudulent—persons have made considerable use of modern techniques of communication and electronic funds transfers to seek to evade judgments of national courts. Surely, it behoves the courts to respond to such challenges by adapting the procedures and rules for enforcement of orders of other courts, in order to ensure that the ultimate aim of the administration of justice, free of abuse, may be maintained.

## The U.S. Oil Pollution Act of 1990

By A. F. Bessemer Clark\*

On Saturday 18 August 1990, 16 months and 25 days after the *Exxon Valdez* grounded in Prince William Sound, President Bush finally signed into law the new Federal Oil Pollution Act. For shipowners and their P. & I. Clubs its progress through the two Houses of Congress has been one of the best publicized exercises in legislation ever witnessed. What is regrettable for the maritime and insurance industries has been that, notwithstanding that publicity and some intensive lobbying of all concerned as to the legal and practical problems posed by some of the more extreme measures, so little attention has been paid to those who will have to work within the framework of the new legislation. The Act itself runs to some 80 sections divided into nine chapters and some of those are sub-divided. Only the first 20 sections deal with liability and compensation; the remainder cover such matters as prevention and removal, nationally and internationally, as well as provisions relating to Prince William Sound and the Trans-Alaska pipeline system and oil pollution research and development. It is to the first chapter or title, however, that most will turn because of the immediate importance of the rules relating to liability and compensation.

### Chapter I

#### Liability

The Act begins with a list of definitions, of which but two need be mentioned at this stage. The framework of this Act is centred around the "responsible party", which so far as concerns a vessel is defined as "any person owning, operating or chartering by demise, the vessel". A "vessel" is defined as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel". Hence, tankers apart, this Act covers not merely dry cargo vessels, but even pleasure yachts.

Liability on the responsible party is joint, several and strict. Owner, demise charterer and operator/manager, each is jointly and severally liable. Given current financing arrangements, where does this leave the bank, which may be the titular owner? Who will fall within the definition of operator? In *The Amoco Cadiz*,<sup>1</sup> the parent oil company, Standard Oil Co. of Indiana, was held to be in effective operational control of, and hence responsible for, the vessel.

Strict liability means that fault is to all intents and purposes irrelevant. There are

83. See, e.g., (U.K.) Civil Jurisdiction and Judgments Act 1982, Sched. 1.

84. *Supra*, fn. 14, at p. 30.

\* Managing Director, The West of England Ship Owners Insurance Services Ltd.

1. [1984] 2 Lloyd's Rep. 304. (U.S.D.C., N.D. Ill., E. Div.).

defences to liability, but only where the sole cause is an act of God, or of war, or an act or omission of a third party, which does not include an employee or agent of a responsible party or someone "whose act or omission occurs in connection with any contractual relationship with the responsible party". The effect of this latter provision is that, should a tanker ground, for example, as a result solely of a steering gear failure due to the negligence of the shipbuilder, the responsible party will not be able to escape liability if he ordered the vessel direct from the yard, although he might, perhaps, if there had been an intervening owner. The responsible party must, in addition, show that he took due care of the oil and that he took precautions against foreseeable acts or omissions of the third party and the foreseeable consequences of those acts. If he can do all this the third party then becomes the responsible party.<sup>2</sup>

#### Damage

So far as damage is concerned, the Act is all-embracing. Indeed, as we shall see, it would be hard to frame a wider definition of pollution damage. Of course, the Act, like the previous Federal legislation, covers clean-up or removal costs, including threat removal costs.<sup>3</sup> The responsible party must pay for all removal costs incurred by the United States and any such costs incurred by anyone "consistent with the National Contingency Plan". In practice, although<sup>4</sup> the President is required to ensure proper clean-up, it will be the owner who is left in the front line cleaning-up, if for no other reason than he loses what little rights he has to limit, if he fails or refuses to provide all reasonable co-operation and assistance requested by a responsible official in connection with removal activities.<sup>5</sup>

The heads of damage covered are six:

(1) The first is damage - injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable cost of assessing the damage. Natural resources are considered to be of such importance that they are given a separate section,<sup>6</sup> as well as a very wide definition: basically all flora and fauna, as well as air and water, and covering all resources on land or sea (up to and including the exclusive economic zone). Claims under this head can be brought by the Federal Government, by state governments or Indian tribes (where these control the resources); and also, in some instances, by foreign governments. The measure of damage is defined generally as including:

- (a) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;
- (b) the diminution in value of those natural resources pending restoration; plus
- (c) the reasonable cost of assessing those damages.

The intention is that regulations shall be produced within two years by the authorities explaining how these general statements will be translated into practice. The aim, according to the Conference Committee report, is that the definitions in the

Act should be consistent with the Federal U.S. Court of Appeals' judgment in *State of Ohio v. Interior*,<sup>7</sup> which rejects the Interior Department's regulations for determining "use values" by reference to the market value of the damaged resource and instead requires the Department to take account of "all reliably calculated use values", including "non consumptive values" such as those of "option and existence". These latter values require the assessor to place a price on the loss to each individual citizen of damaged flora or fauna, by reference to his deprived right to future enjoyment of the injured resource.

(2) The second head of damage covers injury to or economic losses resulting from destruction of real or personal property by a person who owns or leases that property. Here is another departure from the general law: pure economic losses will be recoverable even in cases where there is no claim for physical loss (e.g., a lessee will have a potential claim).

(3) Under the third head, a claimant who uses natural resources for subsistence (e.g., the Eskimo) can claim for his loss, without regard to ownership.

(4) There is a similar right of recovery for loss of profits or earnings from natural resources or property (e.g., the fisherman or hotelier).

(5) The fifth head allows the Federal Government to recover lost revenues from all the activities affected.

(6) Finally, the authorities can recover for the cost of providing increased or additional public services as a result of the spill.

All in all there is a very comprehensive framework for recovery.

#### Limitation

The owner, therefore, looks to limitation to mitigate his exposure. He will not be much comforted. Certainly there are limits but they are writ, if not in water, in potentially ephemeral form. The basic intention is that (for tankers and tank barges) the responsible party will pay \$1,200 per gross ton, subject to a minimum of \$10 million if the vessel is greater than 3,000 tons. If less, the minimum is \$2 million. For all vessels other than tankers the respective figures are \$600 per ton and \$500,000. Thereafter, subject to the responsible party's being entitled to limit, the theory is that the Oil Spill Liability Trust Fund will pay. The practice alas may be rather different.

First, of course, the responsible party has to be entitled to limit. He will lose his right if the incident was caused either by gross negligence or wilful misconduct or by the violation of an applicable Federal safety construction or operating regulation. The difficulties facing an owner who seeks to avoid charges of wilful misconduct and hence hold his right to limit are well illustrated by the case of *The Ocean Prince*.<sup>8</sup> But these acts are not restricted to the responsible party himself. It will be enough if his agent or employee or a person acting pursuant to a contractual rela-

7. (1989) 880 F.2d 432.

8. 1978 AMC 1786, (U.S.C.A.). A tug caused a barge which it was pushing to ground and spill oil in the Hudson River. The tug owners were denied the right to limit on the grounds of wilful misconduct because, while their dispatcher had appointed two highly qualified pilots to the tug, he had failed to designate which was to be the master and the only one with experience of the Hudson was off duty at the time of the spill.

2. S. 1003(a).

3. S. 1002.

4. Under s. 4201.

5. S. 1004(c)(2)(B).

6. S. 1006.

tionship with him is guilty. Thus, to take a further example, even assuming that an owner can be aware of all applicable Federal safety, construction or operating regulations—a tall order for anyone especially a foreign shipowner—his right to limit can be placed in jeopardy by any of his employees or any independent contractor who has worked on the vessel. It is also worth pointing out in connection with the exception of gross negligence that courts perhaps not unnaturally tend to look at the results of the negligence (i.e., the seriousness of the spill) rather than just the degree of fault in deciding whether a tortfeasor's conduct should be classified as gross or simple negligence.

There are further technical grounds which will result in a denial of limitation: namely, failure to report an incident, failure to provide all reasonable co-operation and assistance requested by a responsible official in connection with removal activities; and, without sufficient cause, failure to comply with an order under sub-section (c) or (e)<sup>9</sup> of s. 311 of the Federal Water Pollution Control Act or the Intervention on the High Seas Act, which deals with Presidential powers to order removal.

In addition, as is explained more fully below, interest on claims is not subject to limitation. Nor are removal costs incurred by the U.S. Government or any state or local government in connection with a discharge or a substantial threat of a discharge of oil from any Outer Continental Shelf facility or from a vessel carrying oil as cargo from such a facility.

But avoiding these restrictions on the right to limit is not the only problem a responsible party will face. In many instances there will be State legislation co-existing with the Federal Act. Section 1018 makes it clear that nothing in the new Federal Act shall:

affect, or be construed or interpreted as pre-empting the authority of any State . . . from imposing any additional liability or requirements with respect to:

- (A) the discharge of oil or other pollution by oil within such State; or
- (B) any removal activities in connection with such a discharge . . .

That section further provides that the Act of 3 March 1851,<sup>10</sup> which is the pre-existing Federal limitation of liability statute, shall similarly have no effect on such State laws. The result is that, untrammelled by any Federal limitation provisions, the States can enact for such unlimited exposure on the owner as they wish. Many have already done so.<sup>11</sup> They are equally free to enact their own penalties.<sup>12</sup>

The gravity of this exposure to state laws is underlined by the fact that, even in cases where a spill is Federalized and the owner or responsible party is allowed to limit, with the Fund<sup>13</sup> covering in excess of that limit, the responsible party will still

have to face a claim under State law, since s. 1015 ("subrogation") expressly provides that:

Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims and causes of action that the claimant has under any other law.

So the Fund can, and, at the request of the Secretary for Transport, acting through the Attorney-General, must, recover back what it has expended by action against any responsible party, guarantor,<sup>14</sup> or any other person liable under any other law.

The inference that any owner will draw from this legislation is that his liability in most (if not all) cases will in reality be unlimited. It is an inference which is bound to make shipowners very wary of committing their tankers to the U.S. trade.

#### *The Oil Spill Liability Trust Fund*

There is to be an oil spill fund, The Oil Spill Liability Trust Fund, with power to spend up to \$1 billion per incident. There is, however, a further limit within that global figure of \$500 million for natural resource damage payments. To meet these sums, the Fund has the right to borrow, up to the full \$1 billion per incident.

The Fund is also to receive (and has been receiving since 1 January 1990) an annual levy of 5¢ per barrel on all oil transported in U.S. waters. In addition, it will take in amounts remaining in the Deepwater Port Fund, the Offshore Oil Pollution Compensation Fund and the TAPS Fund. Certain penalties will be paid into the Fund, as will sums recovered for damage to natural resources in excess of those required to reimburse the costs of restoring those resources.

The uses of the Fund are set out in s. 1012. There are five main uses:

- (i) the payment of removal costs by the Federal Authorities or a Governor or State Official in the case of State clean-up;
- (ii) payment of costs for assessing natural resource damage;
- (iii) removal costs and damages resulting from oil spilt from a foreign offshore unit;
- (iv) payment of claims for uncompensated removal costs and damage.<sup>15</sup> Section 1006 allows a responsible party to claim against the Fund for such removal costs and damage which he has paid either when he has a complete defence under s. 1003 or to the extent that such sums exceed his limits under s. 1004;
- (v) payment of Federal administrative, operational, and personnel costs and expenses in connection with the Act.

Before leaving this review of the use of the Fund, it should be noted that, under s. 1013(C) (Claims Procedure for the Fund), if a claim is presented to a responsible party or guarantor and is not settled by payment within 90 days, the claimant may elect either to begin an action in court against the responsible party or the guarantor or to present the claim to the Fund. If the Fund pays, it will then have those powers of subrogation set out above. It is intended by this provision to ensure that

9. These deal with Presidential powers to order removal or oil following a spill.

10. 46 U.S.C. 183 *et seq.*

11. According to the report produced by the Senate Committee in conjunction with s. 686 of the original Senate Act, there were 17 such States in July 1989, including California, Connecticut, Louisiana and Maine.

12. S. 1018 (C).

13. The Fund is the Oil Spill Liability Trust Fund, established by s. 9509 of the Inland Revenue Code, of 1986 (26 U.S.C. 9509). It is considered further *infra*.

14. The guarantor is the person who provides evidence of financial responsibility for a responsible party's liabilities under this Act. This is discussed in greater detail *infra*.

15. Under s. 1013.

no claimant is out of pocket for a period of more than 90 days following submission of a claim. In practice, given the complexity of potential disputes over such matters as environmental damage, it must be doubtful whether the Fund will be much quicker than the courts in compensating claimants, if its only remedy against the owner is to be subrogated to the rights of the claimant. However, the President is required to promulgate regulations for dealing with and adjudicating on claims against the Fund and one will need to await these before assessing how the system will work in practice.

#### *Interest*

Section 1005, which deals with interest on claims, will bring a new and unwelcome dimension to claims handling. Interest begins to run 30 days after the date on which a claim is presented to the responsible party or the guarantor. There is then an exclusion which operates for the benefit of the guarantor but not, it seems, for that of the responsible party. If a guarantor makes an offer within 60 days of the date the claim is presented, he will be protected against an interest charge, provided that his offer is equal to, or greater than, the amount finally paid in satisfaction of the claim. Thirty days or even 90 days is an impossibly short time within which to assess all the complicated factors which go to make up a bona fide pollution claim. Such deadlines will rarely, if ever, be met. Interest is, therefore, likely to be a material factor, and it will not be admitted for the purpose of limitation of liability. It will be an additional liability.<sup>16</sup>

#### *Financial responsibility*

Section 1016 outlines the requirements for financial responsibility. The responsible party for any vessel over 300 gross tons (other than a dumb barge not carrying oil) which uses any place subject to United States jurisdiction, or for any vessel using the waters of the U.S. exclusive economic zone to tranship or lighter oil destined for the U.S., must establish and maintain evidence of financial responsibility sufficient to meet the maximum amount of his liability as limited under s. 1004. If the responsible party has more than one vessel, then he must meet the limits of the largest. A certificate of financial responsibility will be a precondition of entry to or departure from the U.S.. Regulations will be drawn up covering the detail but in essence certificates will be accepted from insurers and evidence may also be provided by surety bonds, letters of credit or guarantees. Claimants will, of course, be able to assert claims directly against guarantors, who will have the same rights and defences under the Act as the responsible party and will, in addition, be able to rely on the latter's wilful misconduct to avoid payment.

Clubs in the International Group have already stated that it is not their intention to depart from their present expressed policy of only issuing certificates for oil pollution under international legislation, such as the Civil Liability Convention and the Federal Pollution Control Act. It must, therefore, be regarded as doubtful if they will provide certificates under this new Act and it remains to be seen how the sys-

tem will evolve with other financial instruments. Meanwhile, the Act<sup>17</sup> states that unless and until new regulations are issued governing new certificates of financial responsibility, the present regulations governing the existing Coast Guard Certificates will continue in force.

#### **Chapters II-III**

This concludes the review of the first chapter. There are eight others. The second deals with conforming amendments and the third with international issues. This latter opens with a section explaining Congress's approach to the international community so far as concerns oil pollution. As a statement of intent it is likely to find few supporters and may indeed engender some resentment, given the very public lead taken by the U.S. delegation to the IMO in 1984 in the formulation of the Protocols. The section<sup>18</sup> reads as follows:

It is the sense of the Congress that it is in the best interests of the United States to participate in an international oil pollution liability and compensation regime that is at least as effective as Federal and State laws in preventing incidents and in guaranteeing full and prompt compensation for damages resulting from incidents.

It is profoundly to be hoped that the international community does not take up that suggestion, if the result is a system of liability and compensation laws similar to those now in force in the U.S. What is clear, however, is that the IMO will have to reconsider the CLC and Fund Convention Protocols in the light of the United States' decision to ignore them, not only because they were framed to reflect United States' wishes, but also, so far as the Fund Convention Protocol is concerned, because it is unworkable, at least in part, without U.S. involvement.

#### **Chapter IV**

The fourth chapter deals with Prevention and Removal. In the first part attention is paid to alcohol and drug abuse and licensing of mariners. The Secretary for Transport may have access to the records of the National Drivers Register of any mariner seeking a licence. The mariner is also to be subject to a drugs test. Equally, licences can be suspended or revoked for alcohol or drug abuse and, if the next two senior officers on board a vessel believe that the master is incapacitated by alcohol or drugs, they may temporarily relieve him.

The Act also goes on to require the Secretary for Transport to evaluate the manning, training, qualification and watchkeeping standards of foreign tanker vessels periodically and after a casualty. He must ensure that these are at least the equivalent of those required by U.S. law or international standards accepted by the U.S. It is Congress's view that international standards are not always so accepted.

Then there are to be various studies on tanker navigation standards and maritime prevention training and the chapter sets out the double hull requirements. These are complicated; they depend on the size of the vessel and its date of construction.

17. S. 1016(h)

18. S. 3001

16. S. 1005(b)(5)

A detailed analysis is outside the scope of this paper but, in short, by the year 2015 all tankers and tank barges must have double hulls.

The second part of this chapter deals with removal. It places the onus firmly on the President, acting in accordance with the National Contingency Plan, to ensure effective and immediate removal of a spill.<sup>19</sup> This in no way affects the obligation of the owner or operator to respond immediately and he, too, must act in accordance with the National Contingency Plan. These provisions are a direct response to the public criticism which followed the *Exxon Valdez* spill, when the clean-up effort was said to be too late and inadequate. In addition, if the spill presents a substantial threat to the public health or welfare of the U.S., the President must direct all response activities. The clean-up, in other words, must be Federalized.

There is an important exemption from liability for persons rendering care, assistance or advice consistent with the National Contingency Plan or as directed by the President. This is sometimes referred to as the "Good Samaritan" provision and is essential if salvors and clean-up operators are not to be discouraged from assisting at spills. The exemption is lost if the assisting person is guilty of wilful misconduct. Interestingly, to the extent that an assisting person is protected from liability for removal costs or damages by this section, the responsible party will be liable in his place. The section then goes on to require the President to produce a National Contingency Plan and, together with the following section,<sup>20</sup> sets out in some detail what will be required.

Apart from the National Contingency Plan, there are also to be Area Contingency Plans. The former will be administered by the National Response Unit, which in turn will supervise Coast Guard Strike Units. The Area Contingency Plans will be administered by Area Committees. The expressed aim of the combined planning operation is to provide nationwide men and equipment capable of removing a worst case discharge or preventing a substantial threat of such a discharge. Parallel with the National and Area Contingency Plans, all tankers trading in and to the U.S. must themselves have an approved contingency or response plan which must demonstrate the personnel and equipment available to the owner to remove "to the maximum extent practicable: a worst case discharge or threat thereof". These plans must be regularly reviewed and kept up to date. Training is an important ingredient. Once an owner has submitted his plan, he may have permission to trade for up to two years without approval of his plan, provided that he can show that he has concluded a commercial contract designed to achieve a result similar to the proposed plan. Finally, perhaps in recognition of the dangers inherent in providing such plans in a place as litigious as the United States, there are provisions excluding the U.S. from liability for any damage arising from its acts or omissions relating to a response plan.

It remains to be seen how these good intentions will be translated into practice. The scope for bureaucratic muddle and confused chains of command is self-evident. The truth is that man cannot cope with a worst case discharge or total loss of

cargo. Only nature may ultimately be able to repair the ravages of such a spill and then only with time.

The third and final part of this chapter deals with penalties. Congress has begun by increasing the existing maximum administrative penalties under the Federal Pollution Control Act from \$5,000 to \$10,000. Turning to the civil penalties, these have become potentially very severe. They can amount to as much as \$1,000 per barrel of oil spilled or \$25,000 per day and, if the spill is due to gross negligence or wilful misconduct, \$3,000 per barrel spilled with a minimum of \$100,000.

Failure to remove the oil or comply with an order for removal will result in a penalty of either \$25,000 per day or three times the costs incurred by the trust fund as a result of the failure.<sup>21</sup> There are many other penalty provisions, including criminal provisions with the potential for imprisonment. They are long and complicated and it seems clear that for the future an owner and his Club will need to consult closely with expert criminal lawyers in the immediate aftermath of a spill. Furthermore, it should not be overlooked that the Club itself is constrained as to the extent of the cover which it can provide for such penalties. It is essential that the act complained of did not result from any personal wilful misconduct either by the owner or by an employee, if it is the employee who is personally fined and the owner decides voluntarily to reimburse him.

#### Chapters V-IX

Chapter V contains provisions relating to Prince William Sound and other sensitive locations. Chapter VI covers miscellaneous matters. Chapter VII establishes a comprehensive oil pollution research and development programme. Chapter VIII contains various provisions covering liability and clean-up within the State of Alaska, including amendments to the Trans-Alaska Pipeline Act. The final chapter, IX, deals with the oil spill liability trust fund.

#### Conclusion

This then in broad outline is the legislation. It is an Act which is going to have profound effects on all tanker owners who decide to trade their tankers to the United States. It is bound to increase costs, not merely insurance premiums, which must rise to meet the additional exposure, but also in the provision of contingency plans. But, beyond that, in raising so clearly the spectre of unlimited exposure for ship-owners, it must also raise doubts in every owner's mind as to whether or not the risk of trading tankers to the U.S. can ever be worth the reward.

Finally, what is particularly to be deplored is Congress's decision to set its face firmly against the CLC and Fund Protocols and to go its own independent way in framing this legislation. A great opportunity has been lost for the United States to have lived up to the brave words of its delegation to IMO in 1984 and taken a lead within the international community in framing a response to oil spills that could be both practical and universally accepted. Instead, we have an Act which is likely to scare off the responsible owner, leaving others so to structure their corporate oper-

19. S. 4201(a)

20. S. 4202

21. S. 4301

ations that the huge potential exposure which they may face will in the final analysis turn out to be chimeric.

One can do no better than quote the words of President Bush in his formal statement accompanying his signing of the Act:

I am concerned about another consequence of the failure to ratify the Protocols. We must work to ensure that, in response to the provisions of this Act, a situation is not created in which larger oil shippers seeking to avoid risk are replaced by smaller companies with limited assets and a reduced ability to pay for the clearing up of oil spills. We will need to monitor developments in order to protect against such undesirable consequences.

## The new Luxembourg Shipping Register

By Luc Frieden\*

As of 1 January 1991, ships have been able to sail under the Luxembourg flag, for the Luxembourg Parliament has recently adopted a Law providing the EEC Member State Luxembourg with a shipping register. The move of the land-locked Grand Duchy of Luxembourg to register ships under its flag was inspired by the will to create a new European Register through a legal framework that attempts to avoid the disadvantages of the "flags of convenience" registers (insufficient safety, labour law and technical controls) and those of the traditional European shipping registers (too high costs). The Law<sup>1</sup> takes into account the existence and opportunities offered by the Luxembourg banking and insurance sector and fully implements the core of the EEC Treaty,<sup>2</sup> including the right of establishment and the free movement of persons, services and capital.

This article considers the most important legal provisions of the Law that has as its alleged goal to open a serious but nevertheless flexible shipping register.<sup>3</sup> The article will (1) analyse the registration requirements for ships that intend to operate under the Luxembourg flag, (2) contemplate the mortgage system set out by the Law, (3) examine several tax aspects, (4) devote some attention to the labour law governing masters and seamen and (5) finally briefly consider some safety requirements.

### 1. Registration requirements

All ships<sup>4</sup> that intend to operate under the Luxembourg flag have to register with the Record Keeper of Maritime Mortgages.<sup>5</sup> Ships acquire Luxembourg nationality *ab initio* if they are owned more than 50% by either natural persons of Luxembourg

\* Avocat, Bonn & Schmitt, Luxembourg.

1. Loi ayant pour objet la création d'un registre public maritime luxembourgeois (hereinafter referred to as the "Law"): Mémorial A No. 58 of 12 November 1990. All references to Articles, unless otherwise specified, refer to the Law.

2. Treaty Establishing the European Economic Community, 25 March 1957, as amended, Arts. 48-73.

3. Preparatory works to the Law, p. 6. Together with the Law, the Luxembourg Parliament also approved many Conventions of the International Maritime Organization, the Inter-governmental Maritime Consultative Organization and the International Labour Organization: Loi du 9 novembre 1990 portant approbation de certaines conventions internationales en matière maritime.

4. With regard to the Law, ships include all vessels with a capacity of more than 25 tons that normally transport persons or goods on the high seas or carry out fishing, towing and any other lucrative maritime activity (Art. 8). Thus, yachts and other boats exclusively used for living purposes may not register under the Law.

5. Arts. 4, 10. The record-keeping office is called the "Bureau de la conservation des hypothèques maritimes". The Law sets out in great detail the documents to be filed with that office (Art. 11). The Certificate of Registration is, however, issued by the Commissioner for Maritime Affairs (Arts. 15-17).

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MATTHEW BENDER & CO., INC.  
11 PENN PLAZA, NEW YORK, NY 10001 (212) 967-7707  
2101 WEBSTER STREET, OAKLAND, CA 94612 (415) 446-7100  
1275 BROADWAY, ALBANY, NY 12201 (518) 487-3000

## PART I A PRACTICAL COMMENTARY ON THE OIL POLLUTION ACT OF 1990

### INTRODUCTION

On August 18, 1990 the Oil Pollution Act of 1990 (the "Act") was enacted and became effective. The Act had its genesis some fourteen years earlier in the form of a Congressional proposal which never gained enough momentum to make it to the floor. But the EXXON VALDEZ disaster of March 24, 1989 revitalized the proposal. A subsequent series of significant if less spectacular spills in various locales throughout the U.S. during the remainder of 1989 and the first half of 1990 transformed the revived proposal into a legislative imperative.

By any measure, the Act represents a fundamental change to the body of maritime law. The change is not so much in the particular liability provisions of the Act, as it is in the Act's abdication of federal supremacy in favor of States' rights. What started out as a debate over whether the U.S. should ratify or adopt some modified version of the 1984 Protocols amending the 1969 International Convention on Civil Liability for Oil Pollution and the 1971 International Convention on Establishment of an International Fund for Compensation for Oil Pollution Damage to promote uniformity of international trade evolved into a debate over whether even national uniformity was necessary. The debate was obviously political. Consideration of whether international or national laws would be better vehicles to compensate victims of oil pollution were ignored. The issue became whether an individual State should retain its right to govern activity in its waters, as opposed to being subordinated to federal law. A States' rights orientation by the Senate majority leader combined with mounting public pressure finally caused the Congressional Conference Committee to capitulate to the States' rights advocates. The Act thus declares that neither it nor the 1851 Limitation of Liability Act ("1851 Act") shall in any way preclude or limit the right of an individual State to enact and enforce its own law on liability for pollution. A number of States already impose unlimited liability for oil pollution damages and others are expected to follow.

### TANKER OWNERS

**Liability.** The Act will apply to U.S. and foreign flag tank vessels while operating in U.S. waters and up to 200 miles offshore. Its liability

provisions apply to spills of oil of any kind or in any form with certain very limited exceptions. It imposes strict liability, jointly and severally, upon each responsible party, a term which is defined as an owner, operator or charterer by demise.

The Act expands the breadth of an owner's strict liability exposure, increases the monetary limits on liability, and makes it easier to impose unlimited liability on an owner:

- An owner will be strictly liable (i.e. liable without fault) to all injured parties for removal costs and damages up to \$1200 per gross ton for a tanker and up to \$600 per gross ton for a non-tanker.
- That limit will not apply where the spill is proximately caused by gross negligence or willful misconduct or violation of an applicable Federal safety, construction or operating regulation, or if the responsible party fails to report the discharge, to cooperate in clean up when requested to do so, or to comply with an order issued pursuant to the FWPCA (Federal Water Pollution Control Act).
- The individual States remain free to enact their own pollution laws and to afford common law (i.e. judge-made law) remedies to claimants.
- The 1851 Act is made inapplicable to pollution claims arising under the new Act or under State law.

When compared to Federal pollution liability law existing at the time enactment, the Act increases or changes liability in several ways:

- Under the prior law, an owner was strictly liable under the FWPCA only for U.S. government removal costs; liability to other parties was based upon a showing of fault. Under the Act, the owner is strictly liable to any party for all damages.
- The limit on liability is increased from \$150 per gross ton to \$1200 per gross ton.
- Under the prior law, the limitation amount could be exceeded only upon a showing that the spill was caused by willful negligence or willful misconduct within the owner's privity or knowledge. The Act no longer requires that the owner have privity or knowledge and vitiates the right to limit where the spill is caused by gross (rather than willful) negligence, or by a violation of certain regulations.
- Under the prior law, an owner could limit its liability for Federal or State-based claims, except U.S. government

removal expenses, to the value of the vessel and pending freight provided it did not have privity or knowledge of the cause of the spill. An owner may no longer use the 1851 Act to limit liability for State-based claims or for claims governed by the new pollution Act.

Schedule B, which follows Part II of this Commentary, is a summary comparison of the prior law and the new Act.

The elimination of the applicability of the limits provided by the 1851 Act to oil pollution claims under State law perhaps will have the most significant impact on tanker owners. It means that shipowners will now be subject to the full reach of the law of pollution liability and damages in each of the individual States of the United States. Tanker owners have been operating under the threat of these State liabilities for years, but have been able to avail themselves of the 1851 Act to cap their liability at the value of the vessel and pending freight. Although in recent years the courts have often expressed frustration with the 1851 Act as an anachronism in the modern era of insurance and have often "stretched" the facts of a particular case to accommodate a finding that limitation would not be permitted, it has remained a real measure of protection in many instances.

This change is significant because many coastal States impose some form of unlimited liability on a vessel owner for removal costs and other damages. Many also impose strict liability on the owner. In addition, many allow recovery of an even broader spectrum of damages than those that would be permitted under the Act. Hence, the demise of the 1851 Act with respect to State law oil pollution claims sharply increases the threat of unlimited liability for a vessel owner in those States having unlimited liability laws. (Ironically, it appears that for spills occurring in non-U.S. waters, but being litigated in U.S. courts, owners would continue to enjoy the benefits of the 1851 Act.)

The provision allowing pollution claimants to recover amounts in excess of the limits set by the Act where there is a violation of a Federal safety, construction or operating regulation is also very threatening to shipowners. Its effect is exacerbated by the elimination of the requirement that such acts must have been within the owner's privity or knowledge. In effect, these provisions could result in unlimited liability for operational negligence. This represents a marked departure from the schemes traditionally employed in statutes allowing shipowners to limit liability unless the owner had knowledge or privity of the acts which caused the loss. Under the Act, an owner who takes every precaution to man the vessel with qualified, experienced officers and trains those officers in a reasonable manner, is nonetheless likely to

face unlimited liability when one of those officers, whether inadvertently or intentionally, violates a regulation and causes a spill. For example, a violation of a rule of the nautical road could result in unlimited liability. We also note that gross negligence will result in unlimited liability. In cases where there is no violation of a regulation, this provision may allow courts to "stretch" the facts to meet a showing of gross negligence so as to impose unlimited liability. These provisions, combined with the broadening of the scope of recoverable damages, present tanker owners with a greater likelihood of incurring liability beyond the Federal statutory limits and, in the event of a major spill in an environmentally sensitive area, in excess of the \$500-\$700 million in pollution liability insurance most currently carry. Although historically only two spills have resulted in liabilities exceeding \$100 million, the new law is likely to make historic reference somewhat irrelevant.

In conclusion, a tanker owner whose vessel spills in U.S. inland or coastal waters faces the very real threat of the loss of the vessel and other assets through seizure in the aftermath of a major spill. In response, tanker owners should not only increase insurance limits, but their beneficial owners should pay careful attention to corporate structuring considerations in order to better protect their other assets from this exposure.

**Defenses.** The Act provides responsible parties with very narrow complete defenses.

A responsible party must demonstrate by a preponderance of the evidence that the discharge and resulting damages were caused solely by

- an act of God;
- an act of War;
- an act or omission of a third party (excluding employers, agents, or those having a contractual relationship with the responsible party) if the responsible party further establishes by a preponderance of the evidence that it
  - a) exercised due care with respect to the oil, and
  - b) took precautions against foreseeable acts or omissions of the third party and foreseeable consequences of those acts or omissions;
- any combination of the above.

However, even if the responsible party is able to prove a defense, it nonetheless is obligated to make payment to claimants. It then becomes subrogated to their rights against such third party.

The complete defenses are not available if a responsible party failed to report the incident, to provide all reasonable assistance and cooperation requested by responsible officials, or, without sufficient cause, to comply with the orders of a government official given under the Federal Water Pollution Control Act or the Intervention on the High Seas Act.

A partial defense is provided against certain claims to the extent the claimant's gross negligence or willful misconduct contributed to the spill.

**Third party actions.** Where a spill is caused solely by a third party, that party is strictly liable. If it is a vessel owner, operator or charterer by demise, it is entitled to limit liability as outlined below; if it is not a vessel owner, operator or charterer by demise, it may limit to the same extent the spilling vessel owner would be entitled to limit.

Where a spill is the result of joint fault, the owner of the spilling vessel would be liable as provided in the Act. The spiller as well as the claimants would have a cause of action under general maritime law or state law against the third party. The general maritime law claim would be subject to the 1851 Limitation of Liability Act, whereas the state law claims would not be so limited.

**Removal Costs and Damages.** The Act broadens the categories of removal costs and damages for which an owner is strictly liable. Recoverable removal costs will be:

- those incurred by the U.S. or a State government or by an Indian tribe;
- those incurred by others if consistent with the National Contingency Plan.

Recoverable damages will be:

- Natural Resources— injury to, destruction of, loss of, or loss of use of natural resources, including the cost of assessing such damages;
- The measure of natural resources damages is:
  - cost of restoring, rehabilitating, replacing or acquiring the equivalent of the damaged natural resource;
  - the diminution in value pending restoration.
- Real or Personal Property— injury to, or economic loss resulting from destruction of, real or personal property;
- Subsistence Use— loss of use of natural resources for subsistence;

- Revenues—net loss of taxes, royalties, rents, fees, or net profit shares due to injury to real or personal property or natural resources;
- Profits and Earning Capacity—loss of profits or impairment of earning capacity due to injury to real or personal property or natural resources;
- Public Services - net costs of providing increased or additional public services during or after removal activities.

According to the Conference Report, the Act also eliminates a major legal impediment which, under existing general maritime law, serves to curtail significantly recovery of remote or consequential damages. Under *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), a claimant who suffers economic losses (e.g. loss of profits) may recover those losses only where there is physical damage to property in which that claimant has a proprietary interest (certain exceptions have developed, e.g. in favor of a fisherman deprived of fishing rights due to a spill). Thus, under the prior law where waterways were closed due to a spill preventing use of the waterway and causing economic losses to those deprived of its use, parties incurring losses could not recover from the spiller. The new Act does not require a showing of physical damage to a proprietary interest. This could significantly increase the quantum of damages for spills occurring in congested waterways. Delayed vessels, waterside terminal operators and the like will attempt to claim their economic losses in the event of a spill resulting in closure of a waterway. Where and how a court will draw the line between recoverable and unrecoverable economic loss remains to be seen.

**Double Hulls and Other Structural and Equipment Requirements.** The double hull issue, which during the legislative process was most contentious, was resolved on a basis which, accepting that double hulls were inevitable, is accommodating to industry:

- Newly constructed tankers contracted for after June 30, 1990 or delivered after January 1, 1994 will be required to have double hulls.
- As of January 1, 1995, single skin tankers of 30,000 gross tons or more and over 28 years old must have double hulls. The age requirement thereafter is reduced so that by 2000 all such vessels over 23 years old must have double hulls. By 2010, all single skin vessels must have double hulls. Existing vessels with double bottoms or double sides are afforded an additional five years.

- Until January 1, 2015, tankers discharging at a deepwater port (LOOP) or lightering more than 60 miles offshore will not be required to have double hulls.
- Until January 1, 2015, tank vessels, including barges, under 5,000 gross tons will not be required to have double hulls.
- These requirements do not apply to vessels in innocent passage in U.S. waters or the exclusive economic zone.
- Within six months after passage of the legislation, the Secretary of Transportation is to determine whether other structural and operational requirements will provide environmental protection equal to or greater than that provided by double hulls and report those findings to Congress with recommendations for legislative action.

Other structural and equipment requirements are on the horizon. Within one year, regulations for (a) cargo tank overfill devices and tank level or pressure monitoring devices, (b) plating thickness and gauging procedures, and (c) radio communication equipment and procedures, shall be established.

**Contingency Plans.** The Act sets forth detailed requirements for contingency plans covering a worst case scenario to be put in place by tanker owners and operators. These include not merely paper plans but:

- contractual commitments with removal contractors and others so that an immediate response is possible;
- training programs for vessel and response personnel;
- periodic drills and availability of containment and removal equipment.

Hence, owners or their managers will have to undertake a more thorough and active role in planning and preparedness. But there will be some breathing room. Contingency plan requirements and implementation will be phased in as follows:

- the Coast Guard has 24 months to promulgate regulations which will specify what the plans must provide;
- owners will then have six months to draft plans and submit them to the Coast Guard for approval;
- vessels may operate without an approved plan until 36 months after enactment.

**Manning.** For foreign flag tank vessels, the manning, training, qualification and watchkeeping standards of the country of a vessel's registry must be equivalent to U.S. law or international law acceptable

to the U.S. If, after a period of evaluation, the Coast Guard determines the flag-country standards are not up to par, the Coast Guard shall refuse entry to vessels registered in that country unless the Coast Guard determines that the particular vessel is safe or entry is necessary for safety of the vessel or her crew. This provision will no doubt cause a re-evaluation of the use of certain flags of convenience which may not measure up to U.S. standards.

The Act also dictates maximum working hours, including administrative duties, for officers and crew:

- no more than 15 hours in a 24-hour period; or
- 36 hours in a 72-hour period.

This provision may very well have a dramatic impact on vessel operations because it appears to include desk-work as well as watch standing. Currently, it is almost routine for officers to exceed these number of hours, particularly during loading or discharging. Since a violation of this provision could defeat the right to limit liability, it will be crucial to implement procedures to assure adherence aboard ship. (Arguably, this provision only applies to U.S. flag vessels but the Coast Guard is reviewing the possibility of its application to foreign flag vessels in U.S. waters as well.)

**Certificates of Financial Responsibility.** This requirement is carried over from present law. The amount to be guaranteed is increased to the maximum limited liability an owner faces (e.g. \$1,200 per gross ton or \$10 million, whichever is greater, for tank vessels over 3,000 gross tons). The guarantor will continue to be directly liable to the claimants, but only to the limits specified in the guarantee. A responsible party with more than one vessel need only establish financial responsibility for the vessel having the greatest maximum liability under the Act. Again, some breathing room is provided as owners may continue to use their current certificates until new regulations and new certificates are issued. There currently is a substantial concern in the industry over the threat by P&I Clubs to refuse to issue such certificates following renewal of P&I insurance on February 20, 1991.

The individual States will be able to enforce this Federal requirement, but will not forfeit the right to inspect the vessel and impose sanctions for failure to comply. It is unclear whether the States will be free to impose their own financial responsibility requirements. There is no express language indicating that the Federal requirement is exclusive and there is language that says the Act should not preempt the States from establishing their own requirements, generally. However, one section of a legislative report which accompanied an early draft of the financial responsibility provision which was finally adopted indicates

that it is intended to preempt the States from imposing such a requirement. Several States already have requirements for certificates, but, except for Alaska, have not enforced them, while others are contemplating such requirements. The P&I Clubs will not issue state-required certificates of financial responsibility. In the past, where a State has required its own certificate of financial responsibility in amounts greater than the Federal requirement, charterers had been willing to arrange for a certificate of financial responsibility on an owner's behalf on the strength of a Club letter acknowledging cover. The Clubs are balking at issuing such letters. Hence vessels may be refused entry unless charterers arrange for issuance of such certificates without the comfort of a P&I letter or owners have the wherewithal to arrange a bank guarantee. Owners should be mindful of time or voyage charter clauses requiring owner to provide such certificates, and negotiate alternatives.

**Miscellaneous Provisions.** There are a number of other provisions which may have an impact on tank vessel operations. The Act

- Requires the Coast Guard to designate areas where single hull tankers over 5,000 gross tons must be escorted by at least two tow vessels.
- Requires participation in Vessel Traffic Systems (in place in New York and San Francisco, and to be put in place at other ports) by vessels that pose a significant threat of pollution.
- Requires that, within two years, vessels carrying oil or hazardous materials in bulk carry appropriate removal equipment that employs the best technology economically feasible and compatible with safe operation.
- Requires the Coast Guard to designate certain sensitive areas where the pilot must be someone other than the person in command of the vessel.
- Requires the Coast Guard to implement regulations on operation with auto-pilot engaged and engine room unmanned.
- Requires the Coast Guard to review records on alcohol and drug abuse before issuing licenses, certificates of registry and merchant mariner documents.
- Allows a chief mate to temporarily relieve a master when the two next most senior licensed officers reasonably believe the master is under the influence of alcohol or drugs and is incapable of commanding the vessel. (Arguably, this provision should apply only to U.S. flag vessels but the Coast

Guard is considering regulations applying it to all vessels in U.S. waters.)

### NON-TANKER OWNERS

The new law imposes liability on a non-tank vessel owner under the same basic scheme as a tanker owner, but limits that liability to \$600 per gross ton with the same basis for unlimited liability as for a tanker owner. This limit will apply to a spill of fuel oil from a non-tanker and to a spill from a tank vessel solely caused by a non-tanker, e.g. in a collision. The 1851 Act will not be available to the non-tanker owner to limit liability for a spill giving rise to a claim under the Act or State law.

The amount to be secured by certificates of financial responsibility is increased to \$600 per ton. Other financial responsibility requirements are the same as for tanker owners.

### OPERATORS

The Act holds the vessel operator liable in the same manner as an owner. An operator's liability is joint and several with that of the owner, i.e. each is responsible for the full amount of the claim.

The definition of "owner or operator" is "any person owning, operating or chartering by demise, the vessel." It is the same definition that is currently used in the FWPCA and thus it appears no change from current law was intended. Operator could be interpreted as the entity which has responsibility for the execution of voyages, i.e. the manning, victualing and navigating of the vessel. It could include the vessel manager or managing agent. Such entities have always been liable for their own independent negligence under U.S. law but they have not previously been strictly liable for damages caused by the vessel or its crew with the possible exception of U.S. government removal costs under the FWPCA. Thus, the Act represents a potential broadening of a vessel manager's liability under Federal law.

Under other environmental statutes such as CERCLA the term "operator" has been given broad interpretation to include parties who effectively control or participate in operational decisions even though they may not be the nominal operator. But as the term "operator" is a term of art in the maritime industry that is not so all encompassing, given the current "green" environment, caution should be exercised. Finally, it must be noted that the statutory provisions of many State laws also impose liability on an "operator".

As with the owner, a combination of greater insurance coverage and more attention to corporate structuring and placement of corporate assets will be required.

### CHARTERERS

The Act expressly defines "owner or operator" to include a charterer by demise. Hence a charterer by demise or bareboat charterer will be strictly liable for a spill.

Neither time or voyage charterers are included as a responsible party under the Act. But time and voyage charterers should be mindful of indemnity obligations that could arise through a breach of a charter safe port/berth clause.

### LENDERS/LESSORS/INVESTORS

No provision of the Act imposes liability directly on a passive investor or a mortgagee. Lessors, however, may be more exposed than under existing law. The drafts of the Act had contained a provision that had purported to exclude from liability any person holding title or other indicia of ownership to protect a security interest (e.g. a lessor under a financing lease or a mortgagee bank). It was eliminated in the final drafting session, apparently because CERCLA contains a similar definition which has been interpreted by a court to impose liability on a secured lender merely because the lender had the ability to influence the borrower's decisions affecting environmental matters. Although the elimination of that provision should prevent the interpretation that is occurring under CERCLA, it could spell trouble for financing lessors.

Typically, a financing lessor bareboat charters the vessel. Under general maritime law principles, an owner who bareboat charters a vessel to another has no personal liability to third parties harmed by the vessel, except possibly where the cause was a condition which existed aboard the vessel prior to the bareboat charter. But under the FWPCA, it has been held that a registered owner is jointly and severally liable with a bareboat charterer to the U.S. government for removal costs, meaning either or both are liable and to the extent one party is not in a position to pay or for some reason can not be sued jointly with the other, the second party must bear the full liability. This has not been a major concern because of the limitations under the FWPCA. But the Act, which uses the same definition of owner or operator as the FWPCA, makes joint and several liability a major concern because the scope of liability and damages is much greater than under the FWPCA. The legislative report accompanying the Act states that the liability is intended to be joint and several. Hence, notwithstanding a bareboat charter, a registered owner/lessor will be liable under the Act. Lessors should be mindful of corporate structuring considerations in order to protect other assets from liability.

An important concern for an owner, mortgagee, or financing lessor is that maximum pollution liability insurance limits be maintained. What amount of insurance will be considered adequate in view of the risk of unlimited liability is a developing picture. It appears that \$700 million (the amount more than 50% of the tankers are said to have in excess pollution liability cover over the \$500 million in P & I pollution liability cover), although there are indications that the \$200 million in excess cover will not be available next year due to lack of capacity in the Lloyd's of London market. If pollution liability exceeds insurance limits, the result could be a seizure of the vessel on the basis of a federal tort claim which would take priority over the mortgage. For the mortgagee, a special "mortgagee's interest insurance-additional perils (pollution)" policy has been developed for this risk. This insurance may become a common requirement of many financing institutions, with the cost to be borne by the owner in the same manner as conventional mortgagee's interest insurance is currently.

In light of recent cases interpreting non-maritime environmental statutes broadly, mortgagees and investors who exercise dominion or control over the vessel or its management may be exposed. Certainly, a mortgagee in possession would be exposed. The elimination from the Act of the proposed provision designed to protect secured lenders but which, ironically, had been used in CERCLA cases to impose liability on a secured lender, should preclude any notion of lender liability on the basis of mere ability to influence decisions relating to pollution avoidance.

#### CARGO OWNERS

The proposal to have the cargo owner share liability with the vessel owner was eliminated. A cargo owner has no liability under the Act.

#### POLLUTION FUND AND CLAIMS PROCEDURE

In 1986 the Oil Spill Liability Trust Fund was established, supported by a tax of 5 cents per barrel on imported oil. The Act sets the current borrowing limit for oil pollution measures at \$1 billion in the aggregate, and limits the per-incident expenditure to one billion dollars with a further limit of \$500 million for recovery for natural resources damages.

The Act is structured to discourage litigation by individual claimants. It provides that claims must first be presented to the responsible party but if it does not pay within 90 days, the claimant may sue the responsible party, or, as is more likely, submit the claim to the Fund.

(Rel 53-Spec. Alert Pub 130)

The Fund is then subrogated to the claimants' rights against the responsible party. The Act sets forth other circumstances for payment by the Fund. It also provides for a notice procedure to be followed by a responsible party with respect to presentation of claims. Claims for removal costs must be made within 6 years of completion. Damages claims must be made within 3 years from discovery of the injury or when reasonably discoverable with due care.

#### STATE LAWS

The Bill does not preempt the States from having or establishing their own pollution prevention, liability and response laws, whether statutory or by common law, although it does not allow States to act with regard to vessel design and construction standards. Virtually all coastal States have prevention, liability and response laws, with many providing for some form of unlimited liability, a factor largely ignored or not appreciated until this year. Now, no Federal law limits what the States may do in this regard.

#### INTERNATIONAL AGREEMENTS

The two International Conventions governing liability for spills within the waters of contracting nations—1969 Convention on Civil Liability and 1971 Convention on Establishment of and International Fund for Compensation of Oil Pollution Damages—will not be ratified by the U.S. The Act states:

It is the sense of the Congress that it is in the best interests of the U.S. to participate in an international oil pollution liability and compensation regime that is at least as effective as Federal and State laws in preventing an incident and guaranteeing full and prompt compensation for damage resulting from incidents.

The President, upon signing the Act, expressed his dismay with this aspect of the Act.

#### CONCLUSION

Although the proposed changes in liability structure have been around for about fifteen years, the EXXON VALDEZ and other recent oil spills in the U.S. have caused Congress to take a more reactive, less considered approach to the problems. The approach belies the safety record of the industry.

In its most sweeping form, the Bill marks a definitive change in the traditional limitation of liability protections afforded vessel owners and may expose managers or lessors to new liabilities. The industry must now adjust. This will require a re-examination of present owning

(Rel 53-Spec. Alert Pub 130)

and operating structures, insurance needs, lend-lease financing, financing terms and chartering practices of the industry.

## PART II

### SUMMARY OF U.S. OIL POLLUTION ACT OF 1990

#### JURISDICTION

Spills or threatened spills onto the navigable waters of the U.S. (inland waters and up to 3 miles offshore) and the waters of the "exclusive economic zone" (up to 200 miles to sea from the shoreline). Puerto Rico, Guam, American Samoa, U.S. Virgin Islands and Marianas are included. Also applies to spills in non-U.S. waters from vessels carrying oil between U.S. ports, or carrying Alaskan oil to U.S. East and Gulf coast ports by way of the trans-Panama pipeline.

#### LIABILITY

Each "responsible party" is jointly, severally and strictly liable subject to the limits stated below.

#### PARTY LIABLE

Responsible party is

- vessel owner, operator or charterer by demise;
- owner or operator of onshore facility;
- lessee or permittee of area in which offshore facility is located, or holder of right of use and easement for area in which facility is located;
- licensee of deepwater port;
- owner or operator of pipeline.

#### DEFENSES TO LIABILITY

A responsible party is not liable where the spill is caused solely by:

- act of God;
- act of war;
- act or omission of a third party (other than an agent or employee or third party acting pursuant to a contractual relationship with the responsible party), provided owner establishes it exercised due care and took precautions against foreseeable acts or omissions of the third party and the consequences that could foreseeably result; or

- Revenues—net loss of taxes, royalties, rents, fees, or net profit shares due to injury to real or personal property or natural resources;
- Profits and Earning Capacity—loss of profits or impairment of earning capacity due to injury to real or personal property or natural resources;
- Public Services—net costs of providing increased or additional public services during or after removal activities.

#### PENALTIES—CIVIL AND CRIMINAL

##### Criminal penalty for spill:

- \$2,500—\$25,000/one year imprisonment for negligent violation;
- \$5,000—\$50,000/three years for knowing violation;
- up to \$250,000/15 years for knowing endangerment.

##### Civil penalty for spill:

- up to \$25,000 per day or up to \$1,000 per barrel discharged;
- if caused by gross negligence, not less than \$100,000 but not more than \$3,000 per barrel discharged.

##### Administrative penalty for spill or violation of pollution avoidance or response regulations:

- Class I—up to \$10,000 per violation not to exceed \$25,000;
- Class II—up to \$10,000 per day of violation not to exceed \$125,000.

##### Civil penalty for failure to remove oil or comply when ordered by governmental authority:

- up to \$25,000 or 3 times the costs incurred by the Fund as a result of such failure.

##### Criminal penalty for failure to notify authorities of spill:

- up to three years imprisonment (five years for second offense);
- fine of up to \$500,000 for an organization, \$250,000 for an individual.

##### Administrative penalty for failure to have a certificate of financial responsibility:

- up to \$25,000 per day.

Variety of existing marine safety laws penalties (e.g. dangerous operation of a vessel) are increased in amount as well.

One provision of unique interest allows a person in whose presence a violation of pollution law occurs, to arrest the violator without a warrant for arrest.

#### REMOVAL RESPONSIBILITY

The President must act to ensure effective and immediate removal, and may monitor and arrange for removal actions. Those involved in legitimate removal activities (except the responsible party) are not liable for removal costs or damages (except for personal injury or wrongful death) unless caused by gross negligence or willful misconduct. A responsible party is liable for removal costs and damages caused by persons involved in removal activity.

#### OIL SPILL LIABILITY TRUST FUND

The Internal Revenue Code of 1986 established the Fund, which is supported by a tax on imported oil. The Act provides that the Fund will also be supported by penalties collected under the Act. The Act authorizes borrowings in the aggregate of \$1 billion and limits recovery for damages to natural resources to \$500 million. The funds are available without appropriation by Congress for:

- Federal and State government removal costs;
- costs of assessing damages to natural resources;
- removal costs and damages resulting from a spill from a foreign offshore unit;
- uncompensated removal costs and damages;
- Federal government costs incurred to implement, administer and enforce the Act.

Claims for removal costs and damages shall be presented first to the responsible party unless

- The President allows collection from the Fund first;
- The responsible party has a defense to liability or is entitled to limit liability, in which event it can collect from the Fund amounts it paid in excess of its liability;
- The Governor of a state requests payment for state removal costs;
- The spill was from a foreign offshore unit and the claimant is a U.S. claimant.

If a responsible party denies a claim or does not pay it within 90 days, the claimant may sue the responsible party or guarantor, or present the claim to the Fund.

Limitation of Admiralty Jurisdiction in  
Wrongful Death Actions: *Molett v.*  
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Questioning the Use of a Declaratory  
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It's Best to Answer When the Coast  
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## THE OIL POLLUTION ACT OF 1990

Antonio J. Rodriguez\* and Paul A.C. Jaffe\*\*

### I. INTRODUCTION

On November 10, 1990, the United States adopted a new legal regime governing the discharge or threat of discharge of oil on the navigable waters of the United States, including the territorial sea, exclusive economic zone of the United States, and the continental shelf. This article examines the Oil Pollution Act of 1990 (OPA) and its expected effects. Because the Oil Pollution Act of 1990 amends the previous statutory framework relating to oil pollution, a general understanding of water pollution law as it existed in the United States prior to passage of the Oil Pollution Act is necessary. United States law regarding water pollution is unusually confused, with overlapping statutes and common law remedies on both the federal and state levels. Now, the Oil Pollution Act is the principal federal legislation in this field; it establishes a comprehensive scheme for prevention, removal, liability, compensation, and penalties relating to oil pollution. However, the preexisting federal legislation, including the Federal Water Pollution Control Act (Clean Water Act),<sup>2</sup> remains in effect except for the imposition of liability, which is now governed by the Oil Pollution Act. Water pollution resulting solely from discharge of hazardous substances other than petroleum, natural gas, and related products is addressed by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund).<sup>3</sup> Although the United States has not adopted either of the major international conventions regarding liability for oil pollution,<sup>4</sup> and thus is not in accord with interna-

\* Partner, Phelps Dunbar, New Orleans, Louisiana; Adjunct Professor of Maritime Law, Tulane University; Chairman, Navigation Safety Advisory Council, United States Department of Transportation; Proctor, Maritime Law Association; B.S. 1966, United States Naval Academy; J.D. 1973, Loyola University of the South; Captain, U.S. Naval Reserve.

\*\* Associate, Phelps Dunbar, New Orleans, Louisiana; LL.B. 1985, London School of Economics; LL.M. in Admiralty 1988, Tulane University; Associate Member, Maritime Law Association.

1. Oil Pollution Act of 1990 (Oil Pollution Act), Pub. L. No. 101-380, 104 Stat. 484 (1990), reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 484.

2. 33 U.S.C. §§ 1251-1387 (1988).

3. 42 U.S.C. §§ 9601-9675 (1988). See section 9601(14) for the precise definition of a hazardous substance covered by the Act.

4. International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969,

tional oil pollution law, various voluntary agreements on this subject are relevant on an international basis.<sup>5</sup>

## II. PREEXISTING LAW

### A. Penalties for Oil Pollution

The Clean Water Act, the principal piece of oil pollution legislation prior to the passage of the Oil Pollution Act, flatly prohibited the discharge of any oil or hazardous substances in or on the navigable waters of the United States, its shorelines, or its contiguous zone subject to certain limited exceptions.<sup>6</sup>

The Clean Water Act assessed civil penalties against the owner, operator, or person in charge of the onshore or offshore facility or vessel (responsible party) that discharged a prohibited amount of oil or a hazardous substance.<sup>7</sup> In addition to civil penalties under the Clean Water Act,<sup>8</sup> both the Clean Water Act<sup>9</sup> and the Refuse Act of

1899<sup>10</sup> provided criminal penalties. While the Refuse Act creates a strict liability crime,<sup>11</sup> the Clean Water Act imposed criminal penalties only for negligent or knowing violations.<sup>12</sup> The amounts of these penalties have been significant. For example, in 1989 the United States assessed a criminal penalty of two million dollars against Ashland Oil for an oil spill.<sup>13</sup>

9. Criminal penalties for violation of the Clean Water Act are imposed by 33 U.S.C. § 1319(c).

10. 33 U.S.C. § 407 (1988). Unlike the Clean Water Act, the Refuse Act has not been amended by the Oil Pollution Act. Fines under the Refuse Act are imposed by 33 U.S.C. § 411, and are between \$500 and \$2,500.

Since the passage of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1895-1897 (1984), higher amounts may be obtained. These amounts are currently:

(c) FINES FOR ORGANIZATIONS.—Except as provided in subsection (e) of this section, an organization that has been found guilty of an offense may be fined not more than the greatest of—

- (1) the amount specified in the law setting forth the offense;
- (2) the applicable amount under subsection (d) of this section;
- (3) for a felony, not more than \$500,000;
- (4) for a misdemeanor resulting in death, not more than \$500,000;
- (5) for a Class A misdemeanor that does not result in death, not more than \$200,000;
- (6) for a Class B or C misdemeanor that does not result in death, not more than \$10,000; and
- (7) for an infraction, not more than \$10,000.

(d) ALTERNATIVE FINE BASED ON GAIN OR LOSS.—If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

(e) SPECIAL RULE FOR LOWER FINE SPECIFIED IN SUBSTANTIVE PROVISION.—If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense.

18 U.S.C. § 3571 (1988).

11. *United States v. Ashland Oil, Inc.*, 705 F. Supp. 270, 276 (W.D. Pa. 1989).

12. 33 U.S.C. § 1319(c). A negligent discharge shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year or by both. A knowing violation carries a fine of not less than \$5,000 nor more than \$50,000 per day of violation or imprisonment for not more than three years, or by both. Fines are higher for repeat offenders. *Id.*

13. The fine was based on twice the gross loss suffered by various interests. Factors included other companies' business interruption and cleanup costs under 18 U.S.C. § 3571(d).

973 U.N.T.S. 3, reprinted in 6 E. BENEDICT, BENEDICT ON ADMIRALTY 6-62.133 (7th ed. 1990) [hereinafter BENEDICT]; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, 1110 U.N.T.S. 57, reprinted in 6 BENEDICT, *supra*, at 6-100.2; Protocol to the International Convention on Civil Liability for Oil Pollution Damage, May 25, 1984, 23 I.L.M. 177, reprinted in 6 BENEDICT, *supra*, at 6-77; Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, May 25, 1984, reprinted in 6 BENEDICT, *supra*, at 6-116.2(3).

5. Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP Standing Agreement) (in effect from October 1969, as amended October 30, 1984), reprinted in 6 BENEDICT, *supra* note 4, at 6-136; Supplement to Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP Supplement) (in effect from February 20, 1987), reprinted in 6 BENEDICT, *supra* note 4, at 6-145; Contract Regarding a Supplement to Tanker Liability for Oil Pollution (CRISTAL) (in effect from 1971, substantially revised February 20, 1987), 10 I.L.M. 137, reprinted in 6 BENEDICT, *supra* note 4, at 6-148.4.

6. 33 U.S.C. § 1321(b)(3). The exceptions were (1) quantities less than those which, by regulation are deemed to be harmful, and (2) where, in certain cases, permitted by the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Protocol) I.M.C.O. Document TSP/CONF/11 of Feb. 16, 1978, reprinted in 17 I.L.M. 546 (codified as amended at 33 U.S.C. §§ 1901-1912 (1988)). In evaluating amounts of oil which may be harmful to the public health and welfare, consideration should include, but not be limited to, damage to fish, shellfish, wildlife, public and private property, shorelines and beaches. 33 U.S.C. § 1321(b)(4), *see generally* Discharge of Oil, 40 C.F.R. pt. 110 (1989). For hazardous substances other than oil, quantities which must be reported are specified in 40 C.F.R. § 117.3 (1989) and 40 C.F.R. pt. 302 (1989).

7. 33 U.S.C. § 1321(b)(6)(A). The penalty is not dependent upon a showing of fault. *Id.*

8. 33 U.S.C. § 1321(b)(6)(A), (B). Because the penalty is civil, the 5th Amendment does not protect a violator from having the oil spill report required by 33 U.S.C. § 1321(b)(5) used to support an assessment of a penalty under 33 U.S.C. § 1321(b)(6). *United States v. Ward*, 448 U.S. 242 (1980), *reh'g denied*, 448 U.S. 916 (1980).

## B. Civil Liability and the Clean Water Act

## J. Liability of Owner or Operator of Discharger

Under the Clean Water Act, the responsible party that discharged oil or a hazardous substance had the primary duty to clean up the spill.<sup>14</sup> A responsible party who failed to clean up was strictly liable to the United States for the actual cost of removing the oil or hazardous substance up to a limit based upon the tonnage, if the discharger was a vessel, or up to a fixed amount if the discharger was an onshore or offshore facility.<sup>15</sup> The Clean Water Act not only created liability in personam, but recognized liability in rem where the source of the discharge was a vessel.<sup>16</sup> Furthermore, where the source of the discharge was a vessel, the Act provided that the government could bring suit to recover cleanup costs not only against its owner or operator, but also directly against its insurer.<sup>17</sup>

The Clean Water Act provided very limited defenses,<sup>18</sup> but its liability limits could be broken only where the government could show that the discharge "was the result of willful negligence or willful mis-

14. *United States v. P/B STCO 213*, 756 F.2d 364, 368-69, 1985 AMC 2763, 2769 (5th Cir. 1985); *United States v. Dixie Carriers, Inc.*, 736 F.2d 180, 184, 1985 AMC 815, 821 (5th Cir. 1984).

15. 33 U.S.C. § 1321(f)(1). This section provides the following liability limits for actual removal costs:

- (1) Inland oil barges—\$12 per gross ton or \$125,000, whichever is greater.
- (2) Other vessels not carrying oil or hazardous substances as cargo—\$150 per gross ton or \$125,000, whichever is greater.
- (3) Other vessels carrying oil or hazardous substances as cargo—\$150 per gross ton or \$250,000, whichever is greater.
- (4) Onshore facility—\$50,000,000.
- (5) Offshore facility—\$50,000,000.

16. This lien is a tort lien and ranks accordingly. See *United States v. M/V Big Sam*, 681 F.2d 432, 1983 AMC 2730 (5th Cir.), *reh'g en banc denied*, 693 F.2d 451 (5th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

17. 33 U.S.C. § 1321(p)(3). The insurer in a direct action suit is entitled to invoke all rights and defenses available to the owner or operator and those available to the insurer if the claim has been brought by the owner or operator. See *United States v. West of England Ship Owner's Mut. Protection & Indem. Ass'n.*, 872 F.2d 192, 1989 AMC 1497 (5th Cir. 1989) (United States sued both the barge owner and its P&I insurers to recover cleanup costs).

18. 33 U.S.C. § 1321(f). The only defenses to this strict liability are that the discharge was caused solely by:

- (1) Act of God.
- (2) Act of war.
- (3) Negligence of the United States government.
- (4) Act or omission of a third party (whether or not the act or omission was negligent), or
- (5) Any combination of the above.

*Id.*

conduct within the privity or knowledge of the owner."<sup>19</sup> In such a case, the responsible party was liable for the full removal costs.<sup>20</sup>

The Clean Water Act did not preempt states, individuals, or foreign governments from recovering actual cleanup costs, even when these costs were in excess of the limits set forth in the Act.<sup>21</sup> However, when the source of the discharge was a vessel, such claims were subject to the Limitation of Liability Act (Limitation Act).<sup>22</sup>

A particularly troublesome problem had arisen in the interpretation of the Clean Water Act with regard to the costs of cleanup efforts undertaken by the responsible party. Courts interpreting the Act determined that if the responsible party accepted his duty and commenced cleanup operations, but the government later stepped in to effect a more thorough cleanup, the responsible party could not credit the amount he had originally spent against the amount subsequently sought by the government for reimbursement of its expenditures.<sup>23</sup>

## 2. Third-Party Liability

In addition to imposing strict liability on the responsible party, the Clean Water Act allowed the government to proceed directly against

19. *Id.*

20. *Id.* See *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1978 AMC 1786 (2d Cir. 1978), *cert. denied*, 440 U.S. 959, 1979 AMC 2019 (1979) (denying tug owner limitation of liability under 33 U.S.C. § 1321(g) and applying the term "willful misconduct").

21. *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 1982 AMC 409 (5th Cir. 1980) (attempt by United States government to recover under the Refuse Act, common law theories of public nuisance, and maritime tort for negligence rejected by the court). See also *In re Oswego Barge Corp.*, 664 F.2d 327, 1982 AMC 769 (2d Cir. 1981), *reh'g denied*, 673 F.2d 47 (1982). In *Oswego Barge Corp.*, the court agreed that 33 U.S.C. § 1321(f) preempts other means of recovery by the United States government. However, amounts paid by the United States government to the Canadian government for cleanup costs incurred by the Canadian authorities were held not preempted by the limitations of liability contained in the Clean Water Act. *Contra United States v. City of Redwood City*, 640 F.2d 963, 1981 AMC 1519 (9th Cir. 1981). See also *Stewart Transportation Co. v. Allied Towing Corp.*, 596 F.2d 609, 1979 AMC 1187 (4th Cir. 1979) (Virginia's recovery of cleanup costs under Virginia statute not preempted by Clean Water Act).

22. 46 U.S.C. §§ 181-188 (1988).

23. *United States v. Dixie Carriers*, 736 F.2d 180, 183-85, 1985 AMC 815, 819-21 (5th Cir. 1984), *Stewart Transportation*, 596 F.2d at 619, 1979 AMC at 1201-02. As an example, assume that the owner or operator's limit under the Act was \$600,000, and he spent \$400,000 effecting cleanup operations which the government determined to be inadequate. If the government then spent an additional \$500,000 on further cleanup, the owner or operator was required to pay the full \$500,000 to the government, notwithstanding the fact that he had already spent \$400,000 in attempting to carry out his statutory duty. Clearly, this anomaly acted as a disincentive for owners and operators of discharging units to effect cleanup operations voluntarily. Because government efforts are generally more expensive than those undertaken by private industry, the anomaly increased pollution cleanup costs.

a third party who solely caused a discharge.<sup>24</sup> The same limited defenses to liability available to a responsible party were available to a third party.<sup>25</sup> If the government elected to proceed against the responsible party who alleged that the spill was caused solely by a third party, the Act permitted the responsible party to pay the removal costs and become subrogated to the government's claim against the third party.<sup>26</sup>

With regard to responsible parties, the Clean Water Act provided the exclusive remedy for recovery of cleanup costs by the United States.<sup>27</sup> However, the Clean Water Act was not the government's exclusive remedy against a third party solely responsible for a discharge.<sup>28</sup> As pointed out by a dissenting federal appellate judge:

[A]ctual dischargers of oil pollutants who are guilty of no more than simple negligence are protected by tonnage limitations on their cleanup liabilities, while third parties whose simple negligence is the cause of such spills are—as maritime tort-feasors—subject to being crushed by full and unlimited liability for the consequences.<sup>29</sup>

### C. Comprehensive Environmental Response, Compensation, and Liability Act

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund)<sup>30</sup> governs discharges of hazardous substances other than petroleum, natural gas, and related products.<sup>31</sup> CERCLA preempts the Clean Water Act and the Oil Pollution Act to the extent that they are inconsistent with CERCLA.<sup>32</sup>

The statutory scheme created by CERCLA imposes strict liability on the owner or operator of a vessel, and on a person who transports

24. 33 U.S.C. § 1321(g).

25. *Id.*

26. *Id.*

27. *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 742, 1982 AMC 409, 417 (5th Cir. 1980).

28. *United States v. M/V Big Sam*, 681 F.2d 432, 1983 AMC 2730 (5th Cir.), *reh'g en banc denied*, 693 F.2d 451 (5th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

29. *United States v. M/V Big Sam*, 693 F.2d 451, 456 (5th Cir. 1982) (Gee, J., dissenting from denial of rehearing en banc).

30. 42 U.S.C. §§ 9601-9675 (1988).

31. 42 U.S.C. § 9601(14)(F).

32. 42 U.S.C. § 9607(a). This section begins: "Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section . . . ."

hazardous substances to a treatment facility.<sup>33</sup> A wide range of damages is recoverable, including removal and remedial costs incurred by the United States, a state, or any other person, as well as damages for injury to or destruction or loss of natural resources.<sup>34</sup> CERCLA allows recovery regardless of physical damage to the proprietary interest of the claimant.<sup>35</sup> The Act specifically provides that the owner or operator of a vessel may not avail itself of the Limitation Act to limit its liability either under CERCLA or maritime tort law for any spill covered by CERCLA.<sup>36</sup> CERCLA also creates a maritime lien against a vessel in favor of the United States for the recovery of removal costs and any remedial action undertaken with respect to a release or threatened release from such vessel.<sup>37</sup> Although the defenses available are limited,<sup>38</sup> CERCLA limits the liability of vessels on the basis of vessel type, nature of the cargo, and tonnage.<sup>39</sup> The Act also allows claims directly against the insurer.<sup>40</sup> Finally, CERCLA imposes civil penalties for breach of certain statutory requirements.<sup>41</sup>

### D. Activity-Based Federal Legislation

In addition to the general federal pollution statutes covered thus

33. *Id.*

34. 42 U.S.C. § 9607(a)(4)(C).

35. 42 U.S.C. § 9607(h).

36. *Id.*

37. 42 U.S.C. § 9607(m).

38. 42 U.S.C. § 9607(b). The defenses are that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by: (1) act of God, (2) act of war, or (3) act or omission of a third party when the defendant can establish that he exercised due care and that he took precautions against foreseeable acts or omissions of any such third party.

39. 42 U.S.C. § 9607(c). This section limits liability as follows:

(1) Vessel carrying hazardous substance as cargo or residue—\$300 per gross ton or \$5,000,000, whichever is greater.  
(2) Other vessels—\$300 per gross ton or \$500,000, whichever is greater.  
(3) Incineration vessels or facilities—total of all response costs plus \$50,000,000 limit for damages.

Limitation can be broken where the release or threat thereof resulted from willful misconduct or willful negligence within the privity or knowledge of such owner or operator, or where the primary cause of a release was the result of breach of certain standards or regulations. § 9607(c)(2).

40. 42 U.S.C. § 9608(c). The insurer may invoke all defenses available to the owner or operator, and the defense that the incident was caused by the willful misconduct of the owner or operator. The insurer may not invoke other defenses that could be used in proceedings brought by the owner or operator against the insurer. Section 9608(d) limits the insurer's liability, which is, of course, limited to the amount of the policy.

41. 42 U.S.C. § 9609.

far, Congress enacted other legislation dealing with pollution in certain areas or resulting from certain activities. These statutes are the Outer Continental Shelf Lands Act Amendments of 1978,<sup>42</sup> the Trans-Alaska Pipeline Authorization Act,<sup>43</sup> and the Deepwater Port Act.<sup>44</sup> The liability provisions of these statutes have been replaced by those of the Oil Pollution Act.<sup>45</sup>

### 1. Outer Continental Shelf Lands Act Amendments of 1978

The Outer Continental Shelf Lands Act Amendments of 1978 (OCSLA) regulated the discharge of oil from any offshore facility or a vessel transporting oil from such an offshore facility on the Outer Continental Shelf and thus were particularly relevant to oil drilling and production in the Gulf of Mexico. OCSLA did not preempt other federal and state imposed liability.<sup>46</sup> Liability under the Act was joint, several, and strict<sup>47</sup> with tonnage-based liability limits for vessels.<sup>48</sup> Defenses were similar to those under the Clean Water Act.<sup>49</sup>

The OCSLA liability limits did not apply when the incident was caused "primarily by willful misconduct or gross negligence, within the privity or knowledge of the owner or operator" or where it was caused primarily by breach of certain federal regulations within such knowledge or privity.<sup>50</sup> OCSLA also provided for a right of direct action by any statutorily permitted claimant against the insurer of the owner or operator of the facility or vessel.<sup>51</sup>

42. 43 U.S.C. §§ 1811-1824 (1988).

43. 43 U.S.C. §§ 1651-1655 (1988).

44. 33 U.S.C. §§ 1501-1524 (1988).

45. See Oil Pollution Act § 2004 (repealing 43 U.S.C. §§ 1811-1824 (OCSLA)), § 4302(m) (amending 33 U.S.C. § 1514(a) (Deepwater Port Act)), § 8102 (amending then repealing 43 U.S.C. § 1653(c) (TAPAA)).

46. 43 U.S.C. § 1820. OCSLA did prohibit double recovery. § 1820(a). Additionally, the claimant had to irrevocably elect, in certain circumstances, whether to bring his claim against a statutorily created fund or against the owner, operator, or guarantor. § 1817(a), (b), (c). Where the claim was presented to the fund, the fund was subrogated to the rights of the claimant. § 1818(a).

47. 43 U.S.C. § 1814(a).

48. 43 U.S.C. § 1814(c).

49. 43 U.S.C. § 1814(b). The liability limits were as follows:

Vessel—500 per gross ton, or \$250,000 whichever is greater, "except when the owner or operator . . . fails or refuses to provide all reasonable cooperation and assistance requested by the responsible Federal official in furtherance of cleanup activities . . ."

Offshore Facility—"Total of removal and cleanup costs, and an amount limited to \$35,000,000 for all damages." *Id.* (emphasis added).

50. 43 U.S.C. § 1814(b).

51. 43 U.S.C. § 1815(c)(1).

### 2. Trans-Alaska Pipeline Authorization Act

The Trans-Alaska Pipeline Authorization Act (TAPAA)<sup>52</sup> applies *inter alia* to vessels loaded with oil transported through the Trans-Alaska Pipeline destined for ports or terminal facilities under United States jurisdiction.<sup>53</sup> Like the other acts addressing water pollution, TAPAA imposed strict liability upon the owner and operator of any vessel subject to the Act, jointly and severally, with limited defenses.<sup>54</sup> TAPAA preempted inconsistent provisions in the Clean Water Act<sup>55</sup> and provided a maximum limit of exposure in all cases.<sup>56</sup> However, from the language of the statute, it appears that the extent of liability imposed by the Clean Water Act was in addition to the limit of exposure imposed by TAPAA.<sup>57</sup> Also, vessel interests could be pursued for amounts above the statutory scheme. Recently, the United States District Court for the District of Alaska held that TAPAA completely repeals the Limitation Act, not only with respect to the vessel owners' liability under TAPAA, but for claims in excess of the TAPAA limit asserted under applicable state law or general maritime law.<sup>58</sup> TAPAA does not allow a direct action remedy against insurers.

### 3. Deepwater Port Act

The Deepwater Port Act,<sup>59</sup> applies to oil handling facilities off the

52. 43 U.S.C. §§ 1651-1655 (1988).

53. 43 U.S.C. § 1653(c)(7). TAPAA is applicable to the EXXON VALDEZ cases. It has been estimated that approximately 150 civil suits, including several class action suits, are currently pending as a result of this oil spill. Edelman, *After the Cleanup, What Next?*, THE BRIEF, Vol. 19, No. 4, p. 10 n.1.

54. 43 U.S.C. § 1653(c)(1), (2), (7). The defenses are act of war, negligence of the United States or other governmental agency, or with respect to a claim by a damaged party that the negligence was caused by that party. § 1653(c)(2). There is no defense of act of God and the third-party negligence defense is extremely limited. *Id.*

55. Alyeska Pipeline Service Co. v. United States, 649 F.2d 831 (Cl. Ct. 1981), cert. denied, 454 U.S. 964 (1981).

56. 43 U.S.C. § 1653(c)(3). The limit for all claims arising out of any one incident is \$100,000,000. The owner or operator is liable for the first \$14,000,000 while a statutorily created fund is liable for the balance. However, where the damage was caused by the unseaworthiness of the vessel or the negligence of the owner or operator, the Fund becomes subrogated to the rights of the claimants and can proceed against the vessel interests for up to the possible \$86,000,000 difference. § 1653(c)(8).

57. See also Senator Stevens' observations during the debate on the Oil Pollution Liability and Compensation Act, S. 686, 135 Cong. Rec. S10,074 (daily ed. Aug. 4, 1989).

58. *In re the Glacier Bay*, 741 F. Supp. 800, 1990 AMC 1614 (D. Alaska 1990).

59. 33 U.S.C. §§ 1501-1524 (1988). The Louisiana Offshore Oil Port (LOOP) is the only deepwater port in the United States.

coast of the United States and beyond the territorial sea<sup>60</sup> and was structured similarly to the other activity-based pollution acts.<sup>61</sup>

### III. STATE LEGISLATION

The oil polluter may face liability under state law in addition to the federal statutes and causes of action. The Oil Pollution Act and all of the preexisting statutes explicitly provide that state law shall not be preempted regarding liability for the discharge of oil,<sup>62</sup> except that the Clean Water Act preempts state legislation when federal statutes or agency regulations occupy the field.<sup>63</sup> Prior to the passage of the Oil Pollution Act, states could impose additional cleanup and removal liabilities, but state law governing damages recoverable by claimants was preempted.<sup>64</sup> Because the Oil Pollution Act permits states to impose additional liabilities on a discharger,<sup>65</sup> state laws now assume an added significance. To date, most coastal states and the Great Lakes states have enacted oil pollution legislation,<sup>66</sup> the vast majority

60. 33 U.S.C. § 1502(10). The Deepwater Port Act does not apply to facilities used exclusively for production, transportation, and storage of oil produced from Outer Continental Shelf mineral leases but rather to facilities used to trans-ship oil from tankers to pipelines. *Get Oil Out! Inc. v. Exxon Corp.*, 586 F.2d 726, 732 (9th Cir. 1978). *N.B.* In Proclamation 5928, December 27, 1988, 3 C.F.R. 547 (1989), President Reagan extended the United States territorial sea to twelve miles.

61. Any discharge of oil in a safety zone or at a deepwater port is prohibited and the owner or operator of such vessel or licensee of the port faces a civil penalty of up to \$10,000 for every discharge. 33 U.S.C. § 1517(a). Owners and operators of vessels are strictly and jointly and severally liable. 33 U.S.C. § 1517(d). Defenses are that the discharge was caused solely by act of war or negligence of the United States government in establishing and maintaining aids to navigation. Additionally, the owner or operator may escape liability to a damaged party where he can show that the damage was caused solely by the negligence of that party. 33 U.S.C. § 1517(g). Liability is limited to \$150 per gross ton or \$20,000,000, whichever is less, except that limitation may be broken where the discharge was the result of gross negligence or willful misconduct within the privity or knowledge of the owner or operator. 33 U.S.C. § 1517(d). The liability of the licensee of the deepwater port is limited to \$50,000,000 with the same defenses. 33 U.S.C. § 1517(e). Certain parties, including a statutorily created fund are subrogated to rights of claimants against vessel interests in certain cases. 33 U.S.C. § 1517(h)(1).

62. 33 U.S.C. § 1321(o)(2) (Clean Water Act); 33 U.S.C. § 1517(k)(1) (Deepwater Port Act); 43 U.S.C. § 1653(c)(9) (TAPAA); 43 U.S.C. § 1820(c) (OCSLA).

63. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 1973 AMC 811, *reh'g denied*, 412 U.S. 933 (1973).

64. *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1985 AMC 1521 (5th Cir. 1985) (*en banc*, *cert. denied*, 477 U.S. 903, 1986 AMC 2704 (1986)).

65. Oil Pollution Act of 1990 (Oil Pollution Act), Pub. L. 101-380, 104 Stat. 484 § 1018 (1990), reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 484.

66. See, e.g., ALA. CODE §§ 22-22-1 to -14 (1990); ALASKA STAT. §§ 46.04, 46.08 (1987); CAL. FISH & GAME CODE §§ 2014, 5655, 12015 (Deering 1989 & Supp. 1990); CAL. GOV'T CODE §§ 8574.1-5 (Deering 1982 & Supp. 1990); CAL. HARB. & NAV. CODE §§ 133, 135,

of which provide for strict, unlimited liability for cleanup and removal costs. While the potential exposure of a vessel owner or bareboat charterer under state statutes was previously subject to the Limitation Act, the Oil Pollution Act provides that the Limitation Act shall not affect any additional liability imposed by a state.<sup>67</sup> With the high profile being given to oil spills, some states are amending their oil pollution statutes, creating an unusually high state of flux.

In short, a party involved in an oil pollution incident must contend not only with the penalties and liabilities imposed by the Oil Pollution Act, but also with any applicable state statutes.

### IV. THE OIL POLLUTION ACT OF 1990

Since 1975, several unsuccessful attempts have been made to streamline United States oil pollution law. The oil spill resulting from the grounding of the EXXON VALDEZ in Prince William Sound, Alaska, on March 24, 1989, followed by other high profile oil spills including the AMERICAN TRADER incident in California, the MEGA BORG explosions and fire in the Gulf of Mexico, and several spills in New York Harbor, catalyzed the enactment of new, far-reaching legislation.<sup>68</sup> The Oil Pollution Act substantially alters and increases the

151-153, 293, 294 (Deering 1978 & Supp. 1990); CAL. PUB. RES. CODE §§ 30232, 30261, 30707 (Deering 1978 & Supp. 1990); CAL. WATER CODE §§ 13440-13443 (Deering 1977 & Supp. 1990); CONN. GEN. STAT. §§ 22a-448 to -459 (1989); DEL. CODE ANN. tit. 7, §§ 6201-6216 (Supp. 1988); FLA. STAT. ANN. chs. 206, 376, 377 (West 1988 & Supp. 1990); GA. CODE ANN. §§ 12-5-20 to -53 (1988 & Supp. 1990); ME. REV. STAT. ANN. tit. 38 §§ 541-560 (1989 & Supp. 1989); MD. ENV. CODE ANN. §§ 4-401 to -502 (1987 & Supp. 1990); MASS. ANN. LAWS ch. 21E, §§ 1-18 (Law Co-op. 1988 & Supp. 1990); MASS. ANN. LAWS ch. 130, §§ 23, 24; ch. 131, § 42 (Law Co-op. 1989 & Supp. 1990); N.H. REV. STAT. ANN. §§ 146-A:1-14 (1964 & Supp. 1989); N.J. STAT. ANN. §§ 58-10-23.11 to -11(Z), 58-10A-1 to -20 (West 1982 & Supp. 1990); N.Y. ENVTL. CONSERV. LAW §§ 17-1743, 71-1941, (McKinney 1984 & Supp. 1990); N.Y. NAV. LAW §§ 170-197 (McKinney 1989 & Supp. 1990); N.C. GEN. STAT. §§ 143-215.75 to .94 (1987 & Supp. 1989); OR. REV. STAT. ch. 465, §§ 468.780-833 (1989); S.C. CODE ANN. §§ 48-43-510 to -620 (Law Co-op. 1987); TEX. WATER CODE ANN. §§ 26.261-.268 (Vernon 1988 & Supp. 1990); VA. CODE ANN. §§ 62.1-44.34;14 to :23 (Supp. 1990); WASH. REV. CODE ANN. §§ 88.40.020, 90.48.142, 335-336, 338, 390, 400 (1962 & Supp. 1990). The five states surrounding the Great Lakes also have pollution statutes. See, e.g., ILL. ANN. STAT. ch. 85, para. 1701-1706 (Smith-Hurd 1987); IND. CODE ANN. §§ 13-1-3-1 to -4-4 (1987 & Supp. 1990); MICH. STAT. ANN. §§ 13.32(1)-32(11) (Callaghan 1987 & Supp. 1990); MINN. STAT. ANN. ch. 115 (West 1987 & Supp. 1990); OHIO REV. CODE ANN. ch. 6111 (Baldwin 1982 & Supp. 1989). Many of these states can be expected to change their laws in response to the Oil Pollution Act.

67. Oil Pollution Act § 1018(a),(b).

68. The Senate version of the new legislation was passed on August 4, 1989, 135 Cong. Rec. S10,090 (daily ed. Aug. 4, 1989), followed by the House version passed on November 9, 1989, 135 Cong. Rec. H8,286 (daily ed. Nov. 9, 1989). In an unusual demonstration of unanimity, the compromise bill was approved by the Senate 99 votes to 0 on August 2, 1990, 136 Cong.

pollution liabilities imposed on those engaged in the exploration, production, and transportation of oil within the territorial seas and the exclusive economic zone<sup>69</sup> of the United States in the event of a discharge of oil.

#### A. Damages Recoverable

The Oil Pollution Act imposes liability for oil spills in the navigable waters, exclusive economic zone, or shoreline of the United States on the owner, operator, or demise charterer of a vessel (responsible party).<sup>70</sup> The Act requires the responsible party to pay all removal costs including the costs to prevent, minimize, or mitigate oil pollution in any case in which there is a substantial threat of, or an actual discharge of oil.<sup>71</sup> The responsible party must pay removal costs incurred by the United States, a state government, or an Indian tribe pursuant to the Clean Water Act,<sup>72</sup> the Intervention on the High Seas Act,<sup>73</sup> or state law as well as removal costs incurred by any person for acts consistent with the National Contingency Plan.<sup>74</sup>

In addition to removal costs, the responsible party shall be liable for damages for injury to natural resources,<sup>75</sup> injury to real or per-

Rec. S11,547 (daily ed. Aug. 2, 1990), and by the House 360 votes to 0 on August 3, 1990. 136 Cong. Rec. H6,949 (daily ed. Aug. 3, 1990). President Bush signed the bill into law on August 18, 1990. 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 484.

69. Generally, the exclusive economic zone extends seaward two hundred miles from the coastline of the United States. See Oil Pollution Act § 1001(8).

70. Oil Pollution Act § 1002(a). With respect to an offshore facility, the "responsible party" is the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under state law or OCSLA. However, with respect to a mobile offshore drilling unit (MODU) which is being used as an offshore facility, the owner or operator of the MODU is the responsible party for discharge or threat of discharge of oil on or above the surface of the water up to the limits of liability specified for a tank vessel. For excess liability for discharge or threats of discharge on or above the surface of the water, and for discharge and threats of discharge below the surface of the water, the responsible party is the lessee, permittee, or holder of a right of use and easement. § 1004(b). With respect to a deepwater port, the "responsible party" is the licensee under the Deepwater Port Act. § 1001(32)(D).

71. Oil Pollution Act §§ 1001(31), 1002(a).

72. 33 U.S.C. §§ 1251-1387 (1988).

73. 33 U.S.C. §§ 1471-1487 (1988).

74. Oil Pollution Act § 1002(b)(1). For a brief discussion of the National Contingency Plan, see *infra* notes 147-149 and accompanying text.

75. The Oil Pollution Act allows recovery by either the United States, a state, an Indian tribe, or a foreign country for injury to, destruction of, or loss of natural resources "belonging to, managed by, controlled by, or appertaining to" such entity. The appropriate entity shall designate a trustee to assess damages for the natural resources injury, destruction, or loss, and to develop and implement a plan for the "restoration, rehabilitation, replacement, or acquisition of the equivalent natural resources." The assessment of damages to natural

sonal property (including economic losses resulting from that injury), loss of subsistence use of natural resources, loss of revenues (including federal, state or local taxes) on the use of natural resources and real or personal property, loss of profits and impairment of earning capacity resulting from such pollution, and the costs of providing additional public services during or after removal activities.<sup>76</sup>

#### 1. Natural Resources

The measure of the value of damage to, or loss of natural resources is a complex exercise fraught with the calculation of intangible values. Under previous law, the methods of calculation were far from settled.<sup>77</sup> The Oil Pollution Act provides that the measure of damages payable to a trustee for lost or damaged natural resources shall be the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources as well as the diminution in value of those natural resources pending restoration, plus the cost of assessing those damages.<sup>78</sup>

The federal government is mandated by the Oil Pollution Act to issue regulations for the assessment of natural resource damages.<sup>79</sup> It is certainly possible that these new regulations will be similar to those issued pursuant to CERCLA, which also requires the government to issue regulations for the assessment of natural resource damages.<sup>80</sup> Once the regulations are issued, a determination of damages pursuant to these regulations acquires the force of a rebuttable presumption<sup>81</sup> and thus will be difficult to overturn.<sup>82</sup> Furthermore, if the regulations are similar to those issued under CERCLA, the method of calculating damages may include, *inter alia*, interviews with individuals to determine what value they attach to changes in the resources.<sup>83</sup> Needless to say, damage to natural resources will be an expensive ele-

resources made by a trustee shall have the effect of a rebuttable presumption in a judicial proceeding. Oil Pollution Act § 1006.

76. Oil Pollution Act § 1002(b)(2).

77. See *Puerto Rico v. S/S Zoe Colocotroni*, 628 F.2d 652, 1981 AMC 2185 (1st Cir. 1980), cert. denied, 450 U.S. 912 (1981) (amount recoverable for spill damage based on cost of restoration and rehabilitation of affected environment, but other factors may be considered if cost would be grossly disproportionate to damage).

78. Oil Pollution Act § 1006(d)(1).

79. Oil Pollution Act § 1006(e).

80. 42 U.S.C. § 9607(f).

81. Oil Pollution Act § 1006(e)(2).

82. See *Ohio v. Department of the Interior*, 880 F.2d 432, 478-79 (D.C. Cir. 1989) (upholding regulations issued under a similar CERCLA provision).

83. *Id.* at 475, 477 nn.86-87.

ment of a discharger's damages. The exact measure of these costs will have to await issuance of the regulations and judicial interpretation of this provision.

## 2. New Claimants

The scope of damages for which the Oil Pollution Act allows recovery is much broader than that previously permitted under maritime tort law. Prior to the passage of the Act, certain limited classes of claimants were able to recover for damages to their businesses under maritime tort law. Most federal circuits hold that maritime tort law permits recovery for physical loss to a proprietary interest and for economic loss accompanied by such physical loss.<sup>84</sup> The majority of the circuits do not allow recovery under maritime tort law for economic losses when the party seeking to recover those losses has not suffered physical damage to a proprietary interest.<sup>85</sup> An exception has been carved out of this rule in favor of commercial fishermen who may recover for the revenue foregone as a result of an oil spill.<sup>86</sup> *Louisiana ex rel. Guste v. M/V Testbank*<sup>87</sup> contains examples of those parties who might suffer economic losses following an oil spill and cannot assert a claim under maritime tort law:

1. Shipping and/or other shipping type interests unable to traverse the area [of the spill]. This includes claims with respect to vessels actually in the area at the time or rerouted around the area at the time.
2. Marina and boat rental operators.
3. Wholesale and retail seafood enterprises not actually

84. Getty Ref. and Mktg. Co. v. M/T Fadi B, 766 F.2d 829, 832, 1985 AMC 2579, 2583-84 (3d Cir. 1985).

85. See, e.g., *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1021, 1985 AMC 1521, 1524 (5th Cir. 1985) (*en banc*, cert. denied, 477 U.S. 903, 1986 AMC 2704 (1986)); *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 1985 AMC 2600 (1st Cir. 1985). *Contra* *Kinsman Transit Co. v. City of Buffalo*, 388 F.2d 821, 1968 AMC 293 (2d Cir. 1968) (forseeable damages are recoverable whether or not there is physical damage to a claimant's proprietary interest). Other theories of recovery, such as breach of the Refuse Act, nuisance tort theories, or even state law claims are unavailable as a means of circumventing the bar to recovery of those whose loss is purely economic. *Testbank*, 752 F.2d at 1031, 1985 AMC at 1540.

86. *Union Oil Co. v. Oppen*, 501 F.2d 558, 1975 AMC 416 (9th Cir. 1974); *Louisiana ex rel. Guste v. M/V Testbank*, 524 F. Supp. 1170, 1982 AMC 2246 (E.D. La. 1981), *aff'd on other grounds*, 728 F.2d 748, 1984 AMC 2951 (5th Cir. 1984), *aff'd en banc*, 752 F.2d 1019, 1026-27, 1985 AMC 1512, 1533-34 (5th Cir. 1985), cert. denied, 477 U.S. 903, 1986 AMC 2704 (1986).

87. 524 F. Supp. 1170, 1982 AMC 2246 (E.D. La. 1981).

engaged in fishing, shrimping, crabbing or oystering in the mandated area.

4. Seafood restaurants.
5. Tackle and bait shops.
6. Fishermen, oystermen, shrimpers and crabbers who engaged in these activities for recreational purposes only.<sup>88</sup>

Under the maritime law prevailing in most circuits, none of these claimants could recover.<sup>89</sup> Although, the Oil Pollution Act allows recovery for lost profits or impairment of earning capacity,<sup>90</sup> the classes of claimants who may recover is unclear. Regrettably, the conference report does not clarify the scope of the Act because it provides as an example the case of commercial fishermen, who were previously allowed recovery under maritime tort law.<sup>91</sup> Although this provision is unclear, the classes of claimants seem broader than previously allowed.

## 3. Defenses to Liability

The only defenses to the strict liability imposed by the Act are that the discharge was caused solely by:

- a. Act of God;
- b. Act of war;
- c. Act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with a contractual

88. *Testbank*, 524 F. Supp. at 1174, 1982 AMC at 2252.

89. See *supra* notes 85-87 and accompanying text. Under *Kinsman Transit Co. v. City of Buffalo*, 388 F.2d 821, 1968 AMC 293 (2d Cir. 1968), at least the claimants listed in item one could recover.

90. Oil Pollution Act § 1002(b)(2)(E).

PROFITS AND EARNING CAPACITY.—Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.

*Id.*

91. H.R. CONF. REP. NO. 653, 101st Cong. 2d Sess. 103, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 779, 780-81. The conference committee report states:

Subsection [1002](b)(2)(E) provides that any claimant may recover for loss of profits or impairment of earning capacity resulting from injury to property or natural resources. The claimant need not be the owner of the damaged property or resources to recover for lost profits or income. For example, a fisherman may recover lost income due to damaged fisheries resources, even though the fisherman does not own those resources.

*Id.*

relationship with the responsible party, but only if the responsible party establishes that it exercised due care with respect to the oil and that it took precautions against the foreseeable acts or omissions of the third party; or,

d. Any combination of paragraphs a, b, or c.<sup>92</sup>

Even those limited defenses are waived where the responsible party does not report the discharge, or fails to cooperate with or abide by the orders of officials concerned with removal activities.<sup>93</sup> Finally, as to a given claimant, the responsible party is not liable to that claimant to the extent that the discharge is caused by the gross negligence or willful misconduct of that claimant.<sup>94</sup>

#### B. Limits of Liability

The Oil Pollution Act contains liability limits which are significantly higher than the limits contained in the Clean Water Act and other previous legislation. For instance, a tank vessel's liability is now \$1,200 per gross ton or \$10,000,000 for a vessel over 3,000 tons (or \$2,000,000 for a smaller vessel), whichever is the greater.<sup>95</sup> By contrast, under the Clean Water Act the limit was \$150 per gross ton or \$250,000, whichever was greater.<sup>96</sup> Although considerably higher, the new limits are dwarfed by the actual amount spent by Exxon following the spill from the EXXON VALDEZ which is reported to be in excess of \$2,000,000,000.<sup>97</sup>

With regard to the offshore oil industry, the Oil Pollution Act also contains special provisions which alter the basic statutory limits of

92. Oil Pollution Act § 1003(a).

93. Oil Pollution Act § 1003(c).

94. Oil Pollution Act § 1003(b).

95. The new limits contained in section 1004 of the Oil Pollution Act are as follows:

- (1) Tank vessel over 3,000 tons—\$1,200 per gross ton or \$10,000,000, whichever is greater.
- (2) Tank vessel of 3,000 gross tons or less—\$1,200 per gross ton or \$2,000,000, whichever is greater.
- (3) Other vessels—\$600 per gross ton or \$500,000, whichever is greater.
- (4) Offshore facility—all removal costs plus \$75,000,000.
- (5) Onshore facility—\$350,000,000. (The liability limits of certain onshore units may be reduced to a figure of not less than \$8,000,000.)
- (6) Deepwater Ports—\$350,000,000. (The liability limits of deepwater ports may be reduced, after studies have been undertaken by the government, to an amount not less than \$50,000,000.)

96. 33 U.S.C. § 1321(f).

97. Brown-Humes, *Hidden Price Exxon Has Paid for the Spill*, Lloyd's List, Mar. 24, 1990, at 5, col. 1.

liability and allocation of responsibility in certain instances. As to a mobile offshore drilling unit (MODU) which is being used as an offshore facility, the Act specifies that it is to be deemed a tank vessel.<sup>98</sup> In the event that removal costs and damages for oil spilled on or above the surface of the water exceed the statutory limit of liability for a tank vessel, the MODU is to be deemed an offshore facility, and therefore the higher limits of financial responsibility apply and must be borne by the lessee or permittee of the area. This higher limit of exposure is to be reduced by any amounts paid while considering a MODU to be a tank vessel where there is a spill or a threat of a spill on or above the surface of the water. So, for a spill on or above the surface of the water, the owner or the operator of the MODU is the responsible party up to the limits of liability specified for a tank vessel. For oil discharged below the surface of the water, the offshore facility limits apply and the lessee or permittee is deemed the responsible party.<sup>99</sup> Finally, the Act provides that notwithstanding the statutory limits of liability and the defenses to liability previously discussed, the owner or operator of an Outer Continental Shelf facility,<sup>100</sup> or a vessel carrying oil from such a facility, shall be liable for *all* removal costs incurred by the United States or by any state or local governmental entity.<sup>101</sup> By its terms, when this last provision applies, it contains no limit of liability.<sup>102</sup>

It also must be emphasized that the Oil Pollution Act provides for unlimited liability where a pollution incident is determined to have been proximately caused by (1) gross negligence or willful misconduct, or (2) the violation of an applicable federal safety, construction, or operating regulation.<sup>103</sup> Further, any potential limitation of liability would be waived where the responsible party does not report the discharge or fails to cooperate with or abide by the orders of officials concerned with removal activities.<sup>104</sup>

The Oil Pollution Act appears to remove the anomaly which

98. Oil Pollution Act § 1004(b)(1).

99. Oil Pollution Act § 1004(b)(2).

100. The Oil Pollution Act defines an Outer Continental Shelf facility as "an offshore facility which is located, in whole or in part, on the Outer Continental Shelf and is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the Outer Continental Shelf." Oil Pollution Act § 1001(25).

101. Oil Pollution Act § 1004(c)(3).

102. *Id.* A similar provision existed in OCSLA.

103. Oil Pollution Act § 1004(c)(1).

104. Oil Pollution Act § 1004(c)(2).

existed under the Clean Water Act: the owner who voluntarily undertook cleanup operations could not credit those expenses against his overall limit if the government subsequently effected further cleanup.<sup>105</sup> However, the new statute specifically allows states to impose additional liabilities, penalties, and other requirements on vessel owners for oil pollution.<sup>106</sup> Of particular note is the fact that the additional state liabilities are not subject to limitation either under the Act itself, or pursuant to the Limitation Act.<sup>107</sup> This provision represents a significant departure from the interaction of the Limitation Act and state statutes under the Clean Water Act. As most states now have unlimited liability statutes, the limits of the new Act are largely theoretical with respect to the actual exposure to which a vessel owner may be subject.

The Act specifically provides that the responsible party shall be liable to claimants for interest beginning 30 days after a claim is presented until the claim is paid.<sup>108</sup> The amount due in interest is not subject to the limitation provisions of the Act.<sup>109</sup>

### C. Increased Penalties

The Oil Pollution Act substantially increases the penalties which may be assessed against a responsible party. The mandatory civil penalty has been increased from \$5,000 for each offense to \$25,000 for each day of such offense, or up to \$1,000 per barrel of oil discharged.<sup>110</sup> Previously, the penalty could be increased to \$50,000 by taking into account the gravity of the spill and the extent and success of the cleanup.<sup>111</sup> In the event of gross negligence or willful misconduct of a person specified in the Act, the penalty shall be not less than

105. Oil Pollution Act § 1004(a). This section provides, in pertinent part:

(a) GENERAL RULE.—Except as otherwise provided in this section, the total of the liability of a responsible party under section 1002 and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed [specified limits].

*Id.* (emphasis added). See *supra*, note 23 and accompanying text.

106. Oil Pollution Act § 1012(c).

107. Oil Pollution Act § 1018(a).

108. Oil Pollution Act § 1005(b)(1). Generally, interest shall be paid from thirty days following the date on which the claim is presented to the guarantor. However, if the guarantor offers the claimant an amount greater than or equal to the amount finally paid, interest does not accrue until the offer is accepted. If the offer is made within sixty days after the claim is presented, interest does not accrue until the offer is accepted, if ever. § 1005(a), (b).

109. Oil Pollution Act § 1005(b)(5).

110. Oil Pollution Act § 4301(b) (codified at 33 U.S.C. § 1321(b)(7)(A)).

111. 33 U.S.C. § 1321(b)(6)(P).

\$100,000 and not more than \$3,000 per barrel of oil discharged.<sup>112</sup> Alternatively, administrative penalties for a discharge or failure to report a discharge may, subject to various hearing requirements, range from up to \$10,000 per violation through \$125,000.<sup>113</sup> The penalty for failure to report a discharge has been increased from a fine of not more than \$10,000 or imprisonment of not more than one year, or both, to a fine of not more than \$250,000 for an individual or \$500,000 for an organization, or by imprisonment of not more than three years (five years for a subsequent conviction), or both.<sup>114</sup>

Negligently discharging oil will now also result in criminal penalties of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both. Knowingly discharging oil will now result in criminal penalties of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than three years. A violator who knows at the time of the discharge that he is placing another person in imminent danger of death or serious bodily injury shall be subject to a fine of up to \$250,000 or imprisonment for not more than 15 years, or both.<sup>115</sup>

Additionally, the Act increases the penalties assessed under a wide range of marine transportation safety laws.<sup>116</sup>

### D. Direct Action Against Insurers

The Oil Pollution Act requires the responsible party for essentially all vessels<sup>117</sup> to have evidence of "financial responsibility"<sup>118</sup> sufficient

112. Oil Pollution Act § 4301(b) (codified at 33 U.S.C. § 1321(b)(7)(D)).

113. Oil Pollution Act § 4301(b) (codified at 33 U.S.C. § 1321(b)(6)(B)(ii)). A person is not liable for civil penalties under paragraph (7) if one has been assessed under paragraph (6). § 4301(b) (codified at 33 U.S.C. § 1321(b)(7)(F)).

114. Oil Pollution Act § 4301(a)(2) (amending 33 U.S.C. § 1321(b)(5)).

115. Oil Pollution Act § 4301(c) (amending 33 U.S.C. § 1319(c) to impose penalties for violations of 33 U.S.C. § 1321(b)(3)).

116. Oil Pollution Act § 4302. For instance, penalties have been increased under laws regarding crew complements, coastwise and foreign commerce pilotage, and for dangerous operation of a vessel. Also, penalties under the Deepwater Port Act, the Intervention on the High Seas Act, and other acts have been increased. § 4302.

117. The requirements apply to:

(1) any vessel over 300 gross tons (except a non-self-propelled vessel that does not carry oil as cargo or fuel) using any place subject to the jurisdiction of the United States; or  
(2) any vessel using the waters of the exclusive economic zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States.

Oil Pollution Act § 1016(a).

to meet the relevant maximum liability provisions of the Act.<sup>119</sup> The Act provides for a right of direct action against the guarantor for claims for removal costs and damages.<sup>120</sup> Failure to have on board the required evidence of financial responsibility will result in denial of the necessary clearances under customs laws, and may result in denial of entry or detention of noncomplying vessels.<sup>121</sup> A noncomplying vessel found in United States navigable waters shall be subject to seizure and forfeiture to the United States.<sup>122</sup>

#### E. Jurisdiction and Venue

A most regrettable feature of the Act, which will undoubtedly result in discharger interests incurring unnecessarily significant legal expenses in defending oil spill cases, is contained in the provisions relating to jurisdiction and venue.<sup>123</sup> The Act grants United States district courts federal question jurisdiction with regard to all controversies arising under the Act.<sup>124</sup> Venue is proper in any district in which the discharge, injury, or damages occurred.<sup>125</sup> It is easy to conceive of a situation in which the spill might affect several shorelines, thus causing injury in different districts, and loss of profits in yet

118. "Financial responsibility" is established by any one, or by any combination of the following methods which the Secretary or President determines to be acceptable:

- (1) evidence of insurance,
- (2) surety bond,
- (3) guarantee,
- (4) letter of credit,
- (5) qualification as a self-insurer, or
- (6) other evidence of financial responsibility.

Oil Pollution Act § 1016(e).

119. Oil Pollution Act § 1016(a). This amount does not include any potential liabilities under the Act for civil, administrative, or criminal penalties. In the case of an offshore facility, a responsible party must have evidence of \$150,000,000 of financial responsibility. § 1016(c).

120. Oil Pollution Act § 1016(f). In direct action cases, the guarantor is entitled to invoke all rights and defenses which would be available to the responsible party, the defense that the incident was caused by the willful misconduct of the responsible party, and any policy terms or defenses which have been approved by the Secretary. The guarantor may not, however, invoke any other defense that might be available to the guarantor if the claim had been brought by the owner or operator. *Id.* A guarantor may not be liable for amounts in excess of the financial responsibility provided. § 1016(g).

121. Oil Pollution Act § 1016(b)(2).

122. Oil Pollution Act § 1016(b)(3). The conference committee report states, "Each vessel must carry on board at all times a certificate, issued by the appropriate U.S. government agency, evidencing financial responsibility." H.R. CONF. REP. NO. 653, 101st Cong. 2d Sess. 119, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 722, 797.

123. Oil Pollution Act § 1017.

124. Oil Pollution Act § 1017(b).

125. *Id.*

another district. Additionally, venue is proper in any district in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process.<sup>126</sup> Under this provision, a defendant might face suits all over the country for a single spill. A defendant in federal court may be able to consolidate all or part of the proceedings in a single forum;<sup>127</sup> however, a transfer rests to a large extent in the discretion of the court.<sup>128</sup>

A more significant problem is that the Act also grants state courts jurisdiction to consider claims under the Act.<sup>129</sup> While state court actions under the Act may be removable to federal court, there is a very real prospect of a defendant facing suits in several different state courts, as well as in different federal courts. Furthermore, the device of the concursus available under the Limitation Act is not a part of the defendant vessel owner's arsenal for consolidating oil pollution cases.<sup>130</sup> These provisions are not conducive to a global and efficient resolution of disputes arising from an oil spill. Rather, the Act encourages piecemeal litigation of oil spill matters in various courts at added legal expense.

#### F. Non-Liability Elements of the Act

##### 1. The Fund

The Act consolidates the funds previously established under federal law into the Oil Spill Liability Trust Fund (Fund).<sup>131</sup> The Fund is available to pay for, *inter alia*, removal costs and certain other expenses, claims and damages, as well as obligations under the Clean Water Act.<sup>132</sup> Once payments are made, the Fund becomes subrogated to the rights of the claimants or of a state who received them to recover from the responsible party.<sup>133</sup> Generally, a claim must be

126. *Id.*

127. See 28 U.S.C. §§ 1404, 1407 (1988).

128. 28 U.S.C. § 1404.

129. Oil Pollution Act § 1017(c).

130. Oil Pollution Act § 1018(a)(2). The language of the section is not entirely clear. It states that nothing in the Oil Pollution Act or the Limitation Act shall be construed to affect the obligations or liabilities of any person under state law, including the common law. Arguably, the concursus does not affect state imposed obligations or liabilities. The recognition of state court jurisdiction in section 1017(c) of the Oil Pollution Act is apparently inconsistent with, and hence preempts, the injunctive powers which a federal court is required to exercise for a concursus in a limitation proceeding.

131. Oil Pollution Act § 9001 (amending 26 U.S.C. § 9509 (1988)). The Oil Spill Liability Trust Fund was established by section 9509 of the Internal Revenue Code.

132. Oil Pollution Act §§ 1012, 9001 (amending 26 U.S.C. § 9509).

133. Oil Pollution Act § 1012(f).

presented to the responsible party or guarantor before being presented to the Fund.<sup>134</sup> The Act requires these parties to advertise, for at least thirty days, the procedures by which claims may be presented and identify themselves as the source of the discharge.<sup>135</sup>

## 2. Double Hulls

A much publicized provision of the Act requires that all new vessels constructed for the carriage of oil shall be equipped with a double hull when operating in United States waters or the United States exclusive economic zone.<sup>136</sup> With regard to existing vessels, the double hull requirement is phased in over a period of years, starting in 1995, depending upon the age and size of the tanker.<sup>137</sup> By the year 2010, all vessels over 5,000 gross tons must have double hulls, except that those which currently have double bottoms or double sides may continue operating in United States waters until 2015.<sup>138</sup> The year 2015 is also the date by which vessels unloading oil at a deepwater port or offloading in lightering operations more than 60 miles from the coast must have double hull construction.<sup>139</sup>

## 3. Prevention, Removal, and Other Provisions

The Oil Pollution Act modifies existing legislation aimed at prevention of spills, removal of oil, and protection of Prince William Sound. For instance, the Act contains sections permitting the government to examine records for drug and alcohol offenses of those applying for or seeking renewal of licenses, certificates of registry, and merchant mariners' documents;<sup>140</sup> alterations to manning standards for foreign tank vessels;<sup>141</sup> changes to vessel communications equipment require-

134. Oil Pollution Act § 1013(a). The claim may be presented first to the Fund (1) where the President has advertised or otherwise notified claimants, (2) by the governor of a state for removal costs incurred by that state, or (3) by a United States claimant where a facility located in the territorial sea, or over the continental shelf of a foreign country, spills or substantially threatens to spill oil resulting in costs or damages within United States jurisdiction. § 1013(1).

Additionally, if a claim has been presented to the responsible party or guarantor and that party denies liability or fails to pay within a 90-day period, the claimant may elect to present his claim to the Fund. § 1013(c).

135. Oil Pollution Act § 1014(b).

136. Oil Pollution Act § 4115 (adding new section 3703a to 46 U.S.C.).

137. Oil Pollution Act § 4115(a) (codified at 46 U.S.C. § 3703a(c)(3)).

138. Oil Pollution Act § 4115(a) (codified at 46 U.S.C. § 3703a(c)(4)).

139. Oil Pollution Act § 4115(a) (codified at 46 U.S.C. § 3703a(b)(3)).

140. Oil Pollution Act § 4101 (amending 46 U.S.C. § 7101).

141. Oil Pollution Act § 4106 (amending 46 U.S.C. § 9101(a), 46 U.S.C. § 6101, and 33 U.S.C. § 1228(a)).

ments;<sup>142</sup> special provisions regarding navigation and facilities in Prince William Sound<sup>143</sup> (the site of the EXXON VALDEZ grounding); reforms to the land-based application of the Trans-Alaska Pipeline Authorization Act;<sup>144</sup> as well as other matters. The Oil Pollution Act also amends the Clean Water Act regarding the ability of the federal government to undertake cleanup efforts. This provision requires the President to ensure that effective and immediate removal actions are undertaken and allows the President to assume responsibility for the cleanup and seek reimbursement from the responsible party.<sup>145</sup> If a spill is of such size or character as to be a substantial threat to the public health or welfare of the United States, the President is required to direct all removal actions.<sup>146</sup>

The National Contingency Plan, which was originally adopted pursuant to the Clean Water Act, is prepared by the President and provides for the coordination of the various public entities involved in a cleanup, the procurement and storage of equipment and supplies, the establishment of Coast Guard strike teams equipped and trained to deal with oil spills, as well as other matters deemed necessary to ensure a coordinated government response.<sup>147</sup> The National Contingency Plan must also establish procedures for a worst case discharge of oil (e.g., loss of an entire cargo) and include a fish and wildlife response plan.<sup>148</sup> The Act provides limited immunity from liability for those involved in cleanup operations consistent with the National Contingency Plan or those retained by the federal authority.<sup>149</sup> The Act establishes a national planning and response system,<sup>150</sup> and, importantly, requires that regulations be issued to mandate that owners and operators of tank vessels and facilities prepare and submit individual response plans to the President.<sup>151</sup> The individual response

142. Oil Pollution Act § 4118.

143. Oil Pollution Act §§ 3001-3007.

144. Oil Pollution Act §§ 8001-8302 (Trans-Alaska Pipeline System Reform Act of 1990).

145. Oil Pollution Act § 4201(a) (amending 33 U.S.C. § 1321(c)).

146. Oil Pollution Act § 4201(a) (codified at 33 U.S.C. § 1321(c)(2)(A)).

147. Oil Pollution Act § 4201(b) (codified at 33 U.S.C. § 1321(d)).

148. *Id.*

149. Oil Pollution Act § 4201(a) (codified at 33 U.S.C. § 1321(c)(4)).

150. Oil Pollution Act § 4202 (amending 33 U.S.C. § 1321(j)).

151. Oil Pollution Act § 4202 (codified at 33 U.S.C. 1321(j)(4)). Vessels which must submit such plans are those defined as "tank vessels" in 46 U.S.C. § 2101(39) (1988). A tank vessel within the meaning of that section is

a vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue, and that—

(A) is a vessel of the United States;

(B) operates on the navigable waters of the United States; or

plan must, *inter alia*, identify an individual having full authority to implement removal actions, identify and ensure by contract that private personnel and equipment are available to remove a "worst case" discharge, and describe the training to be provided to personnel on a vessel to mitigate or prevent a discharge of oil.<sup>152</sup> Compliance with this plan does not constitute a defense to the liabilities and fines imposed by the Act, but a failure to comply will result in a fine of up to \$25,000 per day of violation.<sup>153</sup>

### G. Missed Opportunities and Practical Effect of the Act

#### 1. The International Conventions

One of the greatest disappointments of the Oil Pollution Act is the failure of Congress to make provision for the United States to adopt the International Convention on Civil Liability for Oil Pollution Damage (CLC Convention), the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention), and their 1984 protocols. The Act does contain a provision stating that it is in the best interest of the United States to participate in an international oil pollution regime that is at least as effective as United States law.<sup>154</sup> As a practical matter, however, ratification of these conventions is impossible. Ratification would have been possible only if the amount of the vessel owner's liability under the Oil Pollution Act would not have exceeded the amount imposed by the 1984 Protocol to the CLC Convention.<sup>155</sup> The Act's higher limits and the potential for unlimited liability under state law render ratification impossible.<sup>156</sup>

(C) transfers oil or hazardous material in a port or place subject to the jurisdiction of the United States.

46 U.S.C. § 2101(39).

152. Oil Pollution Act § 4202(a) (codified at 33 U.S.C. § 1321(j)(5)(C)).

153. Oil Pollution Act § 4301(b) (codified at 33 U.S.C. § 1321(b)(7)(C)).

154. Oil Pollution Act § 3001.

It is the sense of the Congress that it is in the best interests of the United States to participate in an international oil pollution liability and compensation regime that is at least as effective as Federal and State laws in preventing incidents and in guaranteeing full and prompt compensation for damages resulting from incidents.

*Id.*

155. See Article III, para. 4 of the International Convention on Civil Liability for Oil Pollution Damage, reprinted in 6 BENEDICT, *supra* note 4, at 6-63 and Article 4 of the 1984 Protocol to the International Convention on Civil Liability for Oil Pollution, reprinted in 6 BENEDICT, *supra* note 4, at 6-79.

156. The House of Representatives bill originally contained an ingenious provision which would have permitted both ratification of the international conventions and the higher federal

Congress' failure to enact legislation compatible with the international conventions will undoubtedly weaken the influence of the United States in the negotiation of future maritime treaties. The United States took an active role in the negotiation of the 1984 Protocols. Higher liability limits were adopted in order to secure United States ratification. Now there is no prospect that the United States will be in a position to ratify the 1984 Protocols for the foreseeable future.

#### 2. Insurance and the Future of Oil Transportation to, from, and Within the United States

Prior to the passage of the Oil Pollution Act, major oil tanker owners publicly adopted transportation policies in anticipation of the enactment of significant oil pollution legislation. On June 11, 1990, Shell announced that it would use only chartered vessels for carriage of its oil to the United States mainland, but would continue to use Shell-owned vessels solely to discharge oil at the Louisiana Offshore Oil Port (LOOP).<sup>157</sup> Shell explained that the risks of unlimited liability in the United States outweighed the commercial rewards.<sup>158</sup> Although Shell was able to obtain \$1,000,000,000 of insurance for oil spills, it viewed that amount as insufficient in light of the amount spent by Exxon in cleaning up the EXXON VALDEZ spill.<sup>159</sup> While Shell may have the economic muscle to be able to purchase \$1,000,000,000 of oil pollution insurance, many tanker operators have less economic might and remain even more exposed than Shell. Currently, the Protection and Indemnity Clubs offer \$500,000,000 of cover.<sup>160</sup> An additional \$200,000,000 of excess cover is also available from London underwriters through the Clubs; as of the February

and state limits. This provision would have required that amounts up to the limits established by the CLC Convention and its protocols would have been dealt with under the principles of the CLC Convention. Amounts imposed by state or federal laws on a responsible party in excess of the CLC Convention's limits would be defended and indemnified by the Oil Spill Liability Trust Fund. See *supra* notes 131-35 and accompanying text. In this way, claimants would have received the benefits of higher United States limits while the vessel owner's maximum liability would have been that imposed by the CLC Convention. Regrettably, this provision was struck from the bill in conference, apparently because certain influential senators were unwilling to include any provision which might lessen the ability of states to impose their own liabilities on vessel owners. See McLaughlin, *Major US Blow to Oil Protocols*, Lloyd's List, June 30, 1990, at 1, col. 7-8.

157. Smith, *Shell Halts Calls at US Mainland*, Lloyd's List, June 12, 1990, at 1, col. 2.

158. *Id.* at col. 3.

159. *Id.* See also *Insurance Problems Behind Shell Switch*, Lloyd's List, June 12, 1990, at 3, col. 2 (analysis of industry response to pollution liability).

160. Mulrenan, *Liability Crisis Looms for Owners*, Lloyd's List, July 4, 1990, at 11, col. 3.

1990 renewal period, two further excess layers were available.<sup>161</sup> The extent to which this excess cover will be available in February 1991 is currently not clear.<sup>162</sup> Certainly, the basic \$500,000,000 coverage is inadequate for a vessel owner with assets potentially at risk in the event of a major oil spill.

The unavailability of sufficient insurance also appears to have caused Elf Aquitaine, Teekay Shipping, Petrofina, Maersk, and A.P. Moller to announce that their vessels would boycott United States mainland ports.<sup>163</sup> Further, within the United States, some domestic coastal traders announced that they would cease doing business in states such as Maine which have enacted particularly onerous pollution laws.<sup>164</sup>

Intertanko has warned that the new Act will merely encourage the use of genuine single vessel companies unrelated to the oil company whose oil is being transported. The oil tanker owners' organization has further stated that such a development would actually increase the risk of a spill by driving large, responsible fleets with deep corporate pockets out of the oil transportation business, leaving only the single vessel "rust bucket" companies shipping oil to the United States. As Nicholas Blenkey, editor of the *Marine Log* stated, "'At its worst [the bill] would mean American oil would be imported in tankers by dubious one-ship companies that will walk away from the ship in the event of a spill. That is very, very likely to happen.'"<sup>165</sup> The extent to which these public pronouncements, issued while the Act was being considered by the conference committee, constitute genuine changes in policy or simply attempts to influence legislators, is unclear.<sup>166</sup>

Interestingly, certain oil companies adopted a different approach. Arco, for instance, has taken the reverse position and declared that in

161. *Id.* at col. 4.

162. *Id.* at col. 5.

163. Smith, *Elf to Follow Shell in US Port Boycott*, Lloyd's List, June 22, 1990, at 1, col. 2; Prescott, *Teekay Tankers Join US Trade Boycott*, Lloyd's List, July 12, 1990, at 1, col. 3; *US Congress Ends 16-Year Stalemate on Oil Spill Legislation*, 13 OIL SPILL INTELLIGENCE REP. 1, 3 (1990) [hereinafter *Oil Spill Legislation*].

164. Bruchard Transportation has announced that it has stopped serving Maine and Maryland and is considering whether to continue trading in New Jersey. Prescott, *US Coastal Owners Ban Some Tracks*, Lloyd's List, July 12, 1990, at 1, col. 6. Texaco, Amerada Hess, and Maritrans Operating Partners have also decided to stop calling at Maine ports. *Wall Street Journal*, July 26, 1990, at B4, col. 3.

165. *Oil Spill Legislation*, *supra* note 163, at 3.

166. See Brewer, *Boycott Threat Seen as Lobbying Tactic*, Lloyd's List, July 4, 1990, at 10, col. 1.

the future it will transport as much of its oil as possible in Arco-owned tankers.<sup>167</sup> Arco's theory is that only if Arco can control the standards aboard its tankers can it adequately protect itself against the potential liability that would result if a state changed its law to hold cargo interests liable for spill of the cargo.

The future of oil transportation to the United States is unclear. It is likely that large oil companies will be unwilling to risk their corporate assets to potentially unlimited liability for an oil spill. However, it does not necessarily follow that the new Act actually will result in transportation by dubious, one-vessel companies. It is likely that companies specializing in the transportation of oil to, from, and within the United States will emerge and charge substantially increased freight rates due to higher insurance costs and significantly increased exposures resulting from the Act. These additional costs will be passed on to United States consumers.

### 3. The Escape of Cargo Owners

The Oil Pollution Act is the harshest oil pollution legislation to date; it imposes considerably higher limits of liability on a vessel owner than do the international conventions, allows for potentially unlimited liability against a vessel owner under the laws of individual states, and creates exposure to a formidable range of penalties. However, in spite of considerable congressional opposition, oil cargo interests pulled off the remarkable coup of escaping any form of liability under the Act for the discharge of oil from a tanker. The extent of this achievement is particularly noteworthy considering that even the more limited international conventions have recognized that oil cargo interests should share in the financial consequences of an oil spill. Indeed, one of the conventions specifically states that "the economic consequences of oil pollution damage resulting from the escape or discharge of oil carried in bulk at sea by ships should not exclusively be borne by the shipping industry but should be borne in part by the oil cargo interests."<sup>168</sup>

Additionally, part of the industry-sponsored voluntary pollution schemes includes CRISTAL,<sup>169</sup> which provides that when cargo

167. McLaughlin, *Oil Transport Changes Ahead*, Lloyd's List, July 4, 1990, at 10, col. 5.

168. International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage, 1110 U.N.T.S. 57, 59 (preamble).

169. Contract Regarding a Supplement to Tanker Liability for Oil Pollution (CRISTAL) (in effect from 1971, substantially revised February 20, 1987), 10 I.L.M. 137, reprinted in 6 BENEDICT, *supra* note 4, at 6-148.4.

belonging to a CRISTAL member is transported in a TOVALOP<sup>170</sup> tanker, CRISTAL will pay claims above those payable under the TOVALOP supplement up to a tonnage based limit. It is estimated that eighty percent of oil cargoes are covered by CRISTAL.<sup>171</sup> Finally, the House of Representatives original version of the Oil Pollution Act created secondary strict liability on the part of the cargo owner.<sup>172</sup> While the limits contained in the original House bill were eventually enacted, the additional potential liability of oil cargo owners was rejected. This rejection could encourage the use of one-ship companies for transportation purposes due to the absence of potential liability of cargo interests.

#### V. CONCLUSION

The passage of the Oil Pollution Act begins a period of uncertainty regarding its meaning and the practical effects of its provisions. There is little doubt that the cost of shipping oil to, from, and within the United States will rise significantly, and these increased costs will be passed on to United States consumers. It will be interesting to see what effect the resulting increased oil prices will have and whether the Act will actually encourage safer methods of oil transportation and reduce the frequency and severity of pollution incidents. Undoubtedly, there will be a period of adjustment as the industry confronts the new legal regime.

## THE ENFORCEABILITY OF FORUM SELECTION CLAUSES IN MARITIME BILLS OF LADING: AN UPDATE

C. Andrew Waters\*

#### INTRODUCTION

Within the maritime context, parties contracting for the transport of goods frequently stipulate an exclusive forum for settling disputes that arise from the performance of the contract. Such forum selection clauses are frequently used in contracts outside of the admiralty context when the transaction in question involves more than one jurisdiction.<sup>1</sup>

While American admiralty courts were traditionally reluctant to divest themselves of jurisdiction simply because a forum selection clause specified another court as having exclusive jurisdiction,<sup>2</sup> federal courts have begun to accept and enforce the validity of such clauses. However, there are differing degrees of acceptance between the various circuits.<sup>3</sup> In *M/S Bremen v. Zapata Off-Shore Co.*,<sup>4</sup> the Supreme Court brought American law substantially into accord with the law of other common law countries by holding forum selection clauses generally enforceable.<sup>5</sup> While post-*Bremen* cases have raised additional

\* B.A., College of William and Mary, 1981; M.A., College of William and Mary, 1982; J.D., University of Houston Law Center, 1986. Associate, Keesal, Young & Logan, Long Beach, California. The author gratefully acknowledges the instruction and assistance provided by Gus A. Schill, a professor at the University of Houston Law Center and a partner with the firm of Royston, Rayzor, Vickery & Williams.

1. See generally Reese, *The Contractual Forum: Situation in the United States*, 13 AM. J. COMP. L. 187 (1964).

2. Denning, *Choice of Forum Clauses in Bills of Lading*, 2 J. MAR. L. & COM. 17 (1970).

3. See generally *William H. Muller & Co. v. Swedish Am. Line Ltd.*, 224 F.2d 806, 1955 AMC 1687 (2d Cir.) (holding a forum selection clause enforceable unless unreasonable), cert. denied, 350 U.S. 903, 1955 AMC 2406 (1955). See also *Carbon Black Export, Inc. v. The S/S Monrosa*, 254 F.2d 297, 1958 AMC 1335 (5th Cir. 1958) (holding a forum selection clause to be unenforceable), cert. dismissed, 359 U.S. 180, 1959 AMC 1327 (1959).

4. 407 U.S. 1, 1972 AMC 1407 (1972).

5. *Id.* at 10, 1972 AMC at 1414. The Supreme Court held "that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *Id.* For a listing of the decisions of the English courts, see *id.* at 11 n.12, 1972 AMC at 1415 n.12.

170. Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP Standing Agreement) (in effect from October 1969, as amended October 30, 1984), reprinted in 6 BENEDICT, *supra* note 4, at 6-136; Supplement to Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP Supplement) (in effect from February 20, 1987), reprinted in 6 BENEDICT, *supra* note 4, at 6-145.

171. TOVALOP in *Oil Spill Payouts*, Lloyd's List, July 4, 1990, at 11, col. 1.

172. Oil Pollution Act § 1102.

the vessel before deciding what further action, if any, he should take. Applying this test to the facts of *Irvin v. Hine*, it is reasonably clear that the prudent uninsured owner would never have incurred the expense of drydocking, since even the insured owner refused to do so.

### CONCLUSION

The prior discussion illustrates that shipowners have attempted to recover nearly every conceivable type of marine related expenses under the mantle of the Sue and Labor Clause.

Recent cases indicate the clause is back in fashion and enjoying a modest revival in both marine and land-locked affairs.

One need only attain journeyman soothsayer status to predict that the clause will enjoy good health, longevity and even broader usage in the future.

## The Oil Pollution Act of 1990: An Analysis

THOMAS J. WAGNER\*

### INTRODUCTION

On August 18, 1990, President Bush signed into law the Oil Pollution Act of 1990, after the measure had been unanimously approved by both the House and the Senate. The new law establishes a comprehensive oil spill liability, response and compensation program which consolidates the various federal liability provisions into one statute, without preempting state liability laws or implementing the international oil spill conventions. The Act also prescribes an array of preventive measures and oil spill penalties and greatly modifies oil spill response activities.

Manifestly, the Act is a major change in the domestic program dealing with oil spills. The new law is acclaimed by one of its original sponsors as "a major leap forward" in safe transportation of oil<sup>1</sup> which will provide a readily accessible fund for prompt and certain recovery of pollution damages.<sup>2</sup> Prompt and fair claims compensation under a "simpler, clearer, more predictable legal and regulatory system" has long been a principal objective of this legislation.<sup>3</sup> Critics suggest that the new law, while comprehensive in scope, has serious drawbacks because of its limp limitation provisions, overly complicated removal provisions, and the failure of the law to preempt inconsistent liability programs, which will perpetuate inordinate transactional time and litigation costs.<sup>4</sup>

\*B.A. and J.D., Tulane University; Partner, Wagner & Bagot, New Orleans, La.; Chairman, Committee on Marine Ecology, Maritime Law Association of the United States; Lecturer on Marine Pollution Liability, Tulane Law School (1980-1985) and University of San Francisco Law School (1988-Present).

<sup>1</sup>News release by Hon. Walter B. Jones, Chairman of the House Committee on Merchant Marine and Fisheries, August 19, 1990.

<sup>2</sup>Jones, *Oil Spill Compensation and Liability Legislation*, Vol. XIX, No. 8, *Env'tl. L. Rep. (Env'tl. L. Inst.)*, at 10337 (Aug. 1989) ("Jones").

<sup>3</sup>*Id.*, at 10333.

<sup>4</sup>See, generally, Letter of Samuel K. Skinner to Representative Jones, Chairman of the Conference Committee on Oil Spill Legislation, June 28, 1990; *Submission Made by the*

Part I will analyze the Act in light of its principal objectives. Part II will review the development of oil spill liability programs from 1970 to passage of the Oil Pollution Act. Part III will review particular facets of the new legislation dealing with its liability regime, removal requirements, prevention and penalty measures, relationship with other laws, and claims program. Part IV will analyze these measures in light of principal objectives and in the context of certain experiences and lessons derived from the *Exxon Valdez* oil spill in Prince William Sound and the removal operations which followed.

## I THE HISTORICAL DEVELOPMENT OF OIL SPILL LIABILITY REGIMES

The awakening of public concern over oil pollution began with the *Torrey Canyon* disaster off the southwest coast of England on March 18, 1967. The clean-up problems and costs associated with that pollution incident aroused previously indifferent public opinion to the hazards posed by the mass transportation of oil. The incident was soon followed in the United States by the oil spill off Santa Barbara, California, focusing American public opinion upon additional hazards associated with exploration facilities. Public concern over oil pollution produced two distinct responses: the national approach embodied in various Congressional enactments, and the international response embodied in international conventions dealing with oil spills.

The modern era of domestic oil spill legislation began with the enactment of the Federal Water Quality Improvement Act of 1970. This law, as expanded by the Federal Water Pollution Control Act Amendments of 1972 (FWPCA),<sup>5</sup> declared a national policy prohibiting discharges of oil and imposing a regime of civil penalties and strict liability for federal clean-up costs. The FWPCA did not deal with damages of private interests, economic losses, or expenditures by local governments. Later, as source-specific pollution hazards were identified, Congress passed special measures to deal with these hazards. These included the Trans-Alaska Pipeline Authorization Act of 1973 (TAPA),<sup>6</sup> the Deepwater Ports Act of 1974 (DPA)<sup>7</sup> and the

Outer-Continental Shelf Lands Act Amendments of 1978 (OCSLA).<sup>8</sup> Each measure dealt with source-specific oil pollution hazards, with differing liability, limitation and claims provisions and different areas of geographic coverage.

In view of the inconsistent federal enactments overlapping non-preempted state legislation, the need for a comprehensive spill program was long ago recognized.<sup>9</sup> During the last 15 years, Congress considered several comprehensive oil spill measures to combine all state and federal oil spill liability laws into a uniform national program.<sup>10</sup> While several comprehensive measures were approved in the House, no Senate agreement could be obtained until the aftermath of the Prince William Sound oil spill.

In contrast to the domestic approach, the international response developed a comprehensive program to deal with tanker spills of crude oil. At the request of the British government, the Intergovernmental Maritime Consultative Organization (IMCO), now the International Maritime Organization (I.M.O.), prepared an oil spill proposal for consideration at a Diplomatic Conference in Brussels in November 1969. The IMCO proposal was based upon a draft convention prepared by the Comité Maritime International (CMI) at its 29th International Conference, held at Tokyo in April of the same year. The IMCO proposal, with a few amendments, was adopted as the International Convention on Civil Liability for Oil Pollution Damage, 1969 (Civil Liability Convention or CLC).<sup>11</sup> Subsequently, the International Convention for the Establishment of an International Fund for Oil Pollution Damage, 1971 (Fund Convention)<sup>12</sup> was adopted to supplement the compensation of pollution damage claims.

The CLC provides a program of strict liability and compulsory insurance for tanker spills. The convention covers pollution damages of public and private interests for tanker spills of crude and other persistent oil.<sup>13</sup> The Fund Convention establishes an international

<sup>5</sup> 33 U.S.C. § 1251 *et seq.*

<sup>6</sup> Jones, *supra* note 2, at 10333; H.R. Rep. No. 1489, 94th Cong., Pt. 1; see also Straube, *In Full Compensation Possible for the Damages Resulting from the EXXON VALDEZ Spill*, Vol. XIX, No. 8, *Envtl. L. Rep.* 10338, 10349-50 (Aug. 1989) ("Straube").

<sup>7</sup> Jones, *supra* note 2, at 10334-37.

<sup>8</sup> International Convention on Civil Liability for Oil Pollution Damage, 1969, reprinted in 6 *Benedict on Admiralty* 6-60 (Cohen rev. 7th ed. 1983) ("Benedict").

<sup>9</sup> Jones, *supra* note 2, at 10334-37.

<sup>10</sup> International Fund for Compensation of Oil Pollution Damage, December 18, 1971, reprinted in 6 *Benedict* 6-100 ("Fund Convention").

<sup>11</sup> CLC, *supra* note 11, Articles I, III. An excellent description of the development and coverage of the CLC and the Fund Convention appears in Jacobsen & Yellen, *Oil Pollution*

*International Group of P.&I. Associations Regarding Draft Oil Pollution Legislation in the United States* (undated); James, *Legislative Reaction to Recent Oil Spills*, in 1990 *River and Marine Industry Seminar* ("James"); *Oil Spills*, Vol. 20, No. 10, *Env't. Rep. (BNA)* 432 (July 6, 1990).

<sup>12</sup> 33 U.S.C. § 1251 *et seq.*

<sup>13</sup> 43 U.S.C. § 1651 *et seq.*

<sup>14</sup> 43 U.S.C. § 1501 *et seq.*

...and derived from mandatory contributions by oil companies which receive bulk shipments by water in those countries which ratify the convention. The Fund Convention supplements the compensation payable to damaged public and private interests to the extent not compensated under the CLC.<sup>14</sup>

The international approach established a uniform liability regime for all public and private damages for tanker spills. However, the United States declined to ratify the conventions, largely because of dissatisfaction with the liability limits, the difficulty of increasing limits in the future, and concern for the states' role in pollution protection.<sup>15</sup> Concern over the international limits was brought into sharp focus by the *Amoco Cadiz* spill off the coast of France in March 1978. This incident, which involved the loss of 68 million gallons (six times the amount of the *Exxon Valdez* spill), sharpened worldwide recognition that the international regime needed to be updated and the limits of liability increased to meet the requirements of a major catastrophe.<sup>16</sup>

A Diplomatic Conference was convened in London in 1984 to revise the CLC and the Fund Convention in light of these shortcomings. The U.S. delegation to this conference consulted with the House and Senate committees to identify the major domestic objectives needed for Congressional adoption of a uniform international plan. The U.S. delegation was able to achieve most of its objectives in the 1984 Protocols to the CLC and the Fund Convention. These included greatly increased limits of shipowner and fund liability, expanded geographic coverage, compensation for restoration of natural resources, economic losses and preventive measures, a simplified amendment procedure to expedite future increases in

*The 1984 London Protocols and the AMOCO CADIZ*, 15 J. Mar. L. & Com. 467 (1984) ("Jacobsen & Yellen").

<sup>14</sup>Fund Convention, *supra* note 12, Articles 4, 5, 10.

<sup>15</sup>Jones, *supra* note 2, at 10334-36; Jacobsen & Yellen, *supra* note 13, at 482; Temple, Barker & Sloane, *infra* note 17, at IV-3. Although there was obvious dissatisfaction with the international limits, it is interesting that those limits compared favorably with the limits available under then existing U.S. legislation. For example, in 1984 a tanker owner's limit of liability was \$150 per gross ton under the FWPCA. The owner's limits would have been approximately \$136 per ton under the CLC before they were increased by the 1984 Protocols. Jacobsen & Yellen at 473. Furthermore, the shipowner's liability limit was supplemented by the international fund, up to a maximum of \$46 million, which was not available under domestic law. In spite of the domestic dissatisfaction with the international limits, the domestic limits remained constant—roughly equal to the international limits—from 1978 to 1990.

<sup>16</sup>The problems associated with the conventions are outlined in detail in Jacobsen & Yellen, *supra* note 13, at 475-483 (1984).

limits, and partial non-preemption of state laws relative to state oil spill funds, response, and penalty requirements.<sup>17</sup>

With these objectives achieved, the Reagan Administration submitted the 1984 Protocols to the Senate for advice and consent to ratification. The Senate Foreign Relations Committee declined to take action on the Protocols, largely at the direction of Senate leadership. During the last three Congresses, the House of Representatives had proposed or passed comprehensive legislation which would have consolidated federal and state liability programs into a uniform national system and would have implemented the international regime as expanded by the 1984 Protocols.<sup>18</sup> These measures, however, like ratification of the 1984 Protocols, were never acted upon by the Senate.

With the commencement of the 101st Congress, the House of Representatives, in H.R. 1465, again proposed comprehensive oil spill legislation. Unlike previously proposed legislation, H. R. 1465, as amended, redrafted and compromised, was ultimately approved unanimously by the House and the Senate. The obvious reason for passage was the impetus of public opinion reawakened by the *Exxon Valdez* spill in Prince William Sound.

## II

### A REVIEW OF THE OIL POLLUTION ACT OF 1990

The Oil Pollution Act of 1990 differs substantially from the original bill (H.R. 1465) and from former comprehensive proposals. The new law, while comprehensive in scope, neither preempts state law nor implements the international protocols. It expands the liability and limitation programs of former law and addresses particular concerns respecting prevention, removal and civil penalty programs. Like the international program, the new law channels liability to designated parties and provides a fund to respond for catastrophic losses and for claims which are not compensated by dischargers. The following review focuses upon particular facets of the legislation relating to

<sup>17</sup>Temple, Barker & Sloane, *The International Oil Spill Protocols: Should the United States Ratify?*, pp. IV-1-12 (1988) Temple, Barker & Sloane; Jacobsen & Yellen, *supra* note 13, at 475-483, 487, 488; Jacobson & Trotz, *The Definition of Pollution Damage in the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention*, 17 J. Mar. L. & Com. 467 (1986). See also correspondence transmitting and submitting the 1984 Protocols to the Senate for advice and consent to ratification: President Reagan's Letter of Transmittal (Nov. 5, 1985); Secretary Schultz's Letter of Submittal (Oct. 5, 1985).

<sup>18</sup>Jones, *supra* note 2, at 10336, 10337.

liability, removal responsibilities, prevention and civil penalties, relationship with other laws, and claims procedures.

#### A. Liability, Defenses and Limitations

The Act imposes strict liability for removal costs and damages upon each responsible party for discharges of oil from vessels and facilities into navigable waters, onto adjoining shorelines, or into waters within the exclusive economic zone of the United States.<sup>19</sup> Responsible parties are owners and operators of vessels, facilities and pipelines and licensees of deepwater ports.<sup>20</sup> Removal costs are defined to include all containment, removal and mitigation costs incurred by the United States, a state or an Indian tribe under § 311 of the FWPCA or under state law, and any such costs incurred "for acts . . . consistent with the National Contingency Plan."<sup>21</sup>

Recoverable damages include (a) natural resource damages, including loss of use and reasonable assessment costs, (b) damages to property, including economic loss, (c) damages for loss of subsistence use of natural resources, (d) (net) loss of taxes, royalties, rents, fees or shares of net profits, due to damage to property or natural resources, (e) damages for loss of profits or impairment of earning capacity due to damage to property or natural resources, and (f) damages for the net costs of increased public services caused by a discharge of oil.<sup>22</sup> Natural resource damage includes the cost of restoring, rehabilitating or acquiring the equivalent of damaged natural resources, the diminution in value of the resources pending restoration, and reasonable assessment costs.<sup>23</sup>

The Act specifies limited defenses to liability. A responsible party is not liable for removal costs and damages if the discharge was "solely" caused by an act of God, an act of war, an act or omission of a third party, or an combination thereof.<sup>24</sup> "Third party" is narrowly defined to exclude an employee or agent of the responsible party or of a party who acts pursuant to a contract with the

responsible party.<sup>25</sup> There is no liability to a claimant whose gross negligence or willful misconduct caused the incident.<sup>26</sup> These defenses are not available if the responsible party "fails or refuses":

1. to report an incident as required by law;
2. to provide reasonable assistance requested by a responsible official in connection with removal activities; or
3. to comply with an order issued under FWPCA provisions without sufficient cause.<sup>27</sup>

The Act provides for third-party liability consistent with the liability of the responsible party when the responsible party establishes that the discharge was solely caused by the act or omission of the third-party.<sup>28</sup>

The Act sets new limits of statutory liability and removal costs incurred by the responsible party. The sum of its removal costs and its statutory liability is limited to the following amounts:

- (1) the greater of \$1,200 per gross ton or \$10 million for tank vessels of more than 3,000 tons;
- (2) the greater of \$1,200 per gross ton or \$2 million for tank vessels of less than 3,000 gross tons;
- (3) the greater of \$600 per gross ton or \$500,000 for all other vessels;
- (4) \$75 million, plus removal costs, for offshore facilities;
- (5) \$350 million for onshore facilities and deepwater ports.<sup>29</sup>

No limitation is applicable if the incident was proximately caused by gross negligence or willful misconduct, or by a violation of a federal safety, construction or operation regulation by the responsible party, its agent, employee or person acting pursuant to a contract with the responsible party.<sup>30</sup> Likewise, no limitation is available if the responsible party "refuses or fails" to report the incident, to provide reasonable assistance requested by a responsible official, or to comply with certain FWPCA orders without sufficient cause.<sup>31</sup> Notwithstanding the defenses and limitations noted above, federal, state

<sup>19</sup>Id., § 1003(a)(3). The "third party" defense is very restrictive. The responsible party must also establish its own due care and precautions as to foreseeable third-party acts and consequences.

<sup>20</sup>Id., § 1003(b).

<sup>21</sup>Id., § 1003(c).

<sup>22</sup>Id., § 1002(b).

<sup>23</sup>Id., § 1004(a). In general, these limitation amounts do not apply to interest on recoverable removal costs or damages under § 1005(b)(5).

<sup>24</sup>OPA, § 1004(c)(1).

<sup>25</sup>Id., § 1004(c)(2); see note 8, *supra*.

<sup>19</sup>Oil Pollution Act of 1990 § 1002(a) ("OPA").

<sup>20</sup>Id., § 1001(32).

<sup>21</sup>Id., § 1002(a)(1); § 1001(30).

<sup>22</sup>Id., § 1002(b)(2).

<sup>23</sup>Id., § 1006(d)(1).

<sup>24</sup>Id., § 1003(a). The responsible party has the burden to establish these limited defenses.

removal costs for a discharge from an OCS<sup>32</sup> facility or a vessel carrying OCS oil as cargo "shall be borne by the owner or operator."<sup>33</sup>

### B. Removal Responsibilities

Under the FWPCA, the President was authorized to act to remove an oil spill "unless he determine[d]" that such removal would be done properly by the owner or operator of the vessel or facility from which the spill emanated.<sup>34</sup> As amended by the Oil Pollution Act, the FWPCA now expressly empowers the President to remove the discharge and mitigate or prevent the threat of discharge, to direct or monitor all federal, state and private removal actions and, if necessary, to remove and destroy a vessel discharging or "threatening" a discharge.<sup>35</sup> If the discharge or threat of discharge is a "substantial threat to the public health or welfare" of the United States, the President "shall direct" all federal, state and private removal, mitigation or prevention activities.<sup>36</sup>

Neither the Oil Pollution Act nor the FWPCA, as amended, expressly provides that the responsible party or discharger must undertake removal activities. However, the amended FWPCA provides that nothing in Subsection(c) (Federal Removal Authority) "affects . . . the obligation of an owner or operator to respond immediately to a discharge, or the threat of a discharge of oil."<sup>37</sup> In the absence of an express statutory obligation, a responsible party may be obligated to remove discharged oil by Presidential order pursuant to § 311(c), or by other orders pursuant to § 311(e).<sup>38</sup> The statutory basis for such executive authority is not explicit. Presum-

<sup>32</sup>Outer-Continental Shelf.

<sup>33</sup>OPA, § 1004(c)(3).

<sup>34</sup>FWPCA, § 311(c)(1) (33 U.S.C. § 1321(c)(1)).

<sup>35</sup>*Id.*, § 311(c)(1) (33 U.S.C. § 1321(c)(1)), as amended by OPA, § 4201(a).

<sup>36</sup>*Id.*, § 311(c)(2) (33 U.S.C. § 1321(c)(2)), as amended by OPA, § 4201(a).

<sup>37</sup>*Id.*, § 311(c)(5) (33 U.S.C. § 1321(c)(5)), as amended by OPA, § 4201(a).

<sup>38</sup>The 1990 Act imposes substantial penalties for failure to comply with removal orders, or with regulations concerning removal. These include the responsibility of each owner or operator of a tanker or facility to prepare and submit for approval response plans for handling worst case discharges or threatened discharges. FWPCA, § 311(c)(7)(B) (33 U.S.C. § 1321(c)(7)(B)), as amended by OPA, § 4301(b); FWPCA § 311(j)(5) (33 U.S.C. § 1321(j)(5)), as amended by OPA, § 4202(a). Failure to properly carry out a removal order subjects the owner, operator or person in charge to a civil penalty of up to \$25,000 per day while the violation continues, or three times the costs incurred by the Oil Spill Liability Trust Fund. Failure to comply with regulations under the National Response Systems may give rise to a civil penalty of up to \$25,000 per day of violation.

ably Presidential authority to order private removal is inferred from the amended language of § 311(c) that the President "may . . . direct or monitor all" federal, state and private actions, but a contrary inference could be drawn from the use of the word "direct" throughout other provisions of the statute.

The Act activates the Oil Spill Liability Trust Fund, established under the Internal Revenue Code, to be available for payment of pollution damages, and for costs of removal, assessment, restoration and operational activities.<sup>39</sup> The Act retains the requirement that removal activities be undertaken consistent with the National Contingency Plan (NCP), and persons rendering assistance consistent with the NCP are exempt from liability for removal costs and damages.<sup>40</sup> This exemption does apply to a responsible party, to a response under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),<sup>41</sup> with respect to a personal injury or death, or in the event of gross negligence or willful misconduct.<sup>42</sup>

The Oil Pollution Act further amends the FWPCA to provide an extensive network for responding to oil spills. A National Response Unit is created to compile records of worldwide resources, personnel and equipment, to conduct appropriate vessel and facility inspections, and to maintain contingency plans.<sup>43</sup> Coast Guard District Response Groups are established to provide technical assistance to federal on-scene coordinators and to maintain Coast Guard response equipment. Furthermore, at the designation of the President, area committees of federal, state and local agencies are established to prepare area contingency plans for worst case discharges in the involved area.<sup>44</sup>

### C. Prevention and Oil Spill Penalties

The Oil Pollution Act includes several new prevention provisions. The Act amends existing legislation with respect to issuance of licenses and certificates of registry. Specific requirements are imposed to mandate criminal and driving record checks, drug and

<sup>39</sup>*Id.*, § 1012(a).

<sup>40</sup>FWPCA, § 311(c)(4) (33 U.S.C. § 1321(c)(4)), as amended by OPA, § 4201(a).

<sup>41</sup>The Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*

<sup>42</sup>FWPCA, § 311(c)(B) (33 U.S.C. § 1321(c)(B)), as amended by OPA, § 4201(a).

<sup>43</sup>FWPCA, § 311(j)(2) (33 U.S.C. § 1321(j)(2)), as amended by OPA, § 4201(a).

<sup>44</sup>FWPCA, § 311(j)(3) and (4) (33 U.S.C. § 1321(j)(3) and (4)), as amended by OPA, § 4201(a).

...testing programs and temporary suspension of licenses and certificates in certain circumstances.<sup>45</sup> Section 4104 provides for the second-in-command to relieve the vessel's master of command temporarily when the two most senior licensed officers reasonably believe the master is under the influence of alcohol or a dangerous drug and is incapable of commanding the vessel. Specific pilotage requirements are extended and imposed for vessels operating in Prince William Sound.<sup>46</sup>

The Act provides for review by the Secretary of Transportation of the vessel manning standards of a foreign country which issues documentation for tank vessels involved in serious marine accidents. Upon determination that such standards are not equivalent to United States or accepted international standards, the Secretary must, subject to certain exceptions, prohibit such documented vessels from entering United States waters.<sup>47</sup>

Section 4107 amends the Ports and Waterways Safety Act<sup>48</sup> to provide for the construction, operation and expansion of vessel traffic service. It also mandates a study of the need for additional Coast Guard authority to direct vessel movements. The Secretary of Transportation must submit his report and recommendations within one year after enactment of the new statute.

Section 4118 directs the Secretary to issue regulations, within the same one-year period, to ensure that vessels subject to the Vessel Bridge-to-Bridge Radiotelephone Act of 1971<sup>49</sup> are equipped to receive radio marine safety warnings and engage in radio communications with the Coast Guard and with vessels and stations specified by the Coast Guard. Other safety measures concern specific equipment standards, such as tanker plating thickness and periodic gauging of plating thickness on older vessels.<sup>50</sup> Regulations are also mandated for warning devices to prevent overfills and devices to monitor pressure of oil tanks.<sup>51</sup>

Tanker construction standards are substantially amended by the new law. Double hulls are required on new tank vessels, and existing

vessels must be retrofitted with double hulls under a transition schedule, depending upon the age and size of the vessel.<sup>52</sup>

The act greatly expands the criminal, civil and administrative penalties for prohibited discharges of oil. Under amendments to the FWPCA, an owner, operator or person in charge of a vessel or facility which has a prohibited spill may be assessed an administrative or civil penalty. The administrative penalty may be a Class I penalty of up to \$10,000 per violation (not exceeding \$25,000) or a Class II penalty of up to \$10,000 per day for each day the violation continues (not exceeding \$125,000). Alternatively, a civil penalty may be imposed upon the owner, operator or person in charge, of up to \$25,000 per day of violation or \$1,000 per barrel of oil discharged.<sup>53</sup> Substantially increased criminal and civil penalties are also imposed for negligent operations, load line and crew complement violations and violations pertaining to vessel operations under the Deepwater Ports Act and the Ports and Waterways Safety Act.<sup>54</sup>

#### D. Relationship with Other Laws

The Act disavows any intent to preempt other domestic laws in certain areas. Section 1018(a) provides that nothing in the Act or in the Limitation of Liability Act of 1851<sup>55</sup> shall affect or preempt the authority of any state or political subdivision to impose "additional liability or requirements" with respect to oil pollution or removal activities. Further, neither act affects or modifies the obligations or liabilities of persons under the Solid Waste Disposal Act,<sup>56</sup> or under state law or "common law." The Act expressly preserves state funds for costs or damages related to oil pollution.<sup>57</sup> Lastly, nothing in the Act, the Limitation of Liability Act or the Internal Revenue Code setting up the domestic fund<sup>58</sup> affects the authority of the United States or any state or political subdivision to "impose additional liability or additional requirements" or to impose any oil spill civil or criminal fines or penalties.<sup>59</sup>

<sup>45</sup>OPA, §§ 4101-03.

<sup>46</sup>*Id.*, § 4116. The pilot, who may not be a member of the crew, must be licensed under both federal and state requirements.

<sup>47</sup>*Id.*, § 4106.

<sup>48</sup>33 U.S.C. § 1223.

<sup>49</sup>33 U.S.C. § 1203.

<sup>50</sup>OPA, § 4109.

<sup>51</sup>*Id.*, § 4110.

<sup>52</sup>*Id.*, § 4115.

<sup>53</sup>§ 311(b)(6) and (7) (33 U.S.C. § 1321(b)(6) and (7)), as amended by OPA, § 4301(b).

<sup>54</sup>OPA, § 4302.

<sup>55</sup>33 U.S.C. § 183 *et seq.*

<sup>56</sup>42 U.S.C. § 6901 *et seq.*

<sup>57</sup>OPA, § 1018(b).

<sup>58</sup>26 U.S.C. § 9509 *et seq.*

<sup>59</sup>OPA, § 1018(c).

...the Act does not endorse or implement any international regime, convention or protocol. In Title III, Congress acknowledged that it is in "the best interests" of the United States to participate in an international regime which would be "at least as effective" as federal and state laws in preventing pollution and compensating claimants.<sup>60</sup>

#### E. Claims Procedure

The Act provides a new program for compensation of pollution claims. In the event of an oil spill, the President must designate the source of the spill and notify the responsible party (if known) of this designation. The responsible party must either deny the designation within five days or advertise its designation, along with appropriate claims procedures. If the responsible party denies the designation, or if the discharge source was a public vessel, or if the President is unable to designate the source, the President must advertise or notify claimants concerning claim procedures against the domestic fund.<sup>61</sup>

Pollution damage and removal cost claims must be presented initially to the responsible party, except when the President has advertised procedures with respect to claims against the fund, as noted above.<sup>62</sup> Upon a denial of liability by the responsible party, or a failure to settle the claim within 90 days, the claimant may elect to file an action against the responsible party or present his claim to the fund. Furthermore, if full compensation from the responsible party is unavailable, a claim for uncompensated damages and removal costs may be presented to the fund. No claim may be approved by the fund during the pendency of any action to recover costs included in the claim.<sup>63</sup>

Any person, including the fund, who pays compensation for removal costs or damages, is subrogated to all rights, claims, and causes of action of the compensated claimant.<sup>64</sup> Following payment by the fund to a claimant, the Attorney General, at the request of the Secretary of Transportation, must proceed to recover all compensation paid, plus interest, administrative and adjudicative costs, and attorneys' fees. Such an action may be against the responsible party,

<sup>60</sup>Id., § 3001.

<sup>61</sup>Id., § 1014.

<sup>62</sup>Id., § 1013.

<sup>63</sup>Id., § 1013(b)(2), (c) and (d).

<sup>64</sup>Id., § 1015(f).

the guarantor, or any other person liable to the claimant or the fund "pursuant to any law."<sup>65</sup>

The Act provides that the federal district courts have exclusive original jurisdiction of all controversies arising under the Act, except that state courts of competent jurisdiction "may consider" claims under the Act or state law.<sup>66</sup> This contradictory statutory language may be interpreted as empowering both federal and state courts to hear and determine pollution cases covered by the Act. State court judgments are valid and enforceable under the Act.

### III AN ANALYSIS OF THE ACT

This part will analyze the Oil Pollution Act of 1990 from the viewpoint of certain original objectives of comprehensive oil spill legislation and from the context of the insight gained through the experience of the Prince William Sound response and removal operations. One of the principal goals of the comprehensive measure was to provide for prompt and fair compensation of pollution claims under a simpler and more predictable legal and regulatory system.<sup>67</sup> In addition, the legislation seeks to encourage a higher standard of care, while addressing particular concerns and problems identified during the Alaska clean-up effort. In their joint report<sup>68</sup> to President Bush, Transportation Secretary Skinner and EPA Administrator Reilly noted the following concerns and/or needs:

- comprehensive updating of compensation and liability laws to define the relationship between existing laws and to prevent costly litigation<sup>69</sup>;
- potential increase of criminal and civil penalties and judicial and administration authority<sup>70</sup>;

<sup>65</sup>Id., § 1015(b).

<sup>66</sup>Id., § 1017(b)(c).

<sup>67</sup>Jones, *supra* note 2, at 10333. Pollution litigation is complicated and expensive. This is probably best evidenced by the history of the *Amoco Cadiz* litigation. That incident occurred on March 16, 1978. Six years later, the district court rendered its initial decision regarding liability. The decision on damages was not issued until January 11, 1988. Revised damage findings were submitted by the special master on February 21, 1989. Ultimately, on July 24, 1990, more than twelve years after the incident, the district court entered its judgment in favor of the damage claimants. Appeals and cross-appeals have been filed. Remuneration of the damaged parties may still be years away, when the appeal is finally decided.

<sup>68</sup>Skinner & Reilly, *The EXXON VALDEZ Oil Spill*, prepared by the National Response Team (May 1989) ("Skinner & Reilly").

<sup>69</sup>Id., at 35; see also Straube, *supra* note 9, at 10340.

<sup>70</sup>Skinner & Reilly, *supra* note 68.

- contingency planning for realistic worst case scenarios, and better coordination of response activities with streamlining of decision-making;<sup>71</sup>
- implementation of the 1984 Protocols to the CLC and the Fund Convention to provide greater means to address tanker spills.<sup>72</sup>

In this context, the Oil Pollution Act appears to achieve goals relating to its comprehensive scope, prevention provisions, and penalty program. However, the Act may fall well short of other goals respecting removal coordination, implementation of the international conventions and provision for prompt compensation of pollution claims.

#### A. Comprehensive Scope of the Act.

The most obvious achievement of the Act is the consolidation of disparate federal oil spill liability programs into a single statute which provides a single standard of liability with consistent defenses and specified limitations for oil spills from vessels, facilities and deepwater ports.<sup>73</sup> The statute covers both public and private claims, including removal costs, property and natural resource damage and economic losses. A domestic fund is activated to respond, as necessary, for removal costs, and to compensate public and private losses.

In the context of its comprehensive scope, the Act is a successful clarification of the former inconsistent federal provisions. As such, the new law appears to achieve the modernization called for in the joint report to President Bush.<sup>74</sup>

#### B. Prevention and Oil Spill Penalties

The Act legislates major operational and technical changes to promote greater safety and improve the prospects of preventing oil

<sup>71</sup>*Id.*, at ES-1, ES-2, 29, 36. See also covering letters of Messrs. Skinner and Reilly to President Bush: *Straube*, *supra* note 9, at 10349.

<sup>72</sup>*Skinner & Reilly*, *supra* note 68.

<sup>73</sup>The only exception relates to the liability of OCS facilities and vessels carrying oil from such a facility. See § 1004(c)(3).

<sup>74</sup>There is serious concern felt by some interests that the limitation standard is too "breakable." Section 1004 allows the limitation to be broken if there has been a violation of a federal safety, construction or operation regulation. In view of the myriad of applicable regulations, such a violation might easily result from simple negligence of almost anyone even distantly associated with a responsible party. In such a context, the Act practically provides limitless strict liability, which may be uninsurable. See *Oil Spills*, Vol. 21, No. 3, *Env't. Rep.* (BNA) 432 (July 6, 1990); *Env't. Rep.* 432 (July 6, 1990); *Submission Made by International Group of P&T Associations*, *supra* note 4, at p. 5; *James*, *supra* note 4, at p. 6.

spills. These include numerous provisions relating to personnel and equipment. While many of these provisions are controversial as to their overall safety value and/or effectiveness vis à vis other alternatives, the new law manifestly represents a substantial legislative undertaking to promote tanker safety and oil spill prevention.

The Act revises and substantially increases the administrative, civil and criminal exposures of persons responsible for oil spills. As such, the increased penalty exposure coincides with expanded liability limits to serve as a greater deterrent to unsafe operations.

#### C. Removal Responsibilities

Following the *Exxon Valdez* accident, there was considerable commentary regarding appropriate roles of the discharger and the federal, state and local governments in the removal process. Exxon undertook the lead role in the removal process amid criticism from several quarters.<sup>75</sup> Issues were raised and argued concerning the use of dispersants and/or bioremediation agents. Some called for "federalization" of the removal project, while others indicated that the discharger's clean-up activities were handled and executed effectively.<sup>76</sup> Alaskan officials, who wanted a firm say in the removal process, seemed to vacillate between supporting federalization and urging that Exxon remain the principal party charged with effecting the clean-up.<sup>77</sup> The issue of federalization was undermined by the paltry size of the federal funding available to respond to the clean-up. The federal government would have undertaken substantial financial obligations without an available appropriation if Exxon had declined to respond, or if the government had federalized the project.<sup>78</sup>

The issue of removal responsibility was debated during the Congressional hearings on the proposed oil spill legislation. Some interests argued that the spiller should remain "on the front line," primarily responsible for and in charge of the clean-up process.<sup>79</sup> Others argued that while the discharger should be primarily liable for

<sup>75</sup>See, generally *Skinner & Reilly*, *supra* note 68, at 12-23; *Water Pollution*, Vol. 19, No. 50, *Env't. Rep.* (BNA) 2588, 2589 (April 14, 1989); Vol. 19, No. 51, *Env't. Rep.* (BNA) 2623, 2625 (April 21, 1989); Vol. 20, No. 48, *Env't. Rep.* (BNA) 1914 (March 3, 1990); Vol. 21, No. 2, *Env't. Rep.* (BNA) 155 (May 11, 1990); Vol. 21, No. 3, *Env't. Rep.* (BNA) 195 (May 18, 1990).

<sup>76</sup>*Id.*

<sup>77</sup>*Water Pollution*, Vol. 19, No. 50, *Env't. Rep.* (BNA) at 2589, 2623-25.

<sup>78</sup>*Id.*, at 2589, *Straube*, *supra* note 9, at 10340, 10341.

<sup>79</sup>*Olney, Statement of the American Waterways Operators on Oil Pollution Liability, Cleanup and Compensation Legislation*, made to the Subcommittee on Water Resources, of the U.S. House Committee on Public Works and Transportation, June 28, 1989.

removal costs, the federal government was better suited to "manage" the process.<sup>80</sup> The debate was further complicated by the existing law and jurisprudence, under which the discharger was not statutorily responsible to conduct the removal. Accordingly, the discharger's removal expenses were considered "voluntary" and did not apply against the statutory limit of discharger's liability.<sup>81</sup>

Against this back-drop of confusion, disagreement and lack of appropriate funding, the Act provides access to a permanent domestic fund for removal operations.<sup>82</sup> The Act does not, however, squarely designate the federal government or the discharger as the party primarily responsible to effect the operations. The new law mandates the President's role to "ensure effective and immediate" removal, while imposing substantial penalties and increasing the liability of a discharger who fails or refuses to comply with Presidential orders.<sup>83</sup> While the language regarding the federal government's role has been altered, it is unclear whether the new language places the government in any substantially different position than it was in under the former FWPCA language.<sup>84</sup>

With respect to statutory limits, the language of the Act demonstrates that the limits are applicable to the statutory liability and removal costs<sup>85</sup> and appears to replace the jurisprudence under the FWPCA, which held that the discharger's clean-up efforts were "voluntary" and did not constitute a credit against statutory limits. This revision improves the removal process by encouraging the discharger to initiate removal activities even in the absence of a statutory obligation or Presidential order, since the expenditures will apply against the overall statutory liability of the discharger. To this extent, the Act represents a great improvement over the ambiguous and inconsistent removal obligations existing under the former law.

While the Act clarifies the limits applicable to removal costs, it is doubtful whether it effectively resolves the confusion and inefficiency associated with oil spill removal operations. Whether the responsible party or the federal government undertakes the clean-up, the new removal provisions add to an already complicated chain of uncoor-

<sup>80</sup>Rowland, *Testimony on Oil Spill Liability and Compensation Legislation and Oil Response and Clean-up*, before the Subcommittee on Water Resources of the House Committee on Public Works and Transportation, June 28, 1989.

<sup>81</sup>United States v. Dixie Carriers, Inc., 736 F.2d 180 (5th Cir. 1984); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 1979 AMC 1187 (4th Cir. 1979).

<sup>82</sup>OPA, § 1012(a).

<sup>83</sup>Id., §§ 1003(c)(2) and (3); 1004(c)(2)(B) and (C); 4201(a) and 4301(b).

<sup>84</sup>See discussion *supra*.

<sup>85</sup>OPA, § 1004(a).

dated command. The new statutory guidelines for removal activities under the National Contingency Plan require coordination among a large number of parties, including a national response unit, the on-the-scene coordinator, Coast Guard District Response Groups, area committee representatives, and state officials.<sup>86</sup> Vessel and facility plans must be coordinated with area plans which, in turn, must be in harmony with the National Contingency Plan.<sup>87</sup> In this unyielding hodgepodge of plans and personnel, the responsible party is statutorily obligated to render all "reasonable" assistance and cooperation requested by any "responsible" official.<sup>88</sup> The resultant prospect for duplicative, unnecessary or ineffective effort or expense becomes almost inevitable.

Rather than simplify and streamline the removal process by placing responsibility in a single agency, the Act exacerbates the already convoluted removal process. The kibitzing and finger-pointing which so drastically impeded the Alaskan clean-up effort will almost necessarily be compounded under any oil spill removal program in the future. In this respect, the Act appears to fall dramatically short of furnishing an improved removal process.

#### D. Relationship with Other Laws

The most glaring deficiency of the Oil Pollution Act is its failure to promote a uniform national and international approach through its relationship with domestic and international laws. As noted above, the Act makes marked strides in unifying under a single statute the various federal provisions dealing with oil spills. While such a program could serve to simplify the legal system associated with compensation of oil spill claims, the Act fails to achieve this objective, in not preventing duplicative and inconsistent state laws and remedies under the general maritime law and the common law. In effect, the Act replaces the former patchwork of inconsistent federal programs with a new hodgepodge—one federal statute overlapping numerous state provisions and general maritime law and common law remedies.<sup>89</sup>

<sup>86</sup>Id., § 4202.

<sup>87</sup>Id., §§ 4201(a) and 4202(a); FWPCA, § 311(c)(3)(d) and (j) (U.S.C. § 1321(c)(3)(d) and (j)). See also *Water Pollution*, Vol. 19, No. 50, *Env't. Rep.* at 2697.

<sup>88</sup>See *James*, *supra* note 4, at 6, 7.

<sup>89</sup>The potential for duplication and confusion abounds as state laws and regulations proliferate. The joint House and Senate Conference Report does confirm that the Act preserves federal preemption of those areas within federal regulatory authority. *Conference Report on*

Furthermore, the Act does not implement the international regime of the 1984 Protocols to the Civil Liability and Fund Conventions. If the international program had been implemented, crude oil tanker spills would have been covered by initial shipowner liability up to approximately \$78 million, supplemented by compensation from the international fund in amounts up to \$260 million.<sup>90</sup> In the event of a catastrophic spill with losses beyond these limits, the domestic fund would have been available, but only after compensation under the international fund had been exceeded. Thus, implementation of the Protocols would have provided access to a multimillion dollar international fund, financed by mandatory oil company contributions. In failing to tie the provisions of the Act to the fund, as it could have done, Congress effectively relieved the petroleum interests of substantial financial obligations.

In the final legislative compromise, concern over issues such as states' rights and discharger liability limits swayed an emotional Congress to abandon the long-pursued goal of a uniform national and international program for oil spills.<sup>91</sup> In the balance, Congress may have severely compromised America's position with respect to future international safety and environmental conventions.<sup>92</sup>

#### E. Claims Process

The procedure scheduled under the Act attempts to expedite claims compensation in a fashion similar to that of the international convention. The Act streamlines the process by channeling claims initially against the responsible party and subsequently against the domestic fund. However, each claimant must then elect whether to pursue additional or alternative state, common law or maritime claims. If the claimant pursues any claims under any theory, those claims must be adjudicated to a conclusion before the claimant can obtain approval and ultimate compensation of the claim from the domestic fund. As a result of the failure to preempt other inconsistent liability laws, the

claims process will necessarily become mired in a transactional and litigation mess.<sup>93</sup>

The claims process is further stymied by the failure of the Act to designate a single forum for resolution of claims. The Act thus perpetuates the redundant process of identical claims for pollution loss and damage being adjudicated in multiple federal and state courts. The transactional costs and delay of such an unstructured program are exacerbated when no single forum has jurisdiction to oversee all claims and supervise consolidated pleading, discovery, motion and trial practice.

The net effect of the failure of the Act to preempt inconsistent liability laws and implement the international scheme may well perpetuate the litigation delays and transactional costs inherent in the typical adjudication of complex pollution incidents.

#### CONCLUSION

The Oil Pollution Act of 1990 culminates a 15-year struggle to enact comprehensive oil spill liability legislation. Spurred by public opinion in the wake of the *Exxon Valdez* spill, longstanding disagreement vanished as Congress unanimously approved this new law. In its rush to enact responsive legislation, Congress may have unwittingly compromised its original goal—to provide a simple, uniform program to ensure prompt compensation for oil pollution damages.

H. R. 1463 § 1018, p. 122; see *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). Nonetheless, many states have rushed to enact their own oil spill legislation, see, e.g., Md. H. B. No. 392 (Apr. 24, 1990), or to propose their own regulations. See Cal. S. B. 2040 (Sept. 22, 1990); Fla. H. B. 517 (June 22, 1990); Fla. S. B. 1068 (June 11, 1990).

<sup>90</sup>See note 17, *supra*.

<sup>91</sup>Implementation of the Fund Convention, which requires contributions from worldwide oil receiving interests, would have effected a sharing of removal costs and pollution damages among the international community, up to the international limits.

<sup>92</sup>*Jacobsen & Yellen*, *supra* note 13, at 487, 488; *Temple, Barker & Sloane*, *supra* note 17, at VII-4.

<sup>93</sup>In contrast to the *Amoco Cadiz* litigation, claims under the international fund are handled more expeditiously. For example, payments in settlement of claims arising out of the 1980 *Tanio* spill in France, which was the most complicated and expensive incident handled by the international fund to date, were completed by 1985, with the great majority being made in the first four years. See *Information and Approval of Settlement of Claims (Tanio Incident)*, International Oil Pollution Compensation Fund (September 20, 1988).

## V. CONCLUSION

The Louisiana Children's Code Committee's proposed statutory reforms<sup>282</sup> represent a practical, thorough and balanced approach to expanding putative fathers' constitutional rights. A putative father must show some interest in his illegitimate child to merit protection of his paternal rights. The proposed reforms would remove the barriers that currently prevent a putative father from blocking the adoption of his illegitimate child, while requiring affirmative steps on his part to establish a relationship with his child.

Additionally, the proposed reforms utilize the putative father registry, a statutory vehicle already in place in Louisiana, which has the potential to be a valuable tool to putative fathers who want to establish a relationship with their illegitimate children. Ideally, states could establish putative father registries that could allow cross referencing to prevent a natural mother from confounding the system by surrendering her baby for adoption in a neighboring state.

Although the proposed statutory reforms may slow down adoptive proceedings, as the Supreme Court noted in *Stanley v. Illinois*,<sup>283</sup> "the Constitution recognizes higher values than speed and efficiency."<sup>284</sup>

Elizabeth M. McCarron

282. The Louisiana Children's Code Committee has proposed many reforms to both the private and agency adoption statutes. This Comment has highlighted only those pertinent to putative fathers' rights.

283. 405 U.S. 645 (U.S.).

284. *Id.* at 656-57.

THE DIRECT ACTION STATUTE AND OCEAN MARINE  
INSURANCE: CAN PROTECTION AND INDEMNITY INSURERS  
CONVINCE THE COURTS "TO MANACLE AN OLD AND  
BEATEN ENEMY?"

Direct action statutes generally give an injured person the unique right to name a tortfeasor's insurer as a direct defendant in an action based on an insured's tortious conduct.<sup>1</sup> Louisiana's Insurance Code contains such a statute.<sup>2</sup> The provisions of the Louisiana Insurance Code are limited, however, to "insurance other than ocean marine and foreign trade insurances. . . ."<sup>3</sup> Despite the specific exclusion of ocean marine insurance from the provisions of the Insurance Code, federal courts, applying Louisiana's direct action statute, have upheld tort claims against ocean marine insurers.<sup>4</sup> Recently, however, the Louisiana Supreme Court refused to apply another provision of the Insurance Code to ocean marine insurers in light of the ocean marine exclusion.<sup>5</sup> This Comment will attempt to reconcile the Louisiana Supreme Court's latest proclamation on the ocean marine exclusion with the federal jurisprudence that holds that the direct action statute applies to ocean marine insurance. Specifically, the Comment will examine whether ocean marine insurers are exempt from direct action in the wake of the recent Louisiana decisions.

1. As a general rule, the common law bars a direct action by the claimant against the insurer because of an absence of privity of contract between them. Therefore, for the right of direct action to exist, a statute or a provision in the policy itself must prescribe the right to direct action against the insurer. G. COUCH, COUCH ON INSURANCE § 45:785 (2d ed. 1981).

Few states have adopted direct action statutes. These include: Louisiana, LA. REV. STAT. ANN. § 22:655 (West 1978 & Supp. 1991); Rhode Island, R.I. GEN. LAWS § 27-7-1, 27-7-2 (1989 & Supp. 1990); Wisconsin, WIS. STAT. ANN. § 632.24 (West 1980 & Supp. 1990); and Guam, GUAM GOV'T CODE § 43354 (1970).

2. The text of the statute provides in pertinent part:

B.(1) The injured person or his or her survivors or heirs . . . 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, . . .

LA. REV. STAT. ANN. § 22:655(B)(1) (West 1978 & Supp. 1991).

3. *Id.* § 22:611 (emphasis added).

4. Johnson, *The Louisiana Direct Action Statute*, 43 LA. L. REV. 1455, 1528 (1983); see *infra* notes 25-76 and accompanying text.

5. See *infra* notes 78-129 and accompanying text.

## THE DIRECT ACTION STATUTE

The concept of direct action arose in Louisiana in 1918 when the legislature passed an act<sup>6</sup> to combat insurance companies who were escaping liability through "no action" clauses.<sup>7</sup> Under "no action" clauses, insurers were not liable to an insured unless he had actually sustained loss through payment of a judgment to a person, based upon legal liability.<sup>8</sup> If the insured had never paid a judgment because he was insolvent or had declared bankruptcy, under a "no action" clause, he suffered no "loss" and the insurer was not liable for payment to the insured or to the injured party.<sup>9</sup> This inequitable result aroused public policy considerations because the fund created by the payment of premiums for the coverage was not being used.<sup>10</sup> The 1918 act provided that the insolvency or bankruptcy of the insured would not release the insurer from liability, but would give the injured party a right of direct action against the insurance company "within the terms and limits of the policy."<sup>11</sup>

In 1956, the legislature expressed the legislative intent behind the statute.<sup>12</sup> In an amendment, the legislature proclaimed that the purpose of the direct action statute was to give protection and coverage to "all insureds, whether they are named insureds or additional insureds under the omnibus clause, for any legal liability said insured may have as or for a tort-feasor within . . . the terms and limits of said policy."<sup>13</sup> One commentator<sup>14</sup> on the direct action statute has observed that this amendment was probably a codification of the view expressed in *Lewis v. Manufacturers Casualty Insurance Co.*<sup>15</sup> In *Lewis*, the court, commenting on the direct action statute, noted that "[t]he public policy of this State, announced time and again, is that an insurance policy against liability to the public is not issued primarily for the protection of the

insured, but for the protection of the general public."<sup>16</sup> Thus, by requiring that all insureds are entitled to insurance coverage under the terms of their policy, the direct action statute ensures that any victim of the insured's tortious conduct (i.e., the public at large) will have access to policy proceeds, even if the insured tortfeasor is judgment proof.

In short, the direct action statute allows an injured person (or his or her heirs) to sue an insurer without first obtaining a judgment against the insured. Specifically, the statute prohibits the insolvency or bankruptcy of the insured from releasing the insurer from the payment of damages.<sup>17</sup> All that is required to prove that an insured is insolvent is a judgment against the insured tortfeasor which has become executory.<sup>18</sup> For the statute to apply, the policy sued on need not have been written or delivered in Louisiana, provided the accident or injury occurred in Louisiana.<sup>19</sup>

Under the terms of the statute, a plaintiff has the option of suing the insurer alone, or the insured and the insurer jointly and in solido, with exceptions for circumstances where only the insurer may be sued.<sup>20</sup> The plaintiff's right of direct action, however, is limited to the terms and limits of the policy.<sup>21</sup> Moreover, the insurer remains entitled to any lawful defenses available under the terms of the policy.<sup>22</sup> Lastly, the statute sets forth the legislative intent that all liability policies are executed for the benefit of all injured persons and their survivors or heirs to whom the insured is liable, and that the purpose of all liability policies is to give protection and coverage to all insureds whether they are named insureds or additional insureds.<sup>23</sup> A review of the statute's legislative history reveals that the legislature has never seen fit to address the Insurance Code's ocean marine exclusion, leaving interpretation of the exclusion to the courts.<sup>24</sup>

6. Act approved July 11, 1918, No. 108, 1918 La. Acts 253.

7. Johnson, *supra* note 4, at 1457.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Act approved July 12, 1956, No. 946, 1956 La. Acts 475.

13. *Id.* Omnibus clauses provide coverage to persons who use a named insured's automobile with the permission of the insured. 15 W. MCKENZIE AND H. JOHNSON, LOUISIANA CIVIL LAW TREATISE, INSURANCE LAW AND PRACTICE § 50 (1986).

14. Johnson, *supra* note 4, at 1465.

15. 107 F. Supp. 465 (W.D. La. 1952).

16. *Id.* at 471.

17. LA. REV. STAT. ANN. § 22:655(A) (West 1978 & Supp. 1991).

18. *Id.*

19. *Id.* § 22:655 (B)(2).

20. *Id.* § 22:655 (B)(1).

21. *Id.*

22. *Id.* § 22:655 (C).

23. *Id.* § 22:655 (D).

24. Ocean marine insurance was not defined in the Insurance Code when the legislature adopted the ocean marine exclusion. See *supra* note 3 and accompanying text. In 1989, the legislature defined ocean marine insurance for the purposes of the Louisiana Insurance Guaranty Association law as follows:

### ANALYSIS OF CASES INTERPRETING THE OCEAN MARINE EXCLUSION

The first court to address the applicability of Louisiana's direct action statute to ocean marine insurance was the United States District Court for the Eastern District of Louisiana in *Maryland Casualty Co. v. Cushing*.<sup>25</sup> In *Cushing*, the ocean marine exclusion issue arose after the JANE SMITH, a towboat, collided with a concrete pier and capsized in the Atchafalaya River.<sup>26</sup> Five seamen drowned in the collision. The owner and charterer of the JANE SMITH successfully petitioned the court to limit their liability under the provisions of the federal Limited Liability Act.<sup>27</sup> The Limited Liability Act allows the owner of a vessel, and its charterer, to limit their liability to the value of the owner's interest in the vessel and her freight when loss, damage, or injury occurs without the owner's privity or knowledge.<sup>28</sup> When a petition to

<sup>25</sup> "Ocean marine insurance" includes marine insurance as defined in R.S. 22:6(13), except for inland marine, as well as any other form of insurance, regardless of the name, label or marketing designation of the insurance policy, which insures against maritime perils or risks, which are usually insured against by traditional marine insurances such as hull and machinery, marine builders' risks . . . and marine protection and indemnity. Such perils and risks insured against include without limitation loss, damage or expense or legal liability of the insured for loss, damage, or expense arising out of or incident to ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss or damage to the property of the insured or another person.

LA REV. STAT. ANN. § 22:1379(9) (West 1978 & Supp. 1991). See *infra* notes 93-97 and accompanying text. In *Backhus v. Transit Casualty Co.*, the Louisiana Supreme Court defined ocean marine insurance as including protection and indemnity insurance. See *supra* note 109-110 and accompanying text.

<sup>26</sup> 99 F. Supp. 681 (E.D. La. 1951), *rev'd*, 198 F.2d 536 (5th Cir. 1952), *reh'g den.* 198 F.2d 1021, *vacated on other grounds*, 347 U.S. 409 (1954).

<sup>27</sup> *Cushing*, 99 F. Supp. at 682.

<sup>28</sup> *Id.* at 682-83 (citing 46 U.S.C. § 183).

28. The Limitation of Liability Act provides in part:

(a) The liability of the owner of any vessel, whether American or foreign . . . for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. § 183 (1988).

The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of [this chapter] relating to the limitation of the liability of the owners of vessels. . . .

46 U.S.C. § 186 (1988).

limit liability has been granted, suit against the vessel owner or charterer is precluded in any other action.<sup>29</sup> Nevertheless, in *Cushing*, the representatives of the drowned seamen sued the insurers of the vessel owner and charterer in a second action pursuant to the direct action statute.

The district court announced two principal reasons for dismissing the plaintiffs' direct action against the insurers.<sup>30</sup> First, the court noted that the insurance policies in question were protection and indemnity policies which protected the owner and charterer of the vessel against liability for personal injury and accidental death occurring on the vessel.<sup>31</sup> To determine whether the direct action statute applied to protection and indemnity insurance, the district court noted that the Louisiana Insurance Code defines and classifies the various types of insurance covered by the Code.<sup>32</sup> The court further observed that the Code draws a distinction between liability insurance<sup>33</sup> and marine and transportation (inland marine) insurance.<sup>34</sup> The court pointed out that the direct action statute is

29. The Supplemental Rules of Federal Civil Procedure for Certain Admiralty and Maritime Claims provide:

Upon compliance by the owner with the requirement of . . . this rule all claims and proceedings against the owner or his property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or his property with respect to any claim subject to limitation in the action.

SUPP. FED. R. CIV. P. F(3).

30. *Cushing*, 99 F. Supp. at 682.

31. *Id.* at 682-83. Protection and indemnity insurance originated in England and America in the 1840s and 1850s to cover vessel owner's collision liabilities arising out of negligence. See A. PARKS, *THE LAW & PRACTICE OF MARINE INSURANCE AND AVERAGE* § 843 (1987). Prior to that time, standard hull policies traditionally covered the property aspect of marine insurance. As passenger services expanded and the field of tort law grew, a need for liability insurance developed. Protection and indemnity insurance was developed in response to this need. Today, the standard protection and indemnity policy covers many different risks, including excess collision damages, loss of life or injury to any person not covered under a state or federal compensation scheme, damages caused by vessels to docks and similar structures, pollution liabilities, and the expenses of investigation and defense.

32. *Cushing*, 99 F. Supp. at 683.

33. Section 6, subsection 4 provides:

Liability. Insurance against the liability of the insured for the death, injury or disability of an employee or other person, and insurance against the liability of the insured for damage to or destruction of another person's property.

LA REV. STAT. ANN. § 22:6(4) (West 1950), cited in *Cushing*, 99 F. Supp. at 683.

34. Section 6, subsection 13(e) provides:

"Marine protection and indemnity insurance," meaning insurance against, or against legal liability of the insured for, loss, damage, or expense incident to ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured

entitled "[l]iability policy . . . direct action against insurer" and relates solely to liability insurance as the Code defines it, but that the policies in question were policies of marine insurance, as defined under marine and transportation (inland marine) insurance.<sup>35</sup> The court reasoned that "[t]he legislature when it used the term 'liability insurance' in [the direct action statute] obviously intended to limit the application of that section to liability insurance. If [the legislature had] . . . intended [the direct action statute] to be applicable to marine insurance[,] it would have said so."<sup>36</sup> The court rejected the plaintiffs' argument that the term "liability insurance" used in the direct action statute is broader than the definition of liability insurance set forth in the Code.<sup>37</sup> The court found the argument to be unsupported by the basic principles of statutory construction. According to the court, "What purpose would there be in defining the types of insurance covered by the code if the very definitions given in the code are to be ignored by the code itself?"<sup>38</sup>

The court's second and "more fundamental reason" for dismissing the direct action suit against the insurers was that the representatives of the drowned seamen had duplicated their claims against the shipowner and charterer because the plaintiffs had already filed claims for their injuries in the limitation of liability proceedings.<sup>39</sup> The court explained that if the plaintiffs received payment for their claims in the limitation proceeding, then the shipowner would have a right of reimbursement from his underwriters pursuant to his policy. If, however, the plaintiffs' direct action against the shipowner's underwriters were to proceed, and the underwriters paid the plaintiffs for their claims, the shipowner might be deprived of his right to indemnification from the underwriters.<sup>40</sup> In other words, if the underwriters' exposure on the policies was depleted in paying the seamen's claims, then the shipowner's right to be reimbursed by his underwriters would be extinguished.<sup>41</sup> The court also explained that "[t]he effect . . . of

for personal injury, illness or death or for loss of or damage to the property of another person.

*Id.* § 22-6 (13)(e), cited in *Cushing*, 99 F. Supp. at 683.

35. *Cushing*, 99 F. Supp. at 683.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 683-84.

40. *Id.*

41. *Id.* at 684.

allowing these plaintiffs to proceed directly against the shipowner's insurers would be to force the owner to turn his insurance into the limitation proceeding as part of 'the interest of such owner in such vessel.' This the owner is not required to do."<sup>42</sup> After discussing the purpose of the limitation of the liability statute and its origin,<sup>43</sup> the court held that

[t]o give effect to the direct action statute . . . by allowing these plaintiffs to proceed directly against the shipowner's insurers 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 the Limitation of Liability Act] in a field already covered by that Act.<sup>44</sup>

The court of appeals reversed, holding that the district court read the direct action statute too restrictively, and that the statute was nothing more than a permissible regulation of insurance authorized by the McCarran Act.<sup>45</sup> Moreover, the court concluded that permitting direct action would "not defeat the purpose of the federal limitation of liability statute, nor [would] it interfere with

42. *Id.* (quoting *City of Norwich v. Norwich & N.Y. Trans. Co.*, 118 U.S. 468 (1886)).

43. The court set forth that the purpose of the limitation of liability statute is to encourage the investment of capital in shipping and in ships in general. In adopting the Limitation of Liability Act, Congress embraced an essential difference between the limitation of liability statutes of the continental countries and that of England. In the continental countries, the amount surrendered in limitation was the value of the owner's interest *after* the collision, whereas in England, the amount surrendered was the value of the owner's interest *before* the accident. Under the continental statutes the shipowner could surrender the vessel in the condition in which it was *after* the accident, then claim his insurance and reimburse himself for any losses caused by the accident and incurred from the limitation. In contrast, the English law required the shipowner to include his insurance in the limitation proceeding. To encourage capital to come into the merchant marine and to provide for losses resulting from the perils of the sea, Congress adopted the continental view, thereby providing the shipowner with a method of not only limiting his liability, but also of protecting himself with insurance. *Id.*

44. *Id.* at 684.

45. *Cushing*, 198 F.2d at 539 (citing 15 U.S.C. § 1011, 1012). The McCarran Act provides in pertinent part:

Congress declares that the continued regulation . . . by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation . . . of such business by the several States.

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1011-1012 (1988).

the harmony or uniformity of admiralty law in its international or interstate relations."<sup>46</sup>

On writ of certiorari, the United States Supreme Court, did not consider the lower courts' assessment of whether the direct action statute applied to marine insurance in light of Louisiana's Insurance Code ocean marine exclusion.<sup>47</sup> Instead, the Court focused solely on whether applying the statute would violate the "Jones Act, the Limited Liability Act and the constitutional grant to the federal government of exclusive jurisdiction in maritime matters."<sup>48</sup> The Supreme Court was split by a 4-1-4 vote and ultimately succeeded in merely ensuring

that . . . [direct actions] do not interfere with the Federal Limitation proceeding. To do this we need only require that the limitation proceeding be concluded first and the owner's liability settled under it. The petitioners could then discharge this liability, to the extent that their policies covered it, by paying into the limitation proceeding the proper sum. The door would then be left open for prosecution of direct actions against the insurance companies on the remaining coverage of the policies. Thus, whatever the insurers' liability may be under Louisiana law in the subsequent direct actions, the [vessel] owner's purse cannot be touched.<sup>49</sup>

In sum, the *Cushing* decision merely established the procedural requisite that limitation proceedings precede direct actions against the vessel owner's insurer, and did not directly address the Louisiana Insurance Code's ocean marine exclusion.

In *Lovless v. Employers' Liability Assurance Corp.*,<sup>50</sup> the Fifth Circuit again addressed the direct action statute's interference with maritime jurisdiction. In *Lovless*, the plaintiff was injured aboard a tug delivering clam shells in the New Orleans New Basin Canal.<sup>51</sup> The policy sued on was a "standard workmen's

compensation and employers' liability policy" with a maritime endorsement.<sup>52</sup> The insurance company moved for summary judgment, arguing that the direct action statute could not constitutionally apply to marine insurance because it would infringe on the exclusive maritime jurisdiction of federal courts.<sup>53</sup>

The district court granted the insurer's motion for summary judgment, but the Fifth Circuit reversed. Without elaborating, the court distinguished the *Cushing* decision, on the grounds that, in *Cushing*, the vessel owner had petitioned for limitation of liability; whereas in this case, limitation of liability had not been invoked.<sup>54</sup> The *Lovless* court held that a plaintiff could sue jointly a vessel owner and its liability underwriter pursuant to the direct action statute where limitation proceedings had not been initiated.<sup>55</sup> Accordingly, the *Lovless* decision provided authority for the proposition that where limitation of liability was not involved, an injured party had a right of direct action against an insurer even if the policy covered maritime risks. With limitation of liability not at issue, however, the *Lovless* court had the opportunity to address directly whether the ocean marine exclusion precluded applying the direct action statute to marine insurance. The court elected instead to continue to view the issue as whether the direct action statute interfered with maritime jurisdiction.<sup>56</sup>

Not until 1965, did a court directly address the ocean marine exclusion in the Insurance Code. In *Coleman v. Jahncke Services, Inc.*,<sup>57</sup> the plaintiff was injured when a barge in the tow of a Jahncke tug, THE CLARIBEL, hit a support piling of the Lake Pontchartrain Causeway, causing two spans of the causeway to collapse.<sup>58</sup> Additionally, a Winn-Dixie trailer-truck, which was crossing the causeway at the point of collision, was damaged and lost some of its freight.<sup>59</sup> The owner and operator of the causeway, the Greater New Orleans Expressway Commission, filed an in rem action against THE CLARIBEL, and an in personam action

46. *Cushing*, 198 F.2d at 539.

47. *Cushing*, 347 U.S. at 412.

48. *Id.*

49. *Id.* at 425 (Clark, J., concurring).

50. 218 F.2d 714 (5th Cir. 1955).

51. *Id.* at 715.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. 341 F.2d 956 (5th Cir. 1965), cert. denied, 382 U.S. 974 (1966).

58. *Id.* at 957.

59. *Id.*

against the vessel's owner, Jahncke.<sup>60</sup> Both the Expressway Commission and Winn-Dixie sued Home Insurance Company under the direct action statute seeking coverage under a hull policy issued to Jahncke, which insured Jahncke and THE CLARIBEL against liability for personal injury or property damage caused by THE CLARIBEL.<sup>61</sup>

The district court attributed THE CLARIBEL'S unseaworthiness to Jahncke, thereby precluding application of the Limited Liability Act.<sup>62</sup> Thus, the court's focus was not on whether the application of the direct action statute interfered with exclusive federal jurisdiction,<sup>63</sup> but whether Jahncke's policy, because it was marine in nature, was "excluded by statute from the application of the Louisiana Insurance Code, and hence from direct action."<sup>64</sup> The court succinctly rejected the insurer's argument that it could not be subject to the direct action statute because of the ocean marine exclusion, stating:

The direct action statute, by its terms, applies to every 'policy or contract of liability insurance.' Though historically no love has been lost between the direct action statute and the Fifth Circuit, we resist the temptation to manacle an old and now beaten enemy. 'There is no indication in [the direct action statute] that the Louisiana legislature intended to deny the right of direct action to persons covered by marine policies, while extending it to all others.'<sup>65</sup>

60. *Id.*

61. *Id.* at 960.

62. *Id.* at 958. Under the terms of the Limitation of Liability Act a vessel owner cannot limit his liability if he has privity or knowledge of the damage that the vessel causes. See *supra* note 28. A vessel owner may be attributed with privity of the conditions that led to the unseaworthiness if, for example, he neglects to take adequate precautions after a faulty condition has been revealed to him. See 3 BENEDICT ON ADMIRALTY § 42 (7th ed. 1990).

63. The *Coleman* court expressed dissatisfaction over the *Cushing* holding, and stated: "Because of the Court's extraordinary division, it is impossible to say what the *Cushing* case stands for, beyond the fact that it presumably established a procedure to be followed by lower courts in handling similar cases until the Supreme Court further clarifies the issues." *Id.* at 960, quoting G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY*, § 715 (2d ed. 1975).

The *Coleman* court explained that the *Cushing* court was sharply divided with four justices maintaining that the direct action statute was repugnant to the policies of the Limitation Act, and not to be allowed where limitation was at issue, with another four proposing that the statute did not conflict with the limitation proceeding, and the remaining member thinking that the direct action should be stayed until conclusion of the limitation proceeding so that the shipowner's proceeds would not be exhausted before limitation. To break the deadlock the first four acquiesced in that solution. *Id.*

64. *Id.*

65. *Id.* (quoting *Cushing*, 198 F.2d at 538).

Thus, the court's rationale was that as long as a policy of insurance is a liability policy, the insurer is subject to the direct action statute.

The Fifth Circuit followed the *Coleman* court's reasoning in *Olympic Towing Corp. v. Nebel Towing Co.*<sup>66</sup> The action in *Nebel Towing* arose after the plaintiff's vessel, the M/V CARINTHIA, sank as a result of the alleged improper operation of Nebel Towing's vessel, the M/V G-H.<sup>67</sup> Nebel Towing successfully petitioned the court to limit its liability under the Limitation of Liability Act.<sup>68</sup> Nebel Towing's insurer was unsuccessful, however, in convincing the lower court that the limitation of liability defense was available to it under the Louisiana direct action statute.<sup>69</sup> On appeal, Nebel Towing's insurer contended that Louisiana's direct action statute did not apply to marine insurance policies, and that the protection and indemnity policy involved fell within the Insurance Code's ocean marine exclusion.<sup>70</sup>

In analyzing the insurer's argument, the appellate court relied on the *Coleman v. Jahncke Services* decision.<sup>71</sup> The court, quoting *Coleman*, stated:

The direct action statute, by its terms, applies to every 'policy or contract of liability insurance.' . . . There is no indication in . . . [the direct action statute] that the Louisiana legislature intended to deny the right of direct action to persons covered by marine policies by extending it to all others.<sup>72</sup>

This language, according to the court, conclusively determined that the direct action statute applied to ocean marine insurance "until the Louisiana courts decide the matter differently."<sup>73</sup>

The court also rejected the insurer's argument that because the policy at issue was a protection and indemnity policy, it was not subject to Louisiana's public policy which was that "liability insurance—including purported indemnity insurance—is issued

66. 419 F.2d 230 (5th Cir. 1969), cert. denied, 397 U.S. 989 (1970), overruled on other grounds, *Crown Zellerbach Corp. v. Ingram Indus. Inc.*, 783 F.2d 1296 (5th Cir.), cert. denied, 479 U.S. 821 (1986).

67. 419 F.2d at 232.

68. *Id.*

69. *Id.*

70. *Id.* at 236.

71. 341 F.2d 956.

72. *Nebel Towing*, 419 F.2d at 236 (quoting *Coleman*, 341 F.2d at 960-61).

73. *Id.* at 236.

primarily for the protection of the public rather than the insured.<sup>74</sup> Lastly, the insurers argued that because language in their policy required that the insured be held legally liable before the insurer would owe indemnity, the direct action statute would not apply.<sup>75</sup> In response, the court simply stated that the language relied on did not preclude a direct action.<sup>76</sup>

In sum, federal courts have not specifically addressed the ocean marine exclusion when applying Louisiana's direct action statute to marine insurers. With the exception of the district court in *Cushing*, federal courts have not distinguished between the definitions that the Insurance Code provides for liability and marine insurance.<sup>77</sup> Instead, these courts have focused on the legislatively expressed intent that all policies of insurance, because they are issued for the good of the public, are subject to direct action. In two recent decisions, however, the Louisiana Supreme Court has looked past the policy considerations that the federal courts have underscored and focused instead on the contrasting definitions of liability insurance and marine insurance in applying the Insurance Code provisions to ocean marine insurance.

#### THE LOUISIANA SUPREME COURT INTERPRETS THE OCEAN MARINE EXCLUSION

In *Deshotels v. SHRM Catering Services, Inc.*,<sup>78</sup> the Louisiana Supreme Court proclaimed that the statutes which comprise the Insurance Code do not apply to ocean marine insurance.<sup>79</sup> In *Deshotels*, Joseph Deshotels was injured while working on a jack-up rig operating in the Gulf of Mexico.<sup>80</sup> Deshotels became ill, necessitating that he be transferred in a personnel basket to a crew boat.<sup>81</sup> The crane operator, while lowering the personnel basket, slammed it into the crewboat's deck.<sup>82</sup> Following the accident, Deshotels

sued his employer, SHRM, and Magnum-Marine,<sup>83</sup> the company that owned the rig and employed the crane operator, in federal court for negligence under both the Jones Act<sup>84</sup> and the general maritime law.<sup>85</sup> Additionally, he sued his employer for maintenance and cure and asserted a claim against Magnum-Marine, the rig owner, for breach of its duty to maintain a seaworthy vessel.<sup>86</sup>

Deshotels's employer, SHRM, carried a standard workmen's compensation and employer's liability policy with a maritime endorsement through a Missouri insurer, Transit Casualty Company.<sup>87</sup> Subsequent to the institution of the action, Transit Casualty was declared insolvent.<sup>88</sup> Accordingly, Deshotels filed a third party demand against the Louisiana Insurance Guaranty Association (LIGA).<sup>89</sup> LIGA denied the claim, pointing to the "ocean marine" exclusion in the statute.<sup>90</sup> LIGA contended that the plaintiff was seeking to recover under maritime laws for maritime-related injuries that were risks normally and traditionally covered by ocean marine insurance.<sup>91</sup>

On these facts, the Louisiana Supreme Court characterized the issue as follows: "Does this claim for maritime-related injuries, brought on the Standard Workmen's Compensation and Employers' Liability policy with a marine endorsement, involve 'ocean marine insurance' so as to be excluded, by virtue of La. R.S. 22:1377, from the coverage of the Insurance Guaranty Association Fund?"<sup>92</sup> The court initially noted that the Louisiana Insurance Code does not define "ocean marine" insurance.<sup>93</sup> The court did, however, note that the Insurance Code does define "marine and

83. Magnum-Marine filed for bankruptcy in Texas, thus staying all proceedings against it. *Id.*

84. 46 U.S.C. § 688 (1988).

85. 538 So. 2d at 989.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* LIGA is a non-profit, unincorporated entity created by the Louisiana legislature to pay covered claims, up to statutory limits, in the event that an insurer who is a member of the association becomes insolvent. LA. REV. STAT. ANN. § 22:1380, 1376 (West 1978 & Supp. 1991).

90. 538 So. 2d at 989. The exclusion provides that "[t]his Part shall apply to all kinds of direct insurance, except life, health and accident, title, disability, mortgage guaranty, and ocean marine insurance . . . ." LA. REV. STAT. ANN. § 22:1377 (A) (West 1978) (emphasis supplied).

91. 538 So. 2d at 989.

92. *Id.* at 990.

93. *Id.*

74. *Id.* at 237 (citing *Musmeci v. American Auto. Ins. Co.*, 146 So. 2d 496, 501 (La. App. 4th Cir. 1962); *Mid-South Ins. Co. v. Lewis*, 236 F. Supp. 739, 741-42 (W.D. La. 1964), *aff'd sub nom. Jones v. Mid-South Ins. Co.*, 358 F.2d 887 (5th Cir. 1966)).

75. *Id.* at 236-37.

76. *Id.* at 237.

77. See *supra* notes 33-34 and accompanying text.

78. 538 So. 2d 988 (La. 1989).

79. *Id.* at 992.

80. *Id.* at 988.

81. *Id.* at 988-89.

82. *Id.* at 989.

transportation (inland marine) insurance"<sup>94</sup> and that the definition includes insurance against liability of the insured for personal injury.<sup>95</sup> The court then outlined the various federal court decisions that have considered the meaning of "ocean marine insurance" and its exclusion from both LIGA coverage and the application of the direct action statute.<sup>96</sup> With regard to the direct action statute, the court cited federal cases which have held that the Louisiana direct action statute applies to claims classified as maritime or admiralty, despite the "ocean marine" exclusion.<sup>97</sup> After reviewing the federal case law, the court concluded that ocean marine insurance is excluded not only from LIGA coverage, but also from the entire scope of the Insurance Code, which includes the Louisiana direct action statute.<sup>98</sup> The court devoted the remainder of the opinion to prescribing a standard for determining whether a particular policy is "ocean marine" insurance so as to fall within the ocean marine exclusion.<sup>99</sup>

To define ocean marine insurance, the court contrasted traditional marine insurance and the definition of marine protection insurance in the Insurance Code.<sup>100</sup> The court reasoned that "[i]n context, the term 'ocean marine' is used as a synonym for traditional marine insurance, that is, *property* insurance on hulls, freights and cargoes."<sup>101</sup> Relying on the decision of Judge Heebe of

94. *Id.* (quoting LA. REV. STAT. ANN. § 22:6(13)(b)(e) (West 1959)).

95. LA. REV. STAT. ANN. § 22:6(13) provides in part:

(13) Marine and transportation (inland marine) . . .

(b) Insurance against loss or damage to persons or property in connection with or appertaining to marine, inland marine, transit or transportation insurance, including liability for loss or damage to either arising out of or in connection with the construction, repair, operation, maintenance or use of the subject matter of such insurance. . . .

(e) "Marine protection and indemnity insurance," meaning insurance against, or against legal liability of the insured for, loss, damage, or expense incident to ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person.

LA. REV. STAT. ANN. § 22:6 (13)(b)(e) (West 1959).

96. *Deshotels*, 538 So. 2d at 990-91.

97. *Id.* at 991 (citing *Louless*, 218 F.2d 714 (5th Cir. 1955); *Cushing*, 99 F. Supp. 681 (E.D. La. 1951), *rev'd* 198 F.2d 536 (5th Cir. 1952), *reh'g den.* 198 F.2d 1021, *vacated on other grounds*, 347 U.S. 409 (1954); and *Coleman*, 341 F.2d 956 (5th Cir. 1965)).

98. *Id.* at 992.

99. *Id.* at 992-93.

100. *Id.* at 992.

101. *Id.* (emphasis added).

the Eastern District of Louisiana in *Blair v. Sealford, Inc.*,<sup>102</sup> the court noted that an insurance policy that includes coverage for seaman's injuries is not a policy of ocean marine insurance.<sup>103</sup> Therefore, under this distinction, if a maritime policy included coverage for personal injuries, the *Deshotels* court would not deem it to be ocean marine insurance.

Also central to the court's reasoning was its observation that the Insurance Guaranty Association statute's exclusionary language entailed an enumeration of different kinds of insurance policies, rather than different risks.<sup>104</sup> The court pointed out that the LIGA statute states that Guaranty Association Insurance coverage applies "to all kinds of direct insurance, except life, health and accident, title, disability, mortgage guaranty, and ocean marine insurance."<sup>105</sup> The court reasoned that to determine whether a policy is ocean marine, the court should look to the type of policy involved, not the risks it encompasses.<sup>106</sup> Accordingly, the court concluded that "the exclusion for ocean marine insurance does not apply to employers' liability policies which incidentally cover risks associated with maritime activities."<sup>107</sup> The court held that the personal injury claim covered by a standard workmen's compensation and employers' liability policy with a maritime endorsement was not excluded from LIGA because the policy at issue was not ocean marine insurance.<sup>108</sup>

Subsequent to the *Deshotels* decision, the Louisiana Supreme Court changed its analysis concerning what constitutes ocean marine insurance. In *Backhus v. Transit Casualty Co.*,<sup>109</sup> the court set forth that protection and indemnity insurance is ocean marine insurance even if it covers claims for personal injuries.<sup>110</sup> The plaintiff in *Backhus* sued her employer's insurer and LIGA after she allegedly slipped and fell in a puddle of oil on the deck of an ocean-going vessel.<sup>111</sup> The court found that the policy in effect at

102. No. 84-5367 (E.D. La. 1986); consolidated on appeal with *Sifers v. General Marine Catering Co.*, 897 F.2d 1288 (5th Cir. 1990). See *infra* note 123 and accompanying text.

103. *Deshotels*, 538 So. 2d at 990.

104. *Id.* at 993 (citing LA. REV. STAT. ANN. § 22:1377 (A) (West 1978)).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. 549 So. 2d 283 (La. 1989).

110. *Id.* at 289.

111. *Id.* at 284.

the time of the accident was a protection and indemnity policy which provided coverage for personal injury claims.<sup>112</sup> LIGA contended that protection and indemnity insurance, even if it provides coverage for personal injuries, is ocean marine insurance for which it did not owe coverage.<sup>113</sup>

In analyzing what constitutes ocean marine insurance, the *Backhus* court recognized, as did the *Deshotels* decision, the absence of a legislative definition for ocean marine insurance.<sup>114</sup> Unlike the *Deshotels* court, however, the *Backhus* court did not distinguish maritime insurance against loss of property (i.e. hulls, freights, cargoes) from maritime insurance that provides coverage against personal injuries. The court observed that although the Louisiana Insurance Code does not define "ocean marine insurance," it does define the closely related phrase, "marine and transportation (inland marine)" insurance.<sup>115</sup> The court then noted that among the types of insurance included within that category is "marine protection and indemnity insurance," which includes insurance "against legal liability . . . of the insured for personal injury, illness or death or for loss of or damage to the property of another person."<sup>116</sup> This definition, the court reasoned, supported the view that "protection and indemnity" insurance, even that which provides protection against liability for personal injuries, is a form of "ocean marine" insurance.<sup>117</sup>

Additionally, the court found that the Louisiana Insurance Code's definition of marine insurance corresponded with that found in several leading treatises and published articles concerning maritime insurance law.<sup>118</sup> Employing the civilian principle that "words of art and technical terms must be given their technical

112. *Id.* at 286-87.

113. *Id.*

114. *Id.* at 287.

115. *Id.* (citing LA REV. STAT. ANN. § 22:6(13) (West 1959)); see *supra* note 97 and accompanying text.

116. *Id.* at 288 (quoting LA REV. STAT. ANN. § 22:6(13)(e) (West 1959)).

117. *Id.* at 289. The court reached this conclusion notwithstanding that in *Deshotels* the court held that insurance policies with coverage for a seaman's injuries are ocean marine insurance. *Deshotels*, 538 So. 2d at 990.

118. *Backhus*, 549 So. 2d at 288. The court cited definitions from maritime treatises, such as:

Ocean marine insurance, although usually thought of in connection with oceangoing vessels and their cargoes, . . . also covers 'the liabilities of shipowners, marinas, stevedores, and others for injuries or damage to third parties.' The property insurance aspect of marine insurance comprises hull insurance and cargo insurance, while the liability insurance consists of collision liability insurance the ('running down

meaning when the law involves a technical matter,"<sup>119</sup> the court concluded that "[p]rotection and indemnity insurance is consistently treated as marine insurance within the industry."<sup>120</sup> Next, the court rejected the plaintiffs' argument that the "protection" aspect of protection and indemnity insurance was the type to which LIGA protection was intended to apply on the basis that nothing in the Louisiana Insurance Code indicated that the legislature intended to exclude from LIGA coverage "only that aspect of ocean marine insurance related to property interests."<sup>121</sup> Finally, the court noted the anomaly that now exists with regard to LIGA responsibility for maritime personal injury claims:

Under *Deshotels*, the Louisiana Insurance Guaranty Association is responsible for maintenance and cure owed by an insolvent insurer under a workers' compensation policy with a maritime endorsement, because such a policy does not constitute 'ocean marine insurance.' The [LIGA] is not responsible, however, for maintenance and cure owed by an insolvent insurer under a protection and indemnity policy, because such a policy does constitute 'ocean marine insurance.' In the absence of more specific statutory definitions or statements authorizing expansive interpretation of [LIGA] coverage in spite of statutory exclusions, we are unable to find the language of the statute susceptible of any different meaning; accordingly, resolution of this anomaly must rest with the legislature.<sup>122</sup>

*Backhus* established that a plaintiff who suffers an injury covered by a defendant insurer's protection and indemnity policy has no right of action against LIGA should the insurer be declared insolvent. This precept was acknowledged by the Fifth Circuit Court of Appeals and declared "the law of this circuit" in *Sifers v. General Marine Catering Co.*<sup>123</sup> Consequently, *Sifers* implicitly overrules the prior federal decisions which held that the direct action statute applies to ocean marine insurance.

clause'), protection and indemnity insurance, and other miscellaneous liability insurance.

*Id.* (citing 1 A. BRUNCK, V. SIMONE, & C. WILLIAMS, OCEAN MARINE INSURANCE § 1-4 (1988) (footnotes omitted)).

119. *Id.* at 289 (citing LA CIV. CODE ANN. art. 11 (West 1978 & Supp. 1989)).

120. *Id.*

121. *Id.* at 291.

122. *Id.* at 291-92 (footnote omitted).

123. 892 F.2d 386, 391, *aff'd in part, and rev'd in part on rehearing*, 897 F.2d 1288 (1990) (holding that not only is protection and indemnity insurance covering personal injury ocean marine insurance, but protection and indemnity insurance against liability for damage to the property of third persons is also ocean marine insurance).

In *Delaune v. Saint Marine Transportation Co.*,<sup>124</sup> a recently published opinion, Judge Carr of the Eastern District of Louisiana granted summary judgment in favor of underwriters who provided protection and indemnity insurance and who had been sued pursuant to the direct action statute.<sup>125</sup> Citing *Sifers* and *Backhus*, the court noted that protection and indemnity policies constitute "ocean marine" insurance within the meaning of the Louisiana Insurance Code.<sup>126</sup> The court reasoned that because the direct action statute is subject to the ocean marine exclusion, it follows that the direct action statute applies only to insurance other than marine.<sup>127</sup> Furthermore, the court acknowledged that prior cases exist in which a plaintiff sued a protection and indemnity insurer under the direct action statute.<sup>128</sup> The court determined, however, that these cases were not binding because not only did they not address the ocean marine exclusion, but they were decided prior to *Deshotels* and *Backhus*.<sup>129</sup>

### CONCLUSION

The Louisiana Insurance Code prohibits the application of its provisions to ocean marine insurance.<sup>130</sup> The Insurance Code, however, lacks a definition of what constitutes "ocean marine insurance." Without such statutory guidance, federal courts faced with resolving whether Louisiana's direct action statute applies to marine insurance have looked to public policy considerations behind the statute's enactment.<sup>131</sup> This public policy provides that all policies of insurance are issued for the good of the public, rather than the good of the insured.<sup>132</sup> Accordingly, the federal courts initially faced with the applicability of the direct action statute, virtually ignored the ocean marine exclusion and applied the direct action statute liberally to hold that an injured party does have a right of direct action against a marine insurer.<sup>133</sup> Recent Louisiana

Supreme Court decisions, however, by defining ocean marine insurance to include protection and indemnity insurance,<sup>134</sup> seemingly provide that the ocean marine exclusion precludes an injured party from having a right of direct action against a protection and indemnity insurer.<sup>135</sup> These decisions, however, do not explicitly overrule prior federal jurisprudence that cites Louisiana law declaring that the direct action statute applies to marine insurance.

First, *Deshotels v. SHRM Catering Services, Inc.*,<sup>136</sup> was the first Louisiana decision to address the ocean marine exclusion contained in the Louisiana Insurance Code. The issue before the *Deshotels* court was not whether an injured party had a right of direct action against an insurer providing ocean marine insurance, but whether LIGA provided coverage to an injured party entitled to recover from an insolvent insurer pursuant to a standard workers' compensation policy with a maritime endorsement.<sup>137</sup> Thus, the Court's statement concerning the ocean marine exclusion is dicta.

The second Louisiana decision to address the ocean marine exclusion was *Backhus v. Transit Casualty Co.*<sup>138</sup> In *Backhus*, the court could have relied on the *Deshotels* dicta to determine that the plaintiff did not have a right of direct action against the ocean marine (protection and indemnity) insurer in that case. The *Backhus* court did not do so.<sup>139</sup> Instead, the court held that protection and indemnity insurance is ocean marine insurance, and therefore, excluded from LIGA coverage.<sup>140</sup> The court's holding was based on an absence of legislative intent to protect individuals entitled to recover under protection and indemnity policies.<sup>141</sup> In contrast, the federal courts, when applying the direct action statute, have pointed to language in the statute that expresses the intent of the legislature that all liability policies are issued for the benefit of all injured persons.<sup>142</sup> Implicit in this statement of intent

124. 749 F. Supp. 1463 (E.D. La. 1990).

125. *Id.* at 1473.

126. *Id.* at 1470-71.

127. *Id.*

128. *Id.* at 1468-70.

129. *Id.* at 1471. Judge Carr gives an expansive application to the Louisiana Supreme Court's holdings in *Deshotels* and *Backhus* by finding that these holdings apply not only to LIGA issues, but to actions brought pursuant to the direct action statute as well.

130. See *supra* note 3 and accompanying text.

131. See *supra* note 65 and accompanying text.

132. *Id.*

133. See *supra* notes 25-77 and accompanying text.

134. See *supra* notes 102-115 and accompanying text.

135. In fact, one United States district court has held that the direct action statute is subject to the ocean marine exclusion and dismissed a direct action against a protection and indemnity insurer. See *supra* notes 118-122 and accompanying text.

136. See *supra* note 78.

137. See *supra* note 87 and accompanying text.

138. See *supra* note 109.

139. See *supra* notes 109-122 and accompanying text.

140. See *supra* notes 109-122 and accompanying text.

141. See *supra* note 122 and accompanying text.

142. See *supra* notes 65 and 72 and accompanying text.

is arguably a desire on the part of the legislature to protect individuals entitled to recover from any liability policy, including a protection and indemnity policy.

For the courts to conclude that LIGA does not owe coverage to a claimant who is unable to collect from an insolvent insurer under a protection and indemnity policy is an entirely different matter from deciding that a protection and indemnity insurer is not subject to direct action. If, in actions for personal injuries, protection and indemnity insurers are exempt from an injured party's right of direct action against them, while insurers providing standard workers' compensation and liability coverage with a maritime endorsement are subject to direct action, the anomaly created will arouse the same public policy concerns that led to the enactment of the direct action statute in the first place: the fund created by the payment of premiums would not be used. Moreover, arguably, the legislature has an interest in limiting the number of claims for which the fund created by LIGA provides. Strictly construing the ocean marine exclusion is consistent with this interest. In contrast, the legislature has no corresponding interest in preventing a plaintiff from suing a protection and indemnity insurer directly. Instead, by ensuring that accident victims have all avenues of recovery available to them through legislation such as the direct action statute, the legislature is able to offer protection to the public.

This author submits that until the legislature expresses its intent regarding the applicability of ocean marine insurance to the direct action statute, the loopholes created by *Deshotels* and *Backhus* remain open, and the courts should uphold a personal injury victim's right of direct action against a tortfeasor's protection and indemnity insurer.

Cheryl L. Wilson

## CASENOTES

### *MILES v. APEX MARINE CORPORATION: FROM ANOMALY TO ANOMALY IN SEAMEN'S REMEDIES*

On July 18, 1984, Ludwick Torregano, a seaman, was savagely stabbed to death by a fellow crewman, Clifford Melrose, aboard the vessel M/V ARCHON in United States and Washington state territorial waters.<sup>1</sup> Mercedel Miles, Torregano's mother and administratrix of his estate, sued the vessel's operators, charterer, and owner (collectively Apex) in the United States District Court for the Eastern District of Louisiana.<sup>2</sup> She alleged negligence under the Jones Act<sup>3</sup> for failure to prevent the assault on Torregano and further alleged "breach of the warranty of seaworthiness under general maritime law for hiring a crewman unfit to serve."<sup>4</sup>

Miles sought compensation for loss of support and services and for loss of society of her son.<sup>5</sup> She also claimed punitive damages and sought compensation to Torregano's estate for his "pain and suffering prior to his death and for his lost future income."<sup>6</sup>

The district court granted Apex's motion to strike the punitive damages claim, "ruled that the estate could not recover Torregano's lost future income, and denied Miles' motion for a directed verdict" for the Jones Act negligence and the general maritime unseaworthiness claims.<sup>7</sup>

1. *Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 320 (1990), *aff'g Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989).

2. *Id.* at 320.

3. 46 U.S.C. app. § 688 (1988).

4. *Miles*, 111 S. Ct. at 320.

5. *Id.*

6. *Id.*

7. *Id.*

# Isle shippers: Oil flow may not go

It's 'a potentially crippling problem'

By Ilene Alcahire  
Advertiser Consumer Writer

State officials have called a meeting next week of utilities, sugar plantations, shipping and oil companies to discuss what one shipping official calls "a potentially crippling statewide problem."

The problem is how to make sure that the flow of oil into the state, and the shipment of fuel oil between islands, is not interrupted as a result of new state and federal laws.

Because of these laws, shippers are facing virtually unlimited liability for accidents such as major oil spills. This means the shipping companies either

will not be able to obtain insurance, which they must have to operate, or it will be prohibitively expensive, according to officials at Hawaiian Tug and Barge, a subsidiary of Hawaiian Electric Industries.

"This is a community dilemma that touches all of us," said barge company president Charles Swanson.

In February, one of Hawaii's two refineries, Pacific Resources Inc., announced it would stop shipping fuel oil to the Neighbor Islands. Primary users of fuel oil are the state's electrical utilities and sugar plantations, which also supply power to Neighbor Island utilities as a result of burning sugar by-products.

Hawaiian Tug and Barge said it would pick up the slack, shipping oil to the plantations on a

space-available basis. But the tug and barge company, which already ships fuel oil to its sister companies — Maui Electric Co. and Hawaii Electric Light Co. — has made clear it is not eager to make a career of this.

Chevron, which operates the state's other refinery, also has some existing contracts to ship fuel oil to the Neighbor Islands, which it will honor, regional manager C.P. "Chuck" Woodland said. "The real problem is going to come up as contracts start to expire in a year or 18 months," he said.

Chevron imports crude oil and some refined products such as gasoline into the state and would be affected by the national law if something isn't done to put a limit on the liability a shipper faces, Woodland said.

However, he said he is confident this national problem will be dealt with before the rules implementing the federal law come out next year.

In the future though, Woodland said, shippers are going to increasingly be asking themselves if it is worth the risk of liability to continue to ship fuel oil, which is produced during the refining process, and is a low-profit product.

Murray Towill, director of the state Department of Business, Economic Development & Tourism, said next week's meeting will bring together "...all of the parties involved, to make sure we're dealing with the same facts, the same information, and hopefully put together a group that can pursue options and solutions (to the problems.)"

# PRI to stop interisland oil shipping

□ Industries that sell electricity depend on oil and could be hit hard

By Russ Lynch  
Star-Bulletin

Neighbor island fuel oil users are scrambling to find new ways to get supplies because of a decision by refiner Pacific Resources Inc. to stop shipments to them at the end of March.

PRI said it has no choice because it faces potentially unlimited liability for spills under new federal and state laws.

Chevron U.S.A., facing the same insurance problems, said it will continue to satisfy existing contracts but will seek no new fuel oil business on the neighbor islands.

Because alternatives may be found, there is no suggestion yet that the oil shipment problem might result in more power shutdowns or brown-outs on the other islands.

However, sugar plantations, which sell electricity to the neighbor island utilities to earn money to help compensate for low returns from sugar, could be hit hard.

"It's a big item for us, because of the contract with the utility," said Richard Cameron, president of Hawaiian Commercial and Sugar Co., which supplies power to Maui Electric Co.'s grid.

"We have this firm power contract with the utility," he said.

The sugar company, part of Alexander & Baldwin Inc., uses about 300,000 barrels of oil a

See Oil, Page A-4

Continued from Page A-1  
year, shipped by PRI to Maui.

PRI has told the company it will not ship fuel oil to Maui after the end of February, Cameron said. HC&S's contract with PRI expired at the end of December, but PRI has continued to supply oil.

"We're in the throes, thrashing around like all the other users of heavy oils on the outer islands," he said. Cameron said he does not yet know how his company will get the oil it needs.

"The risk is just too great," said Andrea Simpson, spokeswoman for PRI, which owns the Hawaiian Independent Refinery at Barbers Point.

PRI's last neighbor island supply contract runs out on March 31. Beginning April 1, it will make the oil available at the barge harbor at Barbers Point but will not carry it to sea.

Provisions of the federal Oil Pollution Act of 1990 and new state laws could lead to oil carriers having to prove that they have

unlimited liability coverage, which no insurance company is willing to sell.

"It's part of our risk management," said Colleen Jones, marketing services pricing manager at Chevron. "We are honoring existing arrangements, but we are not taking on additional business to ship by barge."

A reliable oil supply is a big concern for the sugar companies who use hundreds of thousands of barrels of oil to run generators.

The Hilo Coast Processing Co., for example, had electricity sales of about \$9 million last year, about one-third of its total revenues. "It's significant to our operation because we have to use oil

whenever the sugar operation is down," said James Andrasick, executive vice president of C. Brewer & Co., majority partner in the Big Island cooperative with a few independent growers.

"We'd really be stuck between a rock and a hard place," Andrasick said. The contract with Hawaii Electric Light Co. allows Hilo Coast Processing only four weeks' total down time each year. Bagasse is burnt a lot of the time to heat the boilers that run the generators. But at best, Hilo Coast can maintain only a two-day supply of bagasse. Oil is essential.

The company could burn coal and has done so in the past but it is much more expensive than oil.

Andrasick said. "There would be an economic penalty." Since Hilo Coast's payment for oil is based on HELCO's costs, it would not rise if Hilo Coast's costs alone went up. Hilo Coast would have to absorb the difference.

A Brewer subsidiary, Brewer Environmental Industries, already ships bulk quantities of aggregates, sand and so on to the other islands and is looking into what it might be able to do with oil, he said.

The Hawaiian Electric Industries Inc. subsidiary that hauls oil and commercial goods between the islands is also concerned about how it is going to surmount the new requirements. Kent

Whitman, vice president of operations for Hawaiian Tug & Barge and Young Brothers Ltd., said that when the final rules and regulations are drawn up, they could be prohibitive.

"When they go into effect, it might be intolerable for the operators to actually continue. You couldn't buy enough insurance," Whitman said.

PRI said that the Maui and Big Island electric utilities have made arrangements to buy fuel oil from PRI at the barge harbor and ship it themselves. Gasoline and other light fuels are not affected by PRI's decision, only the hard-to-clean-up heavy oils such as those burned to heat boilers.

2/20/92 WSJ

## Oil Pollution Act Fouls the Regulatory Waters

By CHARLES ANDERSON

While there are many examples of how over-regulation harms U.S. interests, few are as representative of the power of legislation to inflict unintended harm on the public as the Oil Pollution Act of 1990.

Today, protection and indemnity (P&I) clubs—mutual insurance organizations providing oil pollution coverage for ship-owners—are meeting in London to decide whether to continue to insure vessels transporting oil to the U.S. This is more than an academic exercise—more than half of U.S. oil is imported, 74% of that by the independent tanker owners insured by P&I clubs.

It's likely that the P&I clubs will refuse to provide coverage if the implementing regulations covering financial responsibility are adopted. Should that happen, the oil could stop flowing.

Hardly anyone expects the spigot to be shut immediately. It is more likely that an interim compromise will be reached. Yet this current impasse shows how Congress, acting in a vacuum, passes legislation that ignores economic realities and frequently ends up harming the public good the policy makers were elected to advance.

In this instance, the U.S. is attempting to regulate an industry that exists almost entirely beyond its borders. The P&I clubs are almost exclusively based outside the U.S., and nearly all the independent tankers fly foreign flags. Thus, Congress may enact laws, but the shipping industry still maintains some measure of control over where vessels will trade.

The provisions of the Oil Pollution Act

that set off the loudest alarms are those that deal with liability and financial responsibility. The act requires tank vessels of more than 3,000 gross tons (the vast majority) to provide proof of financial responsibility of \$1,200 per gross ton or \$10 million, whichever is greater. On top of that, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) requires tankers that carry hazardous substances in addition to oil to provide added proof of financial responsibility of the greater of \$5 million or \$300 per gross ton.

While these requirements are onerous, it could be reasonably argued that tough measures are required to guarantee the safety of America's waters. In fact, neither shipowners nor the P&I clubs have balked at these requirements, though insurance premiums have nearly doubled—even for fleets that are fully in compliance with the act's safety provisions, such as the regulations calling for double hulls. The Oil Pollution Act, however, goes one step further, allowing claimants to sue the underwriter directly in the U.S. for pollution clean-up costs and damages.

Claimants could include not only the federal government, but also the state government in any one of the numerous coastal states that currently have oil pollution statutes (many of which provide for unlimited liability), or a third party that claims it has been harmed by a spill.

This last highlights the true problem: It's not regulation per se that is harmful to business, but multiple layers of regulation, each administered by its own regulatory

body, all regulating the same behavior.

In effect, the P&I clubs are being asked to submit to potentially unlimited liability—from a cascade of civil and federal claimants—every time a ship calls on a U.S. port. They are understandably reluctant to do so.

On the other side of the coin, many foreign-flag tankers primarily serve the U.S. market, and their owners would almost certainly lose substantial revenues were they forced to stop calling here. Recognizing the value of this trade, most are responding positively to the Oil Pollution Act and are attempting to comply with its provisions, even though implementing regulations are still being drafted by the Coast Guard. They are constructing new double-hulled tankers and developing detailed oil-spill contingency plans and training programs for ship's personnel.

Nonetheless, the mere threat of higher liability has already resulted in an increase in freight rates of as much as 10%, according to some published estimates. These increases will ultimately mean higher consumer prices for petroleum products. Further, some ship masters and officers are reluctant to operate vessels in U.S. waters, fearful that they may be held personally or even criminally liable in the event of an accident.

Oddly enough, there is nothing in the Oil Pollution Act to encourage charterers to charter vessels from responsible operators. Cargo owners are not considered responsible parties in the event of a spill. This is counter-productive in at least two ways. First, it undermines the efforts of

responsible ship owners to modernize their vessels to meet or exceed current safety standards; second, it provides no incentive for the cargo owners to do business only with responsible shipping companies. If cargo owners can escape liability in the event of a spill, there is no incentive to charter safer, but perhaps more expensive, tankers.

A reasonable solution exists to resolve the current impasse. For example, in California a certificate of financial responsibility may be obtained by providing "other evidence of financial responsibility." This includes proof of entry in one of the associations making up the international P&I clubs, with oil pollution coverage of not less than \$500 million. California does not require the P&I club to submit to state jurisdiction. The Coast Guard has so far refused to incorporate this option into its proposed rule-making.

A multitude of overlapping laws now governs the transportation of oil to the U.S.: international conventions, most of which the U.S. has refused to ratify; the Oil Pollution Act of 1990; and state laws. Tanker owners must be prepared to respond to the sometimes contradictory demands of all three. This is an inefficient and expensive proposition that serves neither the public interest nor the needs of a nation that still needs imported oil to compete in the world marketplace.

*Mr. Anderson is a partner in a New York law firm whose practice focuses on oil pollution and environmental law.*

## Meeting to discuss ways to keep fuel oil flowing to neighbor isles

Associated Press

A meeting of state officials and leaders of island sugar plantations, oil refineries, utilities and shipping companies is planned next week to discuss the growing problem of how to ship fuel oil to the neighbor islands.

One of the state's two oil refiners, Pacific Resources Inc., says it no longer will ship fuel oil to the neighbor islands because of prohibitive insurance costs — largely because of new state and federal laws that place no cap on an oil company's liability for spills and other accidents.

Some companies won't be able

to afford insurance, some won't be able to get insurance and others will find it's not worth the money they make on the oil shipments, the companies say.

The state's other refiner, Chevron USA, says it's unsure what it will do once current shipping contracts expire over the next 18 months.

Sugar plantations and utilities are worried that they won't be able to get fuel-oil shipments in the future. All neighbor island residents would be affected, because plantations supply power to the utilities by burning sugar byproducts.

# ship some fuel oils

HONOLULU (AP) — Insurance problems have led Pacific Resources Inc. to cut off fuel oil supplies to the Neighbor Islands.

The shipment of heavy oils, such as those burned to heat boilers, will stop at the end of March, PRI said this past week. The decision does not affect shipments of gasoline and other light fuels.

PRI said it can't continue the Neighbor Island shipments of heavy oils from Oahu because of new federal and state pollution laws that could lead oil carriers to prove they have unlimited liability coverage. No insurance company is willing to sell such coverage.

Chevron U.S.A. faces the same insurance problems, but said it will continue to serve its Neighbor Island customers. However, Chevron added it will not expand its fuel oil business on the Neighbor Islands.

"It's part of our risk management," said Colleen Jones, Chevron's marketing services pricing manager. "We are honoring existing arrangements, but we are not taking on additional business to ship by barge."

The electrical utilities on Maui and Big Island will buy fuel oil at the Barbers Point barge harbor and ship it themselves, PRI said.

However, PRI's decision has left a big problem for sugar plantations that sell electricity to the utilities.

The plantations use oil to generate electricity when bagasse is not available.

Richard Cameron, president of Hawaiian Commercial and Sugar Co. on Maui, said he did not know where his company will get the oil it needs.

The Hilo Coast Processing Co. on the Big Island is also in a bind. Last year, the cooperative owned by C. Brewer & Co. and a few independent growers raised some \$9 million, about one-third of its total revenue, from electric sales.

C. Brewer executive vice president James Andrasick said the cooperative is now "stuck between a rock and hard place."

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TONY M. BISHOP, Treasurer  
EDWARD BISHOP, Chairman  
EDWARD BISHOP, Director

## Paying for Oil Spills

THE 1989 EXXON VALDEZ oil spill produced legislative and regulatory ripples that are about to wash up on yet another industry: the mutual insurance societies that cover shipowners against pollution liability risks.

Those insurers, known as protection and indemnity clubs, are fighting new potentially burdensome financial requirements in the 1990 Oil Pollution Act. Even if the clubs succeed in softening the requirements, the rules are likely to change the marine insurance landscape forever.

Detailed rules requiring vessel owners and operators to prove they can pay for the after-effects of a spill are expected soon from the Bush administration. The regulations are an expression of Congress' single-minded resolve in the wake of the Exxon Valdez fiasco: avoid the environmental nightmare of a future spill in which no responsible party can pay for the cleanup and compensate other parties for damage.

With that goal in mind, Congress virtually removed liability limits in pollution cases involving negligence, willful misconduct or violation of federal safety rules. It also required all shipowners to prove that someone stands ready to pay claims arising from a spill.

In most cases, this means vessel owners will have to obtain a certificate from their insurer in which the underwriter agrees to pay claims directly to claimants, even if a spill involved negligence. In effect, the protection and indemnity clubs are being asked to pledge their collective assets to cover the liabilities of any member involved in a spill in U.S. waters.

That requirement, referred to as direct action, strikes at the heart of the present-day insurance system. The mutual insurance societies collect premiums from their members and promise coverage, but reserve the right to deny payment if an insured member acted negligently.

To force government to remove the pay-at-all-costs requirement, or at least to soften its impact, the insurance clubs are threatening to stop providing coverage for ships that call at U.S. ports. Since they cover the oil pollution risks of 95% of the world's merchant vessels, their refusal to provide coverage would threaten to bring oil shipping to the United States to a halt.

But that's unlikely to happen. The clubs have made similar threats in the past, only to back down when other insurers agreed to provide coverage. There are reasons to believe that in this case, too, new insurance options would appear to fill gaps created by the clubs.

Oil companies and some independent tanker owners say privately they aren't likely to let oil shipping to the United States cease. If they lose their current coverage, they may form smaller, specialized mutual insurance pools that closely monitor their members' safety procedures. These new, miniature protection and indemnity clubs would guarantee payment of claims, but only up to the limits set in the law for accidents not caused by negligence. This alternative, too, may fall short of the law, but it goes further than the P&I clubs by permitting direct claims against insurers for damage caused by oil spills. This may be an acceptable compromise to the government.

Another substitute for P&I club coverage could come from the government itself, in the form of greater latitude for vessel owners to show financial responsibility and to self-insure against pollution risks. An increase in self-insurance could reduce the amount of coverage vessel owners purchase from protection and indemnity clubs.

Under either alternative - a market-based replacement for current insurance coverage or more lenient government self-insurance rules - traditional insurers can expect a harsher world under the new rules. At a minimum, they will face the unenviable choice between agreeing to open-ended guarantees of coverage and losing some of their business to new providers of pollution insurance.

## Old Enemies, New Friends

CHINA AND VIETNAM have been forging closer polit-

any. But for computers to be used most effectively, the telephone network must be able to transmit the information computers generate. The ordinary copper wires still in use in most places, and many of the electromechanical switches that route calls, can't do the job.

Fiber optics can. Made from glass and using light as the transmission medium, fiber can carry

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J. Commerce & Commercial

Spt 13, 1991

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"Believe me, you wouldn't like the ocean."

## Encouraging America

By JOHN T. BENNETT

The lackluster economic performance of the United States over the past decade compared with Japan is best explained by the difference in saving behavior in the two countries. The U.S. personal saving rate since 1981 has remained close to 4% of disposable income. The Japanese personal saving rate is twice that. Japan's generally high saving rate, including business savings, has allowed it to achieve a net investment rate of 20% of its gross national product compared with the U.S. rate of 10% of GNP.

A higher rate of savings is essential to greater investment and higher growth. But what can be done to improve the U.S. savings rate? The answer to that lies in an examination of each of the components of savings - households, business and government.

Most households save with a specific end in mind - a new car, a house, retirement, a child's education. Because the motives are so particular and diverse, much household savings behavior would seem beyond the reach of public policy.

Other individuals will save and invest for the return. They forgo present consumption for a larger future benefit. But saving for this purpose faces a startling disincentive: federal and state taxes take about 40% of investment earnings. With taxes and last year's 4.1% inflation,

a money market fund yielding 5% actually delivered a loss of 1.4% in real terms. A long-term bond yielding 10% translated to a real return of only 1.6% - a tiny yield for the risk that their value will fall if rates increase.

Studies indicate that there is no positive correlation between interest rates and household saving. Under present conditions, that is no surprise. In short, there is little or no financial incentive for an individual to save, given current tax rates and inflation.

Besides reducing inflation or tax rates, a number of measures would raise households' incentive to save. Restoring Individual Retirement Accounts defers taxes on savings, increasing their return. Reducing the capital gains tax would do the same thing and would be even more effective in raising productive investment if it were applied only to new investments. The largest incentive would come from taxing consumption and exempting savings, particularly that invested in new assets.

Several other measures could achieve a one-time increase in household savings. The most important one already has been taken - the removal of the interest deduction from the personal income tax. People are more likely now to save before they buy rather than save to pay off their consumption loans.

The tax deduction on mortgages might still be eliminated. To do so,

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## Can Soviets Leap t

By WILLIAM NEIKIRK

WASHINGTON - Consider, for a second, the ruble. This may be an unexciting subject to you after watching the recent political drama in the Soviet Union, or what's left of it. But reflection on the ruble reveals that there is more political and economic chaos ahead, and that democracy is no sure thing.

It appears that the ruble is going to be, if it isn't already, worthless. That is because Moscow is printing money recklessly to pay its soldiers, retirees and bureaucrats. It is doing so because it doesn't have enough money of its own to pay them. The budget deficit is already one-fifth of its domestic production, and could

old days, the republics collected taxes for the central government, which in turn redistributed them back into the regions after extracting money to run things in Moscow. But with the chaos in the last six months, the republics have refused to send the taxes back to the central government.

When the republics said they would send a payment to Moscow as a "voluntary contribution," the central government said if you want it that way, we won't pay any more subsidies. Fine, said the republics, we will pay the subsidies.

So, said Mr. Borzov, that leaves the central government with the huge burden of paying a military with -- useful weapons these days.

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**LEGISLATIVE HISTORY OF AMENDMENT  
TO AS 46.04.040  
PROOF OF FINANCIAL RESPONSIBILITY  
(HB 567: 1990)**

Volume I: Miscellaneous Documents Providing Information on Issue  
of Proof of Financial Responsibility Prior to  
Development of HB 567.

1. Correspondence between the Department of Law and the Transportation Institute regarding compliance of tug and tank barge operators with financial responsibility requirements under AS 46.04.040: (a) letter from Assistant Attorney General Douglas K. Mertz to William T. Lawrence, Transportation Institute, re failure of tug and tank barge operators to obtain insurance in compliance with financial responsibility requirements under AS 46.04.040 (12/30/81); (b) letter from William T. Lawrence, Transportation Institute to Andrew M. Spear, Manager of Oil Pollution Control, Alaska Department of Environmental Conservation (DEC), requesting assistance in obtaining responses to insurers' concerns regarding compliance with financial responsibility requirements under AS 46.04.040 (1/25/82); (c) memorandum from Assistant Attorney General Douglas K. Mertz to Commissioner Ernst W. Mueller, DEC, providing an Attorney General's opinion interpreting AS 46.04.040 and the enforcement policy for that statute (5/13/82); and (d) letter from Commissioner Ernst W. Mueller, DEC, to William D. Lawrence, Transportation Institute, requesting explanation as to why it is not possible for tank barge operators to obtain self-insurance, surety bonds and guarantees in compliance with AS 46.04.040 (5/21/82).
2. Group of four memoranda from Glenn Adams, Oil Pollution Control, DEC, to ADEC Staff listing: (a) the tank vessels with approved proof of financial responsibility through 6/30/90 (9/19/89); (b) the barges with approved proof of financial responsibility through 6/30/90 (11/1/89); (c) oil terminals with approved proof of financial responsibility through 6/30/89 (11/20/89); and (d) offshore and productions facilities with approved proof of financial responsibility through 6/30/89 (11/29/89).
3. "Department of Environmental Conservation, Barges in Alaska Trade," list of barges by company (sent by facsimile on 3/28/90)
4. Chart entitled "Cargo and Refined Product Vessels Sunk, Worldwide, with a Total Loss of Cargo (1979 to Present)" (undated).

5. Report by W.J. Graham, Oil Spill Liability and Compensation: A Review of and Evaluation of Alaska's Civil Penalty Scheme. University of Washington, Seattle: Institute of Marine Studies (1989). [ *See tab #5* s of obtaining a copy les at Alaska Archives.]
6. Excerpts from the entitled "Spill: Implications for S recommendations pe mission's Final Report on Valdez, Oil," listing ry 1990). *Mary*
7. Appendix G to the Alaska Oil Spill Commission's Final Report entitled "The Role of Insurance for the Preparedness and Response to Oil Spills: Liability and Compensation Issues" by the Mitigation Assistance Corporation (December 1989).
8. Article entitled "Focus on Oil Spills" by Roger Vielvoye regarding additional pollution insurance clause in contracts for voyage and time charters (undated).

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Volume II:      Correspondence and Drafts from the Department of  
Law's File No. 883-90-0183 Assigned to Assistant  
Attorney General John McDonagh re HB 567

1.    Memorandum from Shari Kochman, legislative Staff Assistant to Assistant Attorney General Arthur H. Peterson regarding opening of new file with handwritten notations by John McDonagh (2/13/90).
2.    Department of Law Drafts of HB 567, some with handwritten editorial notes (2/15/90).
3.    Memorandum from Commissioner Lennie Gorsuch, Department of Natural Resources to Denby Lloyd, Special Staff Assistant, Office of the Governor providing comments and recommended changes to oil spill bills; includes handwritten notes (2/16/90).
4.    Handwritten note on Office of the Governor letterhead listing major remaining policy questions on the oil spill legislation (2/17/90).
5.    Handwritten note to Assistant Attorney General Jeff Bush providing instructions as to procedures for making changes on bill draft and enclosing a sectional analysis of the contingency plan/financial responsibility proposed legislation (2/17/90).
6.    Department of Law Drafts of HB 567 with handwritten editorial notes (2/20/90).
7.    Memorandum from Attorney General Douglas B. Baily to Governor Steve Cowper enclosing proposed oil spill legislation implementing the Alaska Oil Spill Commission's recommendations in its Executive Summary report issued in January 1990, enclosing draft transmittal letter to the legislature and a sectional analysis for each bill (2/20/90).

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(HB 567: 1990)

Volume III:      Passage of HB 567 from Introduction to Legislature  
to Consideration by the Senate Special Committee  
on Oil and Gas

1. Summary of legislative history of HB 567.
2. Transmittal letters from Governor Steve Cowper to Speaker of the House Sam Cotten and President of the Senate Tim Kelly for HB 565, HB 566 and HB 567 (2/21/90).
3. Drafts of HB 567 from Department of Law File No. 773-90-0053 (dated February 1990).
4. "Letter of Intent for HB 567" (undated).
5. Fiscal Note for HB 567 from DEC (2/19/90); and Fiscal Note for HB 567 from Alaska Department of Fish and Game (ADF&G) (2/14/90).
6. Charts listing the existing and proposed financial responsibility requirements for non-crude barges, existing non-crude barge companies, non-crude terminals, and Barrow non-crude terminals (undated).
7. "SB 504/HB 567" summarizing contents of the 2/21/90 version of these bills (undated).
8. Memorandum from Representatives Menard and Davidson, Co-chairmen of the House Resources Committee to all teleconference sites enclosing charts of issues in HB 565 and HB 567 to be discussed at teleconference (undated).
9. Excerpts from minutes of House Resources Committee meeting held on 2/26/90 regarding HB 565, HB 566, and HB 567.
10. Letter from Walt Schlotfeldt, President of Petro Star Inc. to Representative Curt Menard voicing concerns regarding HB 567 (3/7/90).
11. Excerpts from minutes of House Resources Committee meeting held on 3/8/90 regarding HB 565, HB 566 and HB 567.
12. Comments of the Alaska Rural Electric Cooperative Association on HB 567 and SB 504 (3/8/90).
13. Excerpts from minutes of House Resources Committee meeting held on 3/9/90 regarding HB 565, HB 566 and HB 567.

14. Written testimony on HB 567 by Dave Bouker, General Manager of Nushagak Electric Cooperative (3/9/90).
15. Memorandum from Bernie Saupe, Saupe Enterprises, Inc. to House Resources Committee expressing concerns about effect of HB 567 on small fuel distributors (3/8/90).
16. Written testimony on HB 565, HB 566, and HB 567 by Riki Ott, Oil Reform Alliance (3/9/90).
17. Letter from Tim Robertson, Vice President of Oil Spill Prevention and Response, Regional Citizen Advisory Committee to Representative Curt Menard enclosing position paper on various proposed legislation, including HB 567 (3/12/90).
18. Excerpts from minutes of House Resources Committee held on 3/14/90 on HB 567.
19. Memorandum from DEC Commissioner Dennis D. Kelso to Governor Steve Cowper presenting alternatives to the provisions currently in HB 567/SB 504 on additional requirements for financial responsibility and oil spill contingency plans for non-crude oil facilities (3/16/90).
20. "Statement of Jerry A. Aspland, President, ARCO Marine, Inc., Before the Alaska House Resources Committee, House Bill 567" (3/20/90).
21. Memorandum from Ray Gillespie, Gillespie & Associates, Lobbying and Governmental Affairs, to Representatives Menard and Davidson, Co-Chairmen, House Resources Committee regarding civil penalty and financial responsibility for non-crude oil distributors (3/21/90).
22. Letter from Jim Ramaglia, Vice President, North Pacific Fuel to Representative Cliff Davidson regarding financial responsibility and penalties with respect to refined oil terminals (2/21/90).
23. Memorandum from Assistant Attorney General John A. McDonagh to DEC Deputy Commissioner Amy Kyle regarding draft language on small terminal facilities issue; amends HB 567 by adding a new section AS 42.04.065 (3/20/90).
24. Graph and charts showing fuel storage capacity of 100 Alaska rural electric utilities by the Alaska Energy Authority (3/23/90).
25. Work draft of HB 567 (Resources) with handwritten notes (3/27/90).
26. Work draft of HB 567 (Resources) (3/28/90).
27. Amendment to CSHB 567 (Resources) (3/28/90).

28. Excerpts from minutes of House Resources Committee meeting held on 3/28/90
29. Memorandum from Ray Gillespie, Gillespie & Associates, Lobbying and Governmental Affairs, to Representatives Menard and Davidson, Co-Chairmen, House Resources Committee supplementing 3/21/90 memo on civil penalty and financial responsibility for non-crude oil distributors (3/29/90).
30. Letter from Dave Hutchens, Executive Director of the Alaska Rural Electric Cooperative Association, Inc. to Representative Cliff Davidson opposing increasing the rate of financial responsibility on refined storage petroleum storage tanks from \$25 to \$35 per barrel (3/29/90).
31. Typewritten notes on CSHB 567 by R. Foster (3/29/90).
32. Draft of HB 567 (Resources) with handwritten notes (3/30/90).
33. Excerpts from the minutes of House Resources Committee meeting held on 3/30/90.
34. House Committee Report by the House Resources Committee on HB 567 (3/30/90).
35. Draft of CS HB 567 (Resources) (4/2/90).
36. Fiscal Notes on CSHB 567 (Resources) and CSHB 567 (Finance) from DEC (4/2/90).
37. "CS HB 567 (Resources)" section analysis (4/2/90).
38. "HB 567/SB 504 Contingency Planning, Financial Responsibility, Tanker Inspections" with handwritten note (undated).
39. "Amendment to HB 567" proposing amending AS 46.04.040(c) "Proposed Amendment for H.B. 567" proposing amending AS 46.04.040(e); and "Analysis of Amendments" (4/11/90).
40. Miscellaneous amendments to CSHB 567 (Resources) (undated).
41. "Proposed Changes to House Bill 567 from CS HB 567 (Res) to CS HB 567 ( ) draft 4/20/90 changes relative to CS HB 567 (Res) (4/20/90).
42. Letter from W. Gene Burden, Vice President, Administration and Government Relations, Tesoro Alaska Petroleum Company, to House Finance Committee Members regarding the option of the State of Alaska of not enforcing the provisions requiring financial assurance (4/21/90).
43. Fiscal Notes from ADF&G for CSHB 567 (Finance) (4/23/90).

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Volume IV:      (A) Consideration of SCS CSHB 567 by the Senate  
Special Committee on Oil and Gas

1. Excerpt from minutes of Senate Special Committee on Oil and Gas meeting held on 4/30/90.
2. Excerpt from minutes of Senate Special Committee on Oil and Gas meeting held on 5/2/90.
3. Chart entitled "Financial Responsibility Requirements" showing the differences in requirements between CS HB 567 (Finance) and SCS HB 567 (Oil & Gas) (undated).
4. Draft of SCS for CS for HB 567 (Oil & Gas) (undated).
5. "Letter of Intent for Senate CS for CS for HB 567 (Oil and Gas)" (undated).
6. Amendment Nos. 1 through 8 to 5/3/90 draft for SCS CSHB 567.
7. Three amendments to SCS CSHB 567 (Oil & Gas) (undated).
8. Excerpt from minutes of Senate Special Committee on Oil and Gas meeting held on 5/3/90.
9. Fiscal notes from ADF&G (4/23/90), DEC (5/4/90) and DNR for SCS CSHB 567 (Oil & Gas) (5/5/90).
10. Excerpt from minutes of Senate Special Committee on Oil and Gas meeting held on 5/7/90.
11. Sectional analysis of SCS CS HB 567 (Oil & Gas) (5/8/90).
12. Draft of SCS for CS for HB 567 (Oil & Gas) (5/8/90).
13. Senate Finance Committee Report from Senate Special Committee on Oil and Gas on CS HB 567 (Finance) (5/8/90).

**LEGISLATIVE HISTORY OF AMENDMENT  
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(HB 567: 1990)**

Volume IV:      (B) Attorney General Review and Enactment of SCS  
CS HB 567 (Finance)

1. Letter from Kari Repplinger, Legislative Staff Assistant, Office of the Governor to Attorney General Douglas B. Baily re transmitting SCS CS HB 567 (Finance) for review by his office (6/4/90).
2. PROFS note from Assistant Attorney General Arthur H. Petersen to John McDonagh regarding review of SCS CSHB 566 (Finance) and SCS CSHB 567 (Finance) (6/4/90).
3. Draft letter from Attorney General Douglas B. Baily to Governor Steve Cowper regarding review of SCS CSHB 567 (Finance) (6/12/90).
4. Letter from Attorney General Douglas B. Baily to Governor Steve Cowper regarding review of SCS CSHB 567 (Finance) (6/15/90).
5. SCS CSHB 567 (Finance) as passed by the Alaska House and Senate on 5/8/90.
6. Letters to Speaker of the House Sam Cotten and President of the Senate Tim Kelly from Governor Steve Cowper regarding signing of SCS CS HB 567 (Finance) and forwarding to Lieutenant Governor's office for permanent filing (6/26/90).

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# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

JAY S. HAMMOND, GOVERNOR

POUCH K-STATE CAPITOL  
JUNEAU, ALASKA 99811

December 30, 1981

William Lawrence  
Transportation Institute  
Norton Bldg., Rm. 1502  
801 Second Avenue  
Seattle, Washington 98104

Dear Bill:

Thank you for setting up the meeting with the tug and tank barge operators on December 17. I believe the opening of these lines of communication will help to resolve the problems we face. We have already discussed these matters with the Department of Environmental Conservation.

As I promised at the meeting, I'm writing to confirm my oral statements regarding the operators' current legal status under our oil spill laws. Alaska Statute 46.03.040 does require proof of financial responsibility to respond to damages for oil spills, and as was pointed out at the meeting, operators covered by the statute who have not shown financial responsibility by one of the methods acceptable under the statute are indeed in technical violation. However, the current difficulty in obtaining insurance puts the matter in a different light.

First, if an operator is truly unable to comply with the statute, because neither the insurance nor the other forms of proof of financial responsibility are available, and the firm is unable to self-insure, then I believe it would have a valid defense to an action brought because of the technical failure to comply. And secondly, we can assure you that as long as we are convinced that an operator is making a diligent good faith effort to comply with the requirements, but is unable to do so despite its best efforts, we will not bring any such action because of the failure to comply. Naturally I consider meetings such as ours, with continuing efforts to make insurance available, to be important evidence of such good faith efforts.