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TRANSPORTATION INSTITUTE



3201 Auth Way
Camp Springs, Maryland 20746
(301) 423-3335 (MD)
(202) 347-2590 (Wash., D.C.)
Telecopier (301) 423-0634

Pacific Coast Office
2505 2nd Avenue
Suite 720
Seattle, WA 98121
(206) 443-1738
Telecopier (206) 443-0917

JAMES L. HENRY
President

LAWRENCE H. EVANS
Director, Domestic Marine Affairs

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Director, Pacific Coast Operations

ELIZABETH K. SIGEL
Director, Vessel Operations
and Maritime Initiatives

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DATE:

2-20-92

MESSAGE TO:

Bill Lawrence

COMPANY:

FAX NUMBER:

907-463-5522

MESSAGE FROM:

Liz Buchard

FAX NUMBER:

(301) 423-0634

NUMBER OF PAGES:

12 (Including cover sheet)

IF THE FOLLOWING MESSAGE IS RECEIVED POORLY OR
INCOMPLETELY, PLEASE NOTIFY Kelvin at (301)
423-3335.

COMMONWEALTH OF VIRGINIA
STATE WATER CONTROL BOARD

VR 680-14-08 - TANK VESSEL FINANCIAL RESPONSIBILITY REQUIREMENTS AND
ADMINISTRATIVE FEES FOR APPROVAL

§ 1. Definitions.

The following words and terms, when used in this regulation, shall have the following meaning, unless the context clearly indicates otherwise:

"Board" means the State Water Control Board.

"Containment and cleanup" means abatement, containment, removal and disposal of oil and, to the extent possible, the restoration of the environment to its existing state prior to an oil discharge.

"Discharge" means any spilling, leaking, pumping, pouring, emitting, emptying or dumping.

~~"Facility" means any development or installation within the Commonwealth that deals in, stores or handles oil, and includes a pipeline.~~

"Oil" means oil of any kind and in any form, including, but not limited to, petroleum and petroleum by-products, fuel oil, lubricating oils, sludge, oil refuse, oil mixed with other wastes, crude oils and all other liquid hydrocarbons regardless of specific gravity. For the purpose of this regulation only, this definition does not include [non petroleum hydrocarbon based] animal and vegetable oils, [or petroleum, including crude oil or any fraction thereof, which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that act].

"Operator" means any person who owns, operates, charters by demise, rents or otherwise exercises control over or responsibility for a facility or a vehicle or vessel.

"Person" means any firm, corporation, association or partnership, one or more individuals, or any governmental unit or agency thereof.

"State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction.

"Tank vessel" means any vessel used in the transportation of oil in bulk as cargo. For the purpose of this regulation, this definition includes tankers, tank ships, tank barges and combination carriers when carrying oil. It does not include vessels carrying oil in drums, barrels, on-deck portable tanks or other packages or vessels carrying oil as fuel or stores for that vessel.

"Vehicle" means any motor vehicle, rolling stock or other artificial contrivance for transport whether self-propelled or otherwise, except vessels.

"Vessel" includes every description of watercraft or other contrivance used as a means of transporting on water, whether self-propelled or otherwise, and shall include barges and tugs.

§ 2. Applicability.

Evidence of financial responsibility requirements apply to all tank vessels transporting or transferring oil upon state waters having a maximum storage, handling or transporting capacity of equal to or greater than 15,000 gallons of oil.

§ 3. Compliance dates.

This regulation shall be effective 30 days after publication in the Virginia Register. Cash or its equivalent shall be deposited with the Board as required by Va. Code § 62.1-44.34:16 and section 5.A of this regulation no later than 90 days after the effective date of this regulation. Operators seeking exemption from the cash deposit requirement shall submit their application and the evidence of financial responsibility no later than 60 days after the effective date of this regulation.

§ 4. Statement of purpose.

The purpose of this regulation is to establish requirements for financial responsibility on the part of operators of tank vessels transporting or transferring oil as cargo upon state waters. This regulation provides acceptable means of demonstrating the required level of financial responsibility therefore providing the Commonwealth with the necessary assurance that an operator of a tank vessel has the necessary financial stability to conduct a proper response to a discharge of oil.

§ 5. Financial Responsibility.

A. The operator of any tank vessel entering upon state waters shall deposit with the Board cash or its equivalent in the amount of \$500 per gross ton of such vessel. If the operator owns or operates more than one tank vessel, evidence of financial responsibility need be established only to meet the maximum liability applicable to the vessel having the greatest maximum liability.

1. All documents submitted shall be in English and all monetary terms shall be in U.S. currency.

2. A copy of the Board's acceptance of the required evidence of financial responsibility shall be kept on the tank vessel and readily available for inspection.

2. If the balance sheet and statement of income and surplus cannot be submitted in nonconsolidated form, consolidated statements may be submitted if accompanied by an additional statement by the involved Certified Public Accountant, certifying to the amount by which the operator's assets, located in the United States and acceptable under this part, exceed total liabilities and that current assets, located in the United States and acceptable under this part, exceed its current liabilities.

3. When the operator's demonstrated net worth is not at least 10 times the required amount, an affidavit shall be filed by the operator's treasurer (or equivalent official) covering the first six months of the operator's fiscal year. Such affidavits shall state that neither the working capital nor the net worth have, during the first six months, fallen below the required amounts;

4. Additional financial information shall be submitted upon request by the Board, OR

b. provide evidence in the form of a marine insurance broker's certificate of insurance, [certificate of entry], or other proof satisfactory to the Board, that the operator has obtained oil pollution liability coverage through an operator's membership in a Protection & Indemnity (P&I) Club that is a member of the international group of P&I clubs, or through coverage provided by a pool of marine underwriters in an amount sufficient to meet the requirements of Va. Code § 62.1-44.34:16 and section 5.A.

2. Insurance: Any operator demonstrating evidence of financial responsibility by insurance shall provide evidence of insurance issued by an Insurer licensed, approved, or otherwise authorized to do business in the Commonwealth of Virginia. The amount of insurance shall be sufficient to cover the amount required by Va. Code § 62.1-44.34:16 and section 5.A. The operator shall provide evidence of such coverage in the form of a marine insurance broker's certificate of insurance or by utilizing a form worded identically to the insurance form found in Appendix II. The insurer must also comply with all requirements in Appendix II.

3. Surety: Any operator demonstrating financial responsibility through a surety bond shall file a surety bond utilizing a form worded identically to the surety form found in Appendix III. The surety company issuing the bond must be licensed to operate as a surety in the Commonwealth of Virginia and must possess an underwriting limitation at least equal to the amount required by Va. Code § 62.1-44.34:16 and section 5.A. The surety must also comply with all requirements in Appendix III.

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

C. Federal government entities whose debts and liabilities are debts and liabilities of the United States have the requisite financial strength and stability to fulfill their financial assurance requirements and are relieved of the requirements to further demonstrate an ability to provide financial responsibility under this regulation.

D. Operators of tank vessels may obtain exemption from the cash deposit requirement if evidence of financial responsibility is provided in an amount equal to the cash deposit required for such tank vessel pursuant to Va. Code § 62.1-44.34:16 and section 5.A of this regulation. The following means of providing such evidence, or any combination thereof, will be acceptable:

1. Self-insurance; Any operator demonstrating financial responsibility by self-insurance shall provide evidence of such self-insurance in a manner that is satisfactory to the Board. An operator demonstrating self-insurance shall:

a. maintain, in the United States, working capital and net worth each in the amount required by Va. Code § 62.1-44.34:16 and section 5.A. For the purpose of this regulation, "working capital" means the amount of current assets located in the United States, less all current liabilities; and "net worth" means the amount of all assets located in the United States, less all liabilities.

1. Maintenance of the required working capital and net worth shall be demonstrated by submitting with the application form an annual, current nonconsolidated balance sheet and an annual, current nonconsolidated statement of income and surplus, certified by an independent Certified Public Accountant. Those financial statements shall be for the operator's last fiscal year preceding the date of application and shall be accompanied by an additional statement from the operator's Treasurer (or equivalent official), certifying to both the amount of current assets and the amount of total assets included in the accompanying balance sheet, which are located in the United States and are acceptable for purposes of this regulation.

4. Guaranty; An operator demonstrating financial responsibility through a guaranty shall submit the guaranty worded identically to the form found in Appendix IV. The guarantor shall comply with all provisions of paragraph D.1. for self-insurance and also comply with all requirements in Appendix IV.

E. To obtain exemption from the cash deposit requirements:

[1. The operator shall appoint an agent for service of process in the Commonwealth;]

[1.2.] The ~~operator and~~ insurer, guarantor, or surety shall appoint an agent for service of process in the Commonwealth;

[1.3.] Any insurer must be authorized by the Commonwealth of Virginia to engage in the insurance business; and

[1.4.] Any instrument of insurance, guaranty or surety must provide that actions may be brought on such instrument of insurance, guaranty or surety directly against the insurer, guarantor or surety for any violation by the operator of Article 11 of Chapter 3.1 of the Code of Virginia (Va. Code § 62.1-44.34:14 et seq.) up to, but not exceeding, the amount insured, guaranteed or otherwise pledged.

[1.5.] All forms of evidence of financial responsibility shall be accompanied by an endorsement that certifies that the Insurance policy, Evidence of self-insurance, Surety or Guaranty provides liability coverage for the tank vessel(s) in the amount required by Va. Code § 62.1-44.34:16 and section 5.A.

[6. Subsections E.2, E.3 and E.4 do not apply to operators providing evidence of financial responsibility in accordance with section 5. D. 1. of this regulation.]

F. Any operator whose financial responsibility is accepted under this regulation shall notify the Board at least thirty (30) days before the effective date of a change, expiration or cancellation of any instrument of insurance, guaranty or surety.

G. Acceptance of evidence of financial responsibility shall expire:

1. One year from the date that the Board exempts an operator from the cash deposit requirement based on acceptance of evidence of self-insurance;

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

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

H. All nonexempt tank vessel operators shall file with the Board the application form found in Appendix I for approval of the evidence of financial responsibility. This form shall be submitted with the required evidence of financial responsibility (cash deposit, proof of insurance, self insurance, guaranty or surety) and shall be completed insofar as it pertains to the tank vessel. The operator must sign and date the certification statement on the application form. All forms must be acknowledged before a notary public. If the operator is a corporation, the form must be signed by an authorized corporate official; if the operator is a Municipality, State, Federal or other public agency, the form must be signed by an authorized executive officer or ranking elected official; if the operator is a partnership or sole proprietorship, the form must be signed by a general partner or the sole proprietor.

I. Application for renewal of acceptance of proof of financial responsibility shall be filed with the Board thirty (30) days prior to the date of expiration.

J. All applications, notifications of changes, submissions and updates required by this regulation shall be directed to the Virginia State Water Control Board, Office of Spill Response and Remediation, P.O. Box 11143, Richmond, Va, 23230.

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

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

2. A change in circumstances has occurred that would warrant denial of acceptance of evidence of financial responsibility.

L. If evidence of financial responsibility provided to the federal government or any other state meets the requirements of this regulation, the Board may, upon review, accept it in full or partial satisfaction of the requirements of this regulation as appropriate. A certified copy of the document accepting the evidence of financial responsibility and a copy of the financial responsibility mechanism shall be provided to the Board for approval.

§ 6. ADMINISTRATIVE FEES.

A. This section establishes application fees for acceptance of evidence of financial responsibility.

B. An application for approval of evidence of financial responsibility will be accepted only when the fees established by this section have been paid.

C. Fees shall be paid by check, draft or postal money order made payable to the Virginia State Water Control Board and must be in U.S. currency.

1. Application fees for approval of evidence of financial responsibility for tank vessels are as follows:

a) Applicants shall pay an application fee of \$[~~200~~ 120].

b) Applicants shall pay a fee of \$[~~50~~ 30] for each additional tank vessel requiring a copy of the accepted evidence of financial responsibility.

D. Application fees are refundable upon receipt of a written request received by the Board no later than 30 days after submittal and prior to approval.

E. Overpayments of application fees are refundable upon written request. Overpayments not refunded will be credited for the applicants future use under this section.

§ 7. DELEGATION OF AUTHORITY

The Executive Director, or his designee, may perform any act of the Board under this Regulation, except as limited by Virginia Code §62.1-44.14.



COMMONWEALTH of VIRGINIA
Office of the Attorney General

Mary Sue Terry
Attorney General
H. Lane Kneidler
Chief Deputy Attorney General
Deborah L. Bryant
Chief of Staff

May 21, 1991

K. Marshall Cook
Deputy Attorney General
Finance & Transportation Division

R. Claire Guthrie
Deputy Attorney General
Human & Natural Resources Division

Gail Sterling Marshall
Deputy Attorney General
Judicial Affairs Division

Stephen D. Rosenthal
Deputy Attorney General
Public Safety & Economic Development Division

Robert A. Miller, CPCU, AIE
Deputy Commissioner
Property and Casualty Division
State Corporation Commission
Bureau of Insurance
Box 1157
Richmond, Virginia 23209

**Re: Draft State Water Control Board Financial Responsibility
Regulation For Tank Vessels (VR 680-14-08)**

Dear Mr. Miller:

David T. Ormes of the State Water Control Board ("SWCB") has sent me a copy of your letter dated May 13, 1991 regarding your review of the provisions of the referenced draft regulation pertinent to commercial insurance. He advises that you have been of invaluable assistance during the drafting process. I am writing to seek clarification of your review as to a specific provision of the draft regulation (copy attached).

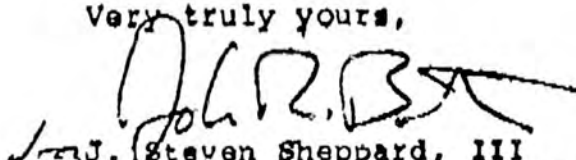
With respect addition to the appropriateness of the draft forms under the State Corporation Commission's regulations, this Office noted that § 4(D)(1)(b) (page 5) authorizes operators of tank vessels to demonstrate self-insurance by providing proof that the "operator has obtained oil pollution liability coverage through an operator's membership in a Protection & Indemnity (P&I) Club that is a member of the international group of P&I clubs, or through coverage provided by a pool of marine underwriters. . . ." When we learned that the legality of these clubs operating in Virginia had not been discussed with the Commission, we recommended that such contact be made.

Accordingly, to avoid any possible misunderstanding, I would appreciate your clarification as to whether the use of these clubs by owners of tank vessels would constitute the unlawful transaction of the business of insurance in the Commonwealth of Virginia under the Commission's regulations and applicable law. In addition, is the use of these clubs the transaction of fidelity or surety insurance in violation of the regulations or law?

Mr. Robert A. Miller
May 21, 1991
Page 2

Thanking you again for your assistance and cooperation, I am

Very truly yours,


J. Steven Sheppard, III
Assistant Attorney General
(804) 786-3588

6:50-c312/314J

cc: R. Claire Guthrie, Deputy Attorney General
David T. Ormes

STEVEN T. FOSTER
COMMISSIONER OF INSURANCE

COMMONWEALTH OF VIRGINIA



RAU 1167
RICHMOND, VA 23200
TELEPHONE: (804) 786-3741
TDD/VOIC: (804) 776-3804

STATE CORPORATION COMMISSION BUREAU OF INSURANCE

June 7, 1991



J. Steven Sheppard, III
Assistant Attorney General
Office of the Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

Re: Draft State Water Control Board Financial Responsibility
Regulation for Tank Vessels (VR 680-14-08)

Dear Mr. Sheppard:

This is in response to your letter of May 21, 1991 regarding the operation of Protection and Indemnity (P&I) Clubs in Virginia. After consulting with the State Corporation Commission's Office of General Counsel, we believe that P&I Clubs do not come under the jurisdiction of the State Corporation Commission or the laws of Virginia because there is no insurance transaction taking place within the Commonwealth.

The P&I clubs are mutual non-profit making organizations which exist to provide services to shipowner members. One of the services extends to liability claims handling, including the appointment of lawyers, surveyors and other experts. The P&I Clubs, although competing for members between themselves, combine their resources in order to purchase reinsurance collectively. It is my understanding that the fifteen P&I Clubs insure the liabilities of over 95% of the world's ocean going merchant fleet. Most of the P&I Clubs are located in London and arrange for any primary insurance or reinsurance contracts from there. An insurance contract is not issued to individual ship owners, but instead they receive the benefits of the club's coverage via membership in the organization.

Mr. J. Steven Sheppard, III
June 7, 1991
Page 2

Section 5 of the proposed regulation permits membership in a P&T Club to be a permissible form of self insurance. Self-insurance is not considered the "business of insurance" and generally is not subject to oversight by the State Corporation Commission.

For these reasons we do not believe the insurance offered through membership in the clubs is the transaction of insurance in Virginia and accordingly, the State Corporation Commission does not have jurisdiction.

Sincerely,

Robert A. Miller, CPCU, AIE
Deputy Commissioner
Property and Casualty Division

RAH:dw

cc: Dave Ormes
State Water Control Board

able, in establishing evidence of financial responsibility to effectuate the purposes of this Act.

(f) **CLAIMS AGAINST GUARANTOR.**—Any claim for which liability may be established under section 1002 may be asserted directly against any guarantor providing evidence of financial responsibility for a responsible party liable under that section for removal costs and damages to which the claim pertains. In defending against such a claim, the guarantor may invoke (1) all rights and defenses which would be available to the responsible party under this Act, (2) any defense authorized under subsection (e), and (3) the defense that the incident was caused by the willful misconduct of the responsible party. The guarantor may not invoke any other defense that might be available in proceedings brought by the responsible party against the guarantor.

(g) **LIMITATION ON GUARANTOR'S LIABILITY.**—Nothing in this Act shall impose liability with respect to an incident on any guarantor for damages or removal costs which exceed, in the aggregate, the amount of financial responsibility required under this Act which that guarantor has provided for a responsible party.

(h) **CONTINUATION OF REGULATIONS.**—Any regulation relating to financial responsibility, which has been issued pursuant to any provision of law repealed or superseded by this Act, and which is in effect on the date immediately preceding the effective date of this Act, is deemed and shall be construed to be a regulation issued pursuant to this section. Such a regulation shall remain in full force and effect unless and until superseded by a new regulation issued under this section.

(i) **UNIFIED CERTIFICATE.**—The Secretary may issue a single unified certificate of financial responsibility for purposes of this Act and any other law.

SEC. 1017. LITIGATION, JURISDICTION, AND VENUE.

(a) **REVIEW OF REGULATIONS.**—Review of any regulation promulgated under this Act may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within 90 days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) **JURISDICTION.**—Except as provided in subsections (a) and (c), the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the discharge or injury or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) **STATE COURT JURISDICTION.**—A State trial court of competent jurisdiction over claims for removal costs or damages, as defined under this Act, may consider claims under this Act or State law and any final judgment of such court (when no longer subject to ordinary forms of review) shall be recognized, valid, and enforceable for all purposes of this Act.

(d) **ASSESSMENT AND COLLECTION OF TAX.**—The provisions of subsections (a), (b), and (c) shall not apply to any controversy or other matter resulting from the assessment or collection of any tax, or to the review of any regulation promulgated under the Internal Revenue Code of 1986.

(e) **SAVINGS PROVISION.**—Nothing in this title shall apply to any cause of action or right of recovery arising from any incident which occurred prior to the date of enactment of this title. Such claims shall be adjudicated pursuant to the law applicable on the date of the incident.

(f) PERIOD OF LIMITATIONS.—

(1) **DAMAGES.**—Except as provided in paragraphs (3) and (4), an action for damages under this Act shall be barred unless the action is brought within 3 years after—

(A) the date on which the loss and the connection of the loss with the discharge in question are reasonably discoverable with the exercise of due care, or

(B) in the case of natural resource damages under section 1002(b)(2)(A), the date of completion of the natural resources damage assessment under section 1006(c).

(2) **REMOVAL COSTS.**—An action for recovery of removal costs referred to in section 1002(b)(1) must be commenced within 3 years after completion of the removal action. In any such action described in this subsection, the court shall enter a declaratory judgment on liability for removal costs or damages that will be binding on any subsequent action or actions to recover further removal costs or damages. Except as otherwise provided in this paragraph, an action may be commenced under this title for recovery of removal costs at any time after such costs have been incurred.

(3) **CONTRIBUTION.**—No action for contribution for any removal costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this Act for recovery of such costs or damages, or

(B) the date of entry of a judicially approved settlement with respect to such costs or damages.

(4) **SUBROGATION.**—No action based on rights subrogated pursuant to this Act by reason of payment of a claim may be commenced under this Act more than 3 years after the date of payment of such claim.

(5) **COMMENCEMENT.**—The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

SEC. 1018. RELATIONSHIP TO OTHER LAW.

(a) **PRESERVATION OF STATE AUTHORITIES; SOLID WASTE DISPOSAL ACT.**—Nothing in this Act or the Act of March 3, 1851 shall—

(1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from

NOTICE OF AVAILABILITY OF MODIFIED TEXT
TITLE 14, CALIFORNIA CODE OF REGULATIONS
SECTIONS 790-797
FINANCIAL RESPONSIBILITY

RISK MANAGEMENT

Notice is hereby provided that the Administrator for Oil Spill Prevention and Response (OSPR) proposes to readopt and amend its previously adopted emergency regulations found in Title 14 of the California Code of Regulations as follows:

Sections 790-797. Financial Responsibility.

AUTHORITY AND REFERENCE

Government Code Section 8670.37.54(b) grants the Administrator the authority to adopt regulations governing policy or other contractual terms, conditions, or defenses which are necessary or which are acceptable in establishing evidence of financial responsibility. Accordingly, the proposed regulations implement, interpret or make specific, Government Code Sections 8670.3 and 8670.37.51 through 8670.37.57, relating to financial responsibility.

INFORMATIVE DIGEST

The Lempert-Keene-Seastrand Oil Spill Prevention and Response Act ("the Act") (See Government Code Sections 8574.1 through 8670.71; and Public Resources Code Sections 8750 through 8760) created a new and comprehensive state oil spill program for marine waters. The new law greatly expands the authority, responsibilities and duties of the Department of Fish and Game under the direction of the Administrator for oil spill response. Government Code Section 8670.6 provides authority for the establishment of OSPR which contains staff to assist the Administrator in performing his or her duties under the Act.

The Act emphasizes oil spill prevention, contingency planning and response, as well as the Administrator's duties in connection therewith. As a result, OSPR is required to address navigational safety issues, establish effective response capability requirements and review and approve contingency plans.

The Act provides the Administrator broad authority to regulate the methods utilized by industry to transport oil in or near California marine waters in order to meet its goal of providing the best achievable protection of its valued coastal resources.

Consequently, regulations governing the financial abilities of responsible parties to pay for any damage they incur during the transportation or transfer of oil within the geographic parameters provided for within the Act, were adopted by OSPR and became

effective on August 15, 1991. These proposed regulations implement the financial responsibility requirements set forth in Government Code Sections 8670.37.51 through 8670.37.57, inclusive.

In order to assure that the affected public had a clear and timely understanding of the State's expectations of them under the new law, the original regulations were adopted on an emergency basis, filed with the Office of Administrative Law on August 5, 1991 (File No. 91-0805-01E) and became effective for a 120-day period beginning August 15, 1991 and ending December 13, 1991.

During this 120-day time period OSPR has provided a 45-day public notice of proposed regulatory adoption; held public hearings (November 13, 1991 in Northern California and November 15, 1991 in Southern California); requested and received public comment during its noticed 45-day comment period ending November 15, 1991 (see California Regulatory Notice Register No. 91,39-2); and received and reviewed applications for certification for over 800 vessels.

During the comment period and the review of applications several issues, which could not have been foreseen during the drafting of the original regulations, have arisen. Further, by extensive review of OSPR legal staff, certain amendments have been made to provide clarity for users of these regulations and consistency with all known federal laws.

WRITTEN COMMENTS

Written comments will be accepted by OSPR on the modified provisions only for a 15-day period beginning January 31, 1992 and ending February 14, 1992. Comments received in the CSPR office after February 14, 1992 will not be considered in the rulemaking process.

DOCUMENTATION

The text of the proposed regulations showing the specific modifications to the originally adopted text by using double-underlined, bold type for additions and strike out type for deletions, is available upon request along with the original initial statement of reasons. In addition, you may request for your review copies of any forms required for use by any provisions of the proposed regulations. All information which OSPR is considering as the basis for this proposal will be maintained in a rulemaking file, which is available for inspection at the OSPR office during normal business hours (8:00 a.m. to 5:00 p.m.).

Questions regarding this regulatory activity, as well as requests for the above-noticed documents may be directed to Kathy Verrue-Slater, Oil Spill Prevention and Response, P.O. Box 944209, Sacramento, California, 94244-2090 or telephone (916) 324-9813.

Please note that, following the comment period, OSPR may adopt the proposed regulations substantially as proposed in this notice or with modifications which are sufficiently related to the originally proposed text and notice of proposed regulatory activity. If modifications are made, the modified text with the changes clearly indicated will be made available to the public for at least 15 days prior to the date on which OSPR adopts the regulations. Requests for copies of any modified regulations should be addressed to the agency contact person identified above. OSPR will accept written comments on the modified regulations during any additional comment period.

FISCAL IMPACT DETERMINATIONS

OSPR has made the following determinations regarding this proposal:

LOCAL MANDATE

The Office of Oil Spill Prevention and Response has determined that the proposed regulations do not impose a mandate upon local agencies or school districts which must be reimbursed by the state pursuant to Section 17500 et seq. of the Government Code.

ECONOMIC IMPACT

The Office of Oil Spill Prevention and Response has determined that the proposed adoption: (1) will have no effect on housing costs; (2) will have no adverse economic impact on small business; (3) involves no significant nondiscretionary costs or savings to local agencies; (4) involves no increased costs or savings to any local agency or school district for which Government Code Section 17561 requires reimbursement; (5) involves no increased costs or savings to any state agency or in federal funding to the state; and (6) involves no significant costs to private persons or entities.

ALTERNATIVES CONSIDERED

In accordance with Government Code Section 11346.5(a)(7), OSPR must determine that no alternative considered by it would be more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected persons than the proposed action.

TITLE 14, CALIFORNIA CODE OF REGULATIONS
SUBDIVISION 4, OFFICE OF OIL SPILL PREVENTION AND RESPONSE
SECTIONS 790 - 797
CHAPTER 1. FINANCIAL RESPONSIBILITY

Text of Modified Regulations

OSPR has illustrated changes to the original text in the following manner: regulation language originally proposed is underlined; deletions from the language originally proposed are shown in strikeout using a line through the text; and additions to the language originally proposed are shown in double-underlined, bold text.

790. DEFINITIONS. The following definitions shall govern the construction of this chapter.
- (a) "Administrator" means the administrator for oil spill response appointed by the Governor.
- (b) "Assets", as defined by Generally Accepted Accounting Principles in the United States (GAAP), means probable future economic benefits obtained or controlled by a particular entity as a result of past transactions or events.
- (c) "Barges" means any vessel that carries oil in commercial quantities as cargo but is not equipped with a means of self-propulsion. For purposes of Chapter 1, Financial Responsibility, a "large barge" is differentiated from a "small barge" as those terms are defined in subparagraphs ~~(j)~~(k) and ~~(w)~~(y) of this regulation.
- (d) "California marine waters" means those waters subject to tidal influence, except for waters in the Sacramento-San Joaquin Delta upstream from a line running north and south through the point where Contra Costa, Sacramento, and Solano Counties meet.
- (e) "Certificant" means an owner or operator or a person accepting responsibility for the oil who has been issued a Certificate of Financial Responsibility under this chapter.
- ~~(e)~~ (f) "Barrel" means 42 United States gallons of oil at 60 degrees Fahrenheit.
- ~~(f)~~ (g) "Current assets", as defined by GAAP, means cash or other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business.
- ~~(g)~~ (h) "Current liabilities", as defined by GAAP, means obligations whose liquidation is reasonably expected to require the use of existing resources properly classifiable as current assets, or the creation of other current liabilities.
- ~~(h)~~ (i) "Independently audited" refers to an audit performed by an independent certified public accountant in accordance with generally accepted auditing standards.

- ~~(j)~~ (j) "Intangible assets" means assets, such as trademarks, goodwill, patents, organization costs, computer programs, etc. which lack physical substance.
- ~~(k)~~ (k) "Large barge" means a barge with a cargo capacity of 150,000 or more barrels.
- ~~(l)~~ (l) "Liabilities", as defined by GAAP, means probable future sacrifices of economic benefits arising from present obligations of a particular entity to transfer assets or provide services to other entities in the future as a result of past transactions or events.
- ~~(m)~~ (m) "Marine facility" includes:
- (1) A drill ship, semisubmersible drilling platform, jack-up type drilling rig, or any other floating or temporary drilling platform.
 - (2) Any facility of any kind, other than a vessel, which is or was used for the purposes of exploring for, drilling for, producing, storing, handling, transferring, processing, refining, or transporting oil and is located in California marine waters, or is located where a discharge could impact California marine waters unless the facility:
 - (A) is subject to Chapter 6.67 (commencing with Section 25270) or Chapter 6.75 (commencing with Section 25299.10) Division 20 of the Health and Safety Code; or
 - (B) is placed on a farm, nursery, logging site, or construction site and does not exceed a 20,000 gallon capacity in any single storage tank.
- ~~(n)~~ (n) "Marine terminal" means any marine facility used for transferring oil to or from vessels. For purposes of this chapter, a marine terminal includes all piping not integrally connected to a tank facility as defined in subdivision (k) of Section 25270.2 of the Health and Safety Code relating to above ground storage tanks.
- (o) "Mobile transfer unit" means any mobile marine facility, including trucks and trailers, used for the transferring of oil at a location where a discharge could impact California marine waters. For purposes of this chapter, a mobile transfer unit includes all hoses and piping connected to the mobile transfer unit.
- ~~(p)~~ (p) "Oil" means any kind of petroleum, liquid hydrocarbons, or petroleum products or any fraction or residues therefrom, including, but not limited to, crude oil, bunker fuel, gasoline, diesel fuel, aviation fuel, oil sludge, oil refuse, oil mixed with waste, and liquid distillates from unprocessed natural gas.

- ~~(e)~~ (q) "Operating" means, in terms of a vessel, the transferring and/or transporting of oil as cargo.
- ~~(e)~~ (r) "Operator" or "Owner".
- (1) Owner or operator means any of the following:
- (A) In the case of a vessel, any person who owns, has an ownership interest in, operates, charters by demise, time charters, or charters, the vessel.
- (B) In the case of a marine facility, any person who owns, has an ownership interest in, or operates the marine facility.
- (C) Except as provided in subsection (D) below, in the case of any vessel or marine facility, where title or control has been conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to an entity of state or local government, the "operator" or "owner" is any person who owned, held an ownership interest in, operated, or otherwise controlled activities concerning the vessel or facility immediately prior to the conveyance.
- (D) An entity of local government which acquired ownership or control of a vessel or marine facility, when that entity has caused or contributed to a spill or discharge of oil into marine waters.
- (2) "Owner" or "operator" does not include a person who, without participating in the management of a vessel or marine facility, holds evidence of ownership primarily to protect his or her security interest in the vessel or marine facility.
- (3) "Operator" does not include any person who owns the land underlying a marine facility or the facility itself if the person is not involved in the operations of the facility.
- ~~(e)~~ (s) "Owners equity", as defined by GAAP, means the difference between total assets and total liabilities.
- ~~(e)~~ (t) "Person" means any individual, trust, firm, joint stock company, or corporation, including, but not limited to, a government corporation, partnership, and association. "Person" also includes any city, county, city and county, district and the state or any department or agency thereof, and the federal government or any department or agency thereof, to the extent permitted by law.
- ~~(s)~~ (u) "Proof of entry" means the documents that evidence that an owner of a vessel, or person named is covered for oil pollution liabilities by a Protection and Indemnity Club.

~~(t)~~ (v) "Protection and indemnity (P&I) club" means a mutual insurance organization formed by a group of ship owners or operators in order to secure cover for various risks of vessel operation, including oil spill costs, not covered by normal hull insurance.

~~(u)~~ (w) "Reasonable worst case oil spill formula" means:

(1) For small barges:

(A) the product derived from multiplying the maximum per barrel clean-up cost of spilled oil (\$12,500) by twenty-five percent (25%) of the maximum cargo capacity of the small barge.

(B) The maximum \$12,500 per barrel clean-up cost may be reduced by the Administrator on a case-by-case basis, where acceptable evidence substantiating such a reduction is submitted by an applicant or the authorized representative of an applicant for a certificate of financial responsibility.

(C) For purposes of subparagraph (B), "acceptable evidence" includes, but is not limited to, copies of technical, theoretical or empirical studies, reports, or similar documentation upon which the applicant of a certificate of financial responsibility is relying to substantiate that their actual per barrel clean-up cost is less than the maximum cost provided for in this regulation.

(2) For marine facilities (except offshore platforms which are addressed below):

(A) except as provided in subparagraphs (3) and (4), the product derived from multiplying the maximum per barrel clean-up cost of spilled oil (\$12,500) by:

i) that portion of the total linefill capacity (total linefill capacity means the cross-sectional area of the inside of the pipeline multiplied by the length of the pipeline located in California marine waters or where a discharge could affect California marine waters) which could be lost during a spill, taking into account the availability and location of emergency shut-off controls; plus

ii) the amount of additional spillage that could reasonably be expected to enter California marine waters during emergency shut-off or transfer or pumping operations if a hose or pipeline ruptures or becomes disconnected, or some other incident

occurs which could cause an oil spill or discharge, taking into consideration other safety devices, emergency reaction times and maximum transfer rates.

- (B) The maximum \$12,500 per barrel clean-up cost may be reduced by the Administrator on a case-by-case basis, where acceptable evidence substantiating such a reduction is submitted by an applicant or the authorized representative of an applicant for a certificate of financial responsibility.
- (C) For purposes of subparagraph (B), "acceptable evidence" includes, but is not limited to, copies of technical, theoretical or empirical studies, reports, or similar documentation upon which the applicant for a certificate of financial responsibility is relying to substantiate that their actual per barrel clean-up cost is less than the maximum cost provided for in this regulation.
- (D) Except as provided in subparagraphs (E) and (F), below, in no event shall the amount determined pursuant to this paragraph be less than \$1,000,000 or in excess of \$100,000,000.
- (E) For mobile transfer units, the amount determined pursuant to this paragraph shall not be less than \$500,000.
- (F) For small craft refueling docks, the amount determined pursuant to this paragraph shall not be in excess of \$500,000.

(3) For offshore platforms:

- (A) the product derived from multiplying the maximum per barrel clean-up cost of spilled oil (\$12,500), by:

 - i) total tank storage capacity; plus
 - ii) that portion of the total linefill capacity (total linefill capacity means the cross-sectional area of the inside of the pipeline multiplied by the length of the pipeline located in California marine waters or where a discharge could affect California marine waters) which could be lost during a spill, taking into account the availability and location of emergency shut-off controls; plus
 - iii) the amount of additional spillage that could reasonably be expected to enter California marine waters during emergency

shut-off or transfer or pumping operations if a hose or pipeline ruptures or becomes disconnected, or some other incident occurs which could cause an oil spill or discharge, taking into consideration other safety devices, emergency reaction times and maximum transfer rates.

- (B) The maximum \$12,500 per barrel clean-up cost may be reduced by the Administrator on a case-by-case basis, where acceptable evidence substantiating such a reduction is submitted by an applicant or the authorized representative of an applicant for a certificate of financial responsibility.
- (C) For purposes of subparagraph (B), "acceptable evidence" includes, but is not limited to, copies of technical, theoretical or empirical studies, reports, or similar documentation upon which the applicant of a certificate of financial responsibility is relying to substantiate that their actual per barrel clean-up cost is less than the maximum cost provided for in this regulation.
- (D) In no event shall the amount determined pursuant to this paragraph be less than \$1,000,000 or in excess of \$100,000,000.

(4) — For refueling docks:

- (A) the product derived from multiplying the per barrel clean-up cost of spilled oil (\$12,500), by:
- i) that portion of the total linefill capacity (total linefill capacity means the cross-sectional area of the inside of the pipeline multiplied by the length of the pipeline located in California marine waters or where a discharge could affect California marine waters) which could be lost during a spill, taking into account the availability and location of emergency shut-off controls; plus
 - ii) the amount of additional spillage that could reasonably be expected to enter California marine waters during emergency shut-off or transfer or pumping operations if a hose or pipeline ruptures or becomes disconnected, or some other incident occurs which could cause an oil spill or discharge, taking into consideration other safety devices, emergency reaction times and maximum transfer rates.

~~(B)~~ The maximum \$12,500 per barrel clean-up cost may be reduced by the Administrator on a case-by-case basis, where acceptable evidence substantiating such a reduction is submitted by an applicant or the authorized representative of an applicant of a certificate for financial responsibility.

~~(C)~~ For purposes of subparagraph (B), "acceptable evidence" includes, but is not limited to, copies of technical, theoretical or empirical studies, reports, or similar documentation upon which the applicant for a certificate of financial responsibility is relying to substantiate that their actual per barrel clean-up cost is less than the maximum cost provided for in this regulation.

~~(v)~~ (x) "Responsible party" means any of the following:

- (1) The owner or transporter of oil.
- (2) A person accepting responsibility for the oil.
- (3) The owner, operator, or lessee of, or person who charters by demise, any vessel or marine facility, or a person or entity accepting responsibility for the vessel or marine facility.

~~(x)~~ (y) "Small barge", for the purposes of determining financial responsibility, means a barge with a cargo capacity of less than 150,000 barrels.

~~(w)~~ (z) "Recreational Marina" "Small craft refueling dock" means a marina which is a marine facility which is a refueling dock that dispenses fuel to small craft used by the public primarily for recreational purposes and which has a refueling deck having a total tank storage capacity not exceeding 20,000 gallons.

~~(y)~~ (aa) "Tanker" means any self-propelled, waterborne vessel, constructed or adapted to transport oil in bulk or in commercial quantities as cargo.

~~(z)~~ (ab) "Vessel" means a tanker or barge as defined in this section. For purposes of this chapter, "large barge" is differentiated from "small barge" as those terms are defined in subparagraphs (j) and (w) of this regulation.

~~(aa)~~ (ac) "Working capital", as defined by GAAP, means current assets minus current liabilities.

NOTE: Authority cited: Section 8670.37.54(b), Government Code.
Reference: Sections 8670.3, and 8670.37.51-8670.37.57,
Government Code; Section 76.2, Harbors and Navigation Code.

791. PROCEDURES FOR APPLICATION FOR CALIFORNIA CERTIFICATE OF RESPONSIBILITY.

- (a) On or after January 1, 1992, all operators or owners of marine facilities and operators or owners of vessels must each first obtain a California certificate of financial responsibility (certificate) before operating in California. The Application for Certificate of Financial Responsibility for Operators or Owners of Vessels or Owners of Oil, revised as of August 14 December 13, 1991 (application) and Application for Certificate of Financial Responsibility for Marine Facility, revised as of August 14 December 13, 1991 (application) (collectively referred to as applications) shall be obtained from and, upon completion, submitted to the Office of Oil Spill Prevention and Response (OSPR) at the following address:

Office of Oil Spill Prevention and Response (OSPR)
Department of Fish and Game
P.O. Box 944209
Sacramento, CA 94244-2090

(b) General Application Procedures.

- (1) All applications and supporting documents shall be prepared in English and all monetary terms shall be in U.S. Currency.
- (2) All spaces on the application shall be completed with either the requested information or the phrase "Not applicable".
- (3) All applications shall be signed by the applicant or authorized representative of the applicant, whose title shall be indicated in the space provided on the application.
- (4) All applications shall be accompanied by a written delegation of authority to sign submit the application on behalf of the applicant where the person signing the application is an individual other than the individual applicant i the case of a sole proprietorship, a partner in the case of a partnership applicant, or an authorized representative officer or director of a corporate applicant.
- (5) Each applicant applying for a vessel or owner of oil certificate of financial responsibility shall designate a person to serve as the applicant's United States' agent for service of legal process.
- ~~(5)~~ (6) If, prior to certificate issuance, an applicant becomes aware of a material change in any of the facts contained in the application or supporting documents, the applicant shall, within five (5) business days of becoming aware of the change or changes, notify the Administrator in writing of the

change.

- ~~(6)~~ (7) Each certificate issued by the Administrator shall:
- (A) except as provided in subsection (b)(7 8) below, expire no later than two years following its issuance date; and
 - (B) bear its expiration date clearly on its face.
- ~~(7)~~ (8) The administrator may issue a certificate for a marine facility for a period of not longer than three years if the administrator finds that:
- (A) the facility was operating on January 1, 1991; and
 - (B) continued operation is necessary to finance abandonment of the marine facility; and
 - (C) the financial resources the operator is able to demonstrate are reasonably sufficient to cover any spill-related damages from the facility.

(c) Application Procedures for Owners or Operators of Tanker Vessels, Large Barges, and/or Owners of Oil

- (1) Owners or operators of tanker vessels, large barges, and/or owners of oil shall submit their applications with evidence of financial responsibility to OSPR no later than September 15, 1991, in order to obtain a certificate on or before January 1, 1992. Levels of financial responsibility and the criteria for demonstrating financial responsibility are set forth in Sections 792 and 795 of this chapter. Applicants shall be notified within 21 days whether the information contained in their application, evidence of financial responsibility, and any supplemental information provided is sufficient to meet the requirements of this chapter.
- (A) If the information contained in the application, evidence of financial responsibility, or other information is insufficient, the Administrator shall notify the applicant of the nature of such insufficiency within 21 calendar days from the date of receipt of either the application or evidence of financial responsibility, whichever is applicable. Applicants shall then have five (5) business days from the date of notification to provide the missing information or additional evidence.
 - (B) Certificates will be issued within 15 calendar days of the submission of additional evidence or supplemental information provided that acceptable evidence or adequate information was

received. In the event that acceptable evidence or adequate information is not received, the Administrator may deny the application by providing written notice specifying the reasons for the denial within the 15-day period set forth in this subparagraph.

(2) Applications for certificates issued after January 1, 1992, will be reviewed within 21 calendar days of receipt of a completed application for owners or operators of tanker vessels, large barges, and/or owners of oil. Certificates will be issued within that period provided that adequate information was furnished in the application and acceptable evidence of financial responsibility, as determined by the Administrator, has been received. Levels of financial responsibility and the criteria for demonstrating financial responsibility are set forth in Sections 792 and 795 of this Chapter.

(A) If the information contained in the application, evidence of financial responsibility, or other information is insufficient, the Administrator shall notify the applicant of the nature of such insufficiency within 21 calendar days from the date of receipt of either the application or evidence of financial responsibility, whichever is applicable. Applicants shall then have five (5) business days from the date of notification to provide the missing information or additional evidence.

(B) Certificates will be issued within 15 calendar days of the submission of additional evidence or supplemental information provided that acceptable evidence or adequate information was received. In the event that acceptable evidence or adequate information is not received, the Administrator may deny the application by providing written notice specifying the reasons for the denial within the 15-day period set forth in this subparagraph.

(d) Application Procedures for Owners or Operators of Marine Facilities and Small Barges.

(1) In order to obtain a certificate on or before January 1, 1992, owners or operators of small barges and marine facilities shall submit their applications to OSPR ~~within five (5) business days of the effective date of these regulations,~~ on or before August 22, 1991. Applicants will be notified of the amount of financial responsibility by the Administrator by October 15, 1991. Owners or operators of marine facilities and small barges must

submit acceptable evidence of financial responsibility to OSPR by November 30, 1991, in order to receive a certificate on or before January 1, 1992.

(A) If the information contained in the application, evidence of financial responsibility, or other information is insufficient, the Administrator shall notify the applicant of the nature of such insufficiency within 21 calendar days from the date of receipt of either the application or evidence of financial responsibility, whichever is applicable. Applicants shall then have five (5) business days from the date of notification to provide the missing information or additional evidence.

(B) Certificates will be issued within 15 calendar days of the submission of additional evidence or supplemental information provided that acceptable evidence or adequate information was received. In the event that acceptable evidence or adequate information is not received, the Administrator may deny the application by providing written notice specifying the reasons for the denial within the 15-day period set forth in this subparagraph.

(2) Applications for certificates issued after January 1, 1992, will be reviewed and applicants notified of the amount of financial responsibility required within 21 calendar days of receipt of a completed application for owners or operators of marine facilities and small barges. Certificates will be issued for owners or operators of marine facilities and small barges upon receipt of acceptable evidence of financial responsibility, as determined by the Administrator. The criteria set for demonstrating financial responsibility is set forth in Section 795 of this chapter.

(A) If the information contained in the application, evidence of financial responsibility, or other information is insufficient, the Administrator shall notify the applicant of the nature of such insufficiency within 21 calendar days from the date of receipt of either the application or evidence of financial responsibility, whichever is applicable. Applicants shall then have five (5) business days from the date of notification to provide the missing information or additional evidence.

(B) Certificates will be issued within 15 calendar days of the submission of additional evidence

or supplemental information provided that acceptable evidence or adequate information was received. In the event that acceptable evidence or adequate information is not received, the Administrator may deny the application by providing written notice specifying the reasons for the denial within the 15-day period set forth in this subparagraph.

(e) Application renewals.

- (1) Certificate renewal applications shall be accepted by the Administrator no earlier than 90 days prior to the expiration date carried by the existing certificate. In order to receive a renewal certificate prior to the expiration date carried by the existing certificate, renewal applications must be submitted no later than 45 days prior to the expiration date.
- (2) If at any time after a certificate has been issued, a holder of a certificate becomes aware of a material change in any facts contained in the application or supporting documents, including the holder ceasing to be the owner or operator of the vessel or marine facility, or the owner of the oil, the holder of the certificate shall notify OSPR, in writing, within five (5) business days of becoming aware of the change.

(f) Requests for Reconsideration.

Applicants may submit a written request to the Administrator requesting reconsideration of any decision to deny issuance of a certificate, a renewal certificate, or the amount of financial responsibility that the applicant must demonstrate to obtain a certificate. Requests must be submitted within ten (10) calendar days from the date that the applicant receives notice of denial or of the amount of financial responsibility to be demonstrated. The request must contain the basis for requesting reconsideration and, if applicable, provide evidence which rebuts the basis for the Administrator's denial of the application, renewal application or financial responsibility determination. Within ten (10) calendar days from the date the request for reconsideration is received, SPR will advise the applicant of the Administrator's decision to grant or deny the request. Within 15 calendar days following the notice that the Administrator will grant reconsideration, the applicant will be sent a notice that the Administrator shall adhere to his or her earlier decision; a certificate shall be issued; or a revised notice of financial responsibility shall be issued.

(g) Destruction or Loss of Certificate.

- (1) In the event that a certificate has been lost or destroyed, the holder of the certificate shall

immediately notify the Administrator of the certificate's loss or destruction.

- (2) Certificate holders shall provide a written request to the Administrator for the issuance of a duplicate certificate which clearly states the reasons for the request.

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

792. CERTIFICATION REQUIREMENTS: VESSELS AND OWNERS OF OIL.

- (a) Effective January 1, 1992, each vessel operator or owner who transports oil across California marine waters or the owner(s) of all the oil contained in and to be transferred to or from the vessel, or the person accepting responsibility for the oil, shall obtain a certificate issued by the Administrator prior to operating in California marine waters. The certificate(s) shall be kept in their possession or control and, if applicable, on board the vessel.
- (b) To obtain a certificate, the operator(s) or owner(s) of tankers, large barges, or owner(s) of the oil contained therein, or the person accepting responsibility for the oil, shall demonstrate their current financial ability to pay at least 500 million dollars (\$500,000,000) for any damages arising from an oil spill during the term of the certificate.
- (c) Effective July 1, 1995, the required minimum level of financial responsibility for operators or owners of tankers, large barges, or owner's of, or persons accepting responsibility for the oil, shall increase to 750 million dollars (\$750,000,000).
- (d) Effective January 1, 2000, the required minimum level of financial responsibility for operators or owners of tankers, large barges, or owner's of, or persons accepting responsibility for the oil, shall increase to one billion dollars (\$1,000,000,000).
- (e) The required amounts of financial responsibility in no way restricts or sets financial limitations on any duty, obligation or liability of the responsible party to the State of California or any other public or private entity. This includes civil penalties assessed pursuant to all applicable federal, state and local laws.
- (f) When the owner(s) of all of the oil contained in the vessel, or the person accepting responsibility for the oil, hold the certificate(s) in lieu of the vessel operator or owner, the owner(s) or person accepting responsibility for the oil, shall provide a copy of documentation demonstrating ownership of, or responsibility for, all the oil contained in the vessel, a written statement authorizing application of the certificate(s) to the vessel, and a copy of the certificate to the vessel operator.

- (g) The original or a certified copy(s) of certificate(s) issued to the responsible party, e.g., the vessel operator or owner (or, in the case of an unmanned barge, a certified copy of the certificate) or, if applicable, the owner(s) of all the oil contained in the vessel or the person accepting responsibility for the oil, shall be carried on the vessel and be available for inspection at all times. If applicable, the documentation required pursuant to paragraph (f) shall be carried on the vessel and be available for inspection at all times.
- (h) If the operator or owner of a vessel intends to rely on the certificate(s) issued to the owner(s) of or person (s) accepting responsibility for the oil cargo, the vessel operator shall, at least 24 hours prior to transporting the oil across California marine waters, provide the Administrator with the following:
- (1) a copy or copies of the certificate(s) applicable to all of the oil at all times during the transport; and
 - (2) a copy of a written statement by the holder(s) of the applicable certificate(s) authorizing its (their) application to the vessel.
- (i) Operators who are not also the owners of the certificated vessels, shall carry on board such vessels the original copy of the charter-party or any other written document which demonstrates that the operators are the operators designated on the certificates.
- (j) The Administrator shall determine the amount of financial responsibility that operators or owners of small barges must demonstrate based on the "reasonable worst case oil spill formula" as that term is defined in Section 790(u) of these regulations.
- (k) Owners or operators of vessels used exclusively to respond to, contain, and clean up oil spills in California marine waters shall be exempt from the financial responsibility requirements set forth in this chapter, provided the owner or operator is indemnified by the responsible party, the Administrator, or is subject to the qualified immunity provisions set forth in Government Code Section 8670.56.6.

NOTE: Authority cited: Section 8670.37.54(b), Government Code. Reference: Sections 8670.37.52-8670.37.54 and 8670.56.6, Government Code.

793. CERTIFICATION REQUIREMENTS: MARINE FACILITIES.

- (a) Effective January 1, 1992, marine terminals and other marine facilities shall demonstrate the financial ability to pay for any damages resulting from the operations of the marine facility during an oil spill. The amount shall be based on the "reasonable worst-case oil spill formula", as that term is defined in Section 790(u) of this chapter.

- (b) Each marine facility operator or owner shall obtain a certificate of financial responsibility (certificate) for the marine facility from the Administrator.
- (c) The original or certified copy of the certificate shall remain on the marine facility premise and be available for inspection at all times.
- (d) Each operator or owner of a marine terminal within the state may only transfer oil to or from a vessel following receipt and verification of a copy(s) of the certificate(s) issued by the Administrator to the operator of the vessel or owner(s) of or person(s) accepting responsibility for the oil contained in the vessel, as well as all the oil to be transferred to or from the vessel.
- (e) Each marine terminal operator may only transfer oil to a vessel which is intended to be used for transporting oil to a second vessel located within 12 miles of the California shoreline and which is intended to be used for transporting such oil as cargo, following receipt and verification of a copy(s) of the certificate(s) issued to the person(s) responsible for both vessels or all of the oil contained in both vessels, as well as all the oil to be transferred to both vessels.
- (f) Each marine terminal operator may only transfer oil from a vessel which has been used for transporting oil cargo from a second vessel located within 12 miles of the California shoreline, following receipt and verification of a copy(s) of the certificate(s) issued to the person(s) responsible for both vessels or all of the oil contained in both vessels, as well as all the oil to be transferred from both vessels.
- (g) Each marine terminal operator shall be determined to have met the verification requirements set forth in subparagraphs (d), (e), and (f) of this regulation, when, at the time of oil transfer, the marine terminal operator has:
- (1) obtained verbal verification that the certificate(s) is (are) current and applicable to the vessel(s) and, if applicable, all of the oil contained in or to be transferred to or from the vessel from the person(s) responsible for the vessel(s) or from person(s) responsible for the oil to be transferred to or from the affected vessels or from person(s) authorized to provide this verification; and
 - (2) visually inspected all relevant manifests or similar documentation (e.g., U.S. Customs Cargo Declarations) to confirm the information ascertained pursuant to subparagraph (1), above; and
 - (3) assured that the information contained in certificates of responsibility, required to be obtained pursuant to this regulation, is consistent with the information acquired in subparagraphs (1) and (2), above.

- (h) The operator of the marine terminal must retain a copy of the certificate(s) obtained in accordance with subparagraphs (d), (e), and (f) for a period of not less than one year.
- (i) The Administrator shall determine the amount of financial responsibility that marine facilities must demonstrate. The amount shall be based on the "reasonable worst case oil spill formula" as that term is defined in Section 790(u) of this chapter.
- (j) The required amounts of financial responsibility in no way restricts or sets financial limitations on any duty, obligation or liability of the responsible party to the State of California or any other public or private entity. This includes civil penalties assessed pursuant to all applicable federal, state and local laws.

NOTE: Authority cited: Section 8670.37.54(b), Government Code.
Reference: Sections 8670.37.52-8670.37.54, Government Code.

794. MULTIPLE VESSELS/FACILITIES CERTIFICATIONS.

- (a) An owner or operator of more than one vessel or marine facility shall only be required to obtain one certificate for all of the vessels or marine facilities owned or operated, except as set forth in subsection (d).
- (b) Original certificates shall be issued, one for each vessel or facility listed on the completed application, following approval of the application by OSPR.
- (c) Total financial responsibility for multiple marine facilities shall be based on the facility determined by the Administrator to pose the greatest financial risk during an oil spill as determined pursuant to 790(u)(2).
- (d) An oil spill or spills occurring from one or more vessels or marine facilities within or outside of California marine waters, which cause the certificate holder(s) to be liable for damages exceeding five (5) percent of the total financial resources reflected by the certificate, as determined by the Administrator, shall cause the Administrator to:

 - (1) immediately review the certificate holder's financial resources to determine the applicability of this section to the certificate holder and notify the holder of the results of the review prior to issuing a determination that the certificate is inapplicable to any vessel or marine facility not associated with the spill; and
 - (2) where a determination is made that the certificate is inapplicable, provide the certificate holder reasonable time to cease necessary operations; and
 - (3) consider the certificate inapplicable to any vessel or marine facility not associated with the spill.

(e) Operators or owners holding certificates deemed inapplicable to any vessel or marine facility not associated with the spill(s), pursuant to subsection (d) above, shall reapply for a certificate for any or all vessel(s) or marine facility(s) not associated with the spill. Upon reapplication, the operator(s) or owner(s) shall demonstrate to the satisfaction of the Administrator that:

- (1) the operator(s) or owner(s) has (have) the amount of financial ability required pursuant to this chapter; and
- (2) the operator(s) or owner(s) has (have) the financial ability to pay all damages which arise or have arisen from the spill or spills which have occurred.

NOTE: Authority cited: Section 8670.37.54(b), Government Code.
Reference: Sections 8670.37.55-8670.37.56, Government Code.

795. EVIDENCE OF FINANCIAL RESPONSIBILITY.

(a) Insurance.

- (1) The whole or portion of the amount of financial responsibility required may be demonstrated by providing evidence that the operator or owner is insured up to the amount determined pursuant to Sections 792 and 793 of this chapter.
- (2) Operators or owners of vessels or marine facilities, or owners of oil, or persons accepting responsibility for the oil may submit an insurance policy, or other documentation, or certificate of insurance that is acceptable to the Administrator specifying the nature, type, amount of insurance. At a minimum, the insurance policy or certificate must include the following information:
 - (A) Name and address of insured;
 - (B) Name and principal characteristics of vessel(s) or facility covered;
 - (C) Name and address of insurer(s);
 - (D) Policy number(s);
 - ~~(D)~~ (E) Effective date and term of coverage;
 - ~~(E)~~ (F) All conditions and limitations of the policy or certificate which may affect coverage in the event of discharge of oil and;
 - ~~(F)~~ (G) Evidence of dollar amounts of insurance policy or certificate of insurance- and;
 - (H) Amount of deductibles.

(3) Certificants or applicants, whichever is applicable, shall notify OSPR within five business days of the date such applicant certificant or applicant knows, or has reason to believe, that the policy of insurance submitted as evidence of financial responsibility will be terminated or any coverage thereunder will cease.

(4) At the Administrator's discretion, deductible provision which is greater than \$1,000,000, in any policy of insurance or certificate is only acceptable if:

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

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

(5) Certificants using insurance as evidence of financial responsibility shall submit written documentation acceptable to the Administrator evidencing the renewal of certificant's policy of insurance, within 30 days of expiration of the current policy period. Acceptable written documentation includes a copy of the renewal policy or a certificate of insurance, both of which incorporate the previous policy by reference and/or contain the minimum information set forth in subsection (A) (2) above, and any additional terms or limitations which may affect coverage including the renewal and new expiration dates.

(6) The Administrator shall have the ability to request the certificant to submit a supplemental certificate of insurance executed by the certificant's insurance company and/or the certificant's insurance broker or agent confirming that the certificant's insurance coverage used to demonstrate financial ability remains current and/or agreeing to notify the Administrator within 30 days of cancellation of the policy for any reason.

(b) Qualification as a self-insurer

(1) An applicant may satisfy financial responsibility requirements by demonstrating, to the Administrator's satisfaction that the applicant meets the requirements specified in this paragraph. To qualify as a self-insurer, the applicant must

meet the criteria of either paragraph (b)(1)(A) (Test I) or, (b)(1)(B) (Test II) or, (b)(1)(C) below.

(A) Test I - The applicant must have:

i. one of the following two ratios:

a) a ratio of total liabilities to net worth less than 1.5;

b) a ratio of cash flow (the sum of net income, after taking into consideration the effect of any extraordinary items, plus depreciation, depletion, and amortization) minus \$20 million to total liabilities greater than 0.1; and

ii. worldwide owners equity minus intangible assets (i.e., "tangible net worth") equal to at least \$20 million plus two times the amount of self-insurance to be established; and

iii. assets in the United States amounting to at least 90 percent of total assets or at least two times the amount of self-insurance to be established.

(B) Test II - The applicant must have:

i. A current rating of the applicant's most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poors or Aaa, Aa, A, or Baa as issued by Moody's or commercial paper rating of A1, A2, or the equivalent; and

ii. Worldwide owners equity minus intangible assets (i.e., "tangible net worth") of at least \$20 million plus two times the amount of self-insurance to be established; and

iii. Assets in the United States amounting to at least 90 percent of total assets or at least two times the amount of self-insurance to be established.

(C) For owners or operators of recreational marinas small craft refueling docks, a declaration stating that they have the financial ability to pay for damages resulting from a reasonable worst case oil spill as defined in Section 790(u)(4) of this chapter.

(2) Applicants relying upon self-insurance provisions set forth in subsection (b)(1) of this section as evidence of financial responsibility shall submit the following additional documentation to the Administrator with the application:

(A) A letter signed by a financial officer if the applicant is a corporation; a general partner if the applicant is a partnership; or the proprietor if the applicant is a sole proprietorship stating:

i. he or she is a financial officer, general partner, or proprietor (as applicable) of the organization or business entity; and

ii. that the letter supports the applicant's use of the financial test to demonstrate financial responsibility in the amount and manner stated (the letter must state the specific amount of financial responsibility being demonstrated by self-insurance and show specifically how the tests have been applied) pursuant to this section; and

iii. the applicant or a subsidiary of the applicant is the owner or operator of the vessel or facility described in the application or the owner of oil; and

iv. The applicant or certificant, whichever applies, agrees to notify the Administrator by certified mail within five (5) business days if, at any time, the applicant or certificant fails to meet the self-insurance test criteria.

(B) Annual financial statements audited by an independent certified public accountant for the fiscal year ending immediately before each initial or renewal application. The applicant may submit, in lieu of audited financial statements, copies of the most recent Form 10-K and any subsequent Forms 10-Q filed pursuant to the Securities Exchange Act of 1934.

(3) Certificants relying upon self-insurance as the method for demonstrating financial responsibility and any persons required to demonstrate to the satisfaction of the Administrator that they meet the self-insurance requirements set forth in this section shall submit the most current documents described in subparagraph (2) (2) above, within 30 days of completion of the audit or forms described therein.

(c) Surety bond.

- (1) An applicant may demonstrate financial responsibility by obtaining and submitting to the Administrator a surety bond which conforms to the requirements of this subsection. The surety company issuing the bond must, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the U.S. Department of the Treasury.
- (2) Applicants utilizing surety bonds to demonstrate evidence of financial responsibility shall establish a standby trust fund. Under the terms of the bond, all payments made thereunder shall be deposited by the surety directly into the standby trust fund in accordance with the Administrator's instructions.
- (3) The bond must guarantee that the applicant shall pay, pursuant to existing law, the costs of cleanup/removal of all oil spilled or discharged in or on California marine waters, including spills which could impact California marine waters, and costs or expenses incurred in the restoration or replacement of natural resources damaged or destroyed as a result of the discharge of oil when it is determined that the applicant is the party responsible for the spill. ~~responsible party.~~
- (4) Under the terms of the bond, the surety shall become liable for the bond obligation when the applicant fails to pay and/or perform as guaranteed by the bond and upon notification of the surety, by the Administrator, that the applicant has failed to pay and/or perform as guaranteed by the bond.
- (5) The surety may cancel the bond prior to its expiration date. The termination date shall be 30 days after written notice that the surety company has elected to terminate the bond and has so notified the certificant, is received by the Administrator, as evidenced by a United States Postal Return Receipt. However, with respect to any vessel(s) covered by the surety bond which is (are) carrying oil in bulk as cargo and which was (were) loaded prior to the termination date, termination shall not take effect earlier than 30 days from receipt by the Administrator of the notice prescribed above and furthermore not until either (1) completion of the discharge of such cargo, or (2) until 60 days after the receipt of the prescribed notice by the Administrator, whichever is earlier.
- (6) The bond shall contain no additional terms or conditions which limit the surety company's obligation to pay for costs and damages arising under Government Code Section 8670.65.5.

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

(d) Letter of Credit

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

- (A) Be effective on or before the approval date of the certificate of financial responsibility;
- (B) Be addressed to the Administrator;
- (C) State that it is established in favor of the State of California up to the amount of ability to pay (expressed in U.S dollars) that it is intended to demonstrate; and that the funds are available to the State upon presentation of:
 - i. a sight draft bearing a reference number to the letter of credit; and
 - ii. a signed statement certifying that the amount of the draft is payable pursuant to California law;
- (D) State an effective date and an expiration date. The expiration date shall be at least one year after the effective date;
- (E) State that it shall be automatically extended for a period of one year unless the Administrator and the applicant are notified by certified mail at least 90 days in advance of expiration that the letter will not be renewed. In the event that such notice is provided, any unused portion of the credit shall, upon presentation of a sight draft, be available for 90 days after the applicant and the Administrator receive the notice;
- (F) State that whenever the letter of credit is drawn upon, the creditor will duly honor such draft and deposit the amount of the draft directly into the standby trust of the applicant in accordance with the Administrator's instructions.

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

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

(A) Establish a standby trust fund;

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

(e) Guaranty:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) Name and address of guarantor; and

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

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

(F) Dollar amounts of guaranty.

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

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

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

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

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

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

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

796. CERTIFICATION REVOCATION.

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

- (1) Negligently making any false material statement in connection with an application for or renewal of a certificate; or
- (2) Failure to establish or maintain evidence of financial responsibility as required by this chapter.

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

- (1) When the holder of the certificate is no longer the owner or operator of the vessel or marine facility, or owner of the oil in question; or
- (2) Willfully making any false statement in connection with an application for or renewal of a certificate.

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

(d) Request for Reconsideration.

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

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

797. REPORTING AND SUSPENSION.

- (a) The holder of a certificate certificant shall provide written notification to the Administrator of an event which could produce a material change that affects the holder of the certificate's certificant's ability to comply with the financial responsibility requirement. Such events include, but are not limited to, an oil spill or discharge occurring within or outside of California marine waters from one or more vessels or marine facilities or other facilities for which the holder of the certificate certificant may be liable for damages, or other significant action against the holder of the certificate certificant. Additionally, certificate holders the certificants must also notify the Administrator in writing of any potential liability that could produce a material change that affects the holder of the certificate's certificant's ability to comply with the financial responsibility requirement. Written notification must be submitted within five (5) business days of knowledge of the incident or knowledge of sufficient facts which would lead a reasonably prudent person to investigate and learn of the incident. For purposes of this subparagraph, "material change" means an event or action which could cause the certificate holder to be liable for damages in an amount exceeding five percent (5%) of the total financial resources reflected by the certificate or, if owners' equity exceeds the total amount of financial resources reflected by the certificate, 5% of the owners equity.
- (b) Upon notification of the oil spill or discharge or other action or potential liability, as required by subsection 797(a), the Administrator shall reevaluate the validity of the certificate of financial responsibility.
- (c) Upon a determination by the Administrator that the holder of the certificate certificant lacks sufficient financial resources to assume financial responsibility for both the current spill or liability and have adequate resources remaining available to meet the requirements of this chapter, the Administrator shall suspend the certificate following (5) business days written notice.
- (d) Suspension of the certificate shall continue until the responsible party demonstrates, to the satisfaction of the Administrator, that the responsible party has the financial resources needed to meet the requirements of this chapter.

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

Alaska State Legislature

Legislative Research Agency



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

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

April 3, 1992

MEMORANDUM

TO: Senator Sam Cotten

FROM: Glenn T. Gray ^{GTG}
Legislative Analyst

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

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

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

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

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

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

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

- **Louisiana:** Tim Ahbert of the Oil Spill Coordinator's Office said that the oil spill statutes do not contain direct action provisions. Steve Hawkland, an attorney for the Secretary of State office said, however, that a general insurance statute requires direct action for all insurance providers (R.S. 22:655).
- **New Jersey:** Section 58:10-23.11s of New Jersey statutes permits the state or injured persons to bring claims "directly against the bond, insurer, or any other person providing evidence of financial responsibility."
- **New York:** According to Gordon Johnson, an assistant attorney general for New York, the state may assert claims directly against a bond or the insurer for cleanup costs, damages and civil penalties (Navigation Law Section 190).
- **Rhode Island:** Legislation passed in 1990 required evidence of financial responsibility for vessels in the amount of \$1,200 per gross ton. The legislation also stated that in the event of environmental damages "the bond shall be forfeited or payment on the insurance policy made to the full extent of the costs incurred by the state and or other persons to rectify and clean up the damages . . ." Both these provisions were eliminated during the 1991 legislative session and replaced by a requirement that vessels possess a Coast Guard approved certificate of financial responsibility. According to Steve Morin, assistant to the director of the Department of Environmental Management, the legislature modified the statute after the marine transportation organization INTERTANKO directed its members to cease oil shipments to Rhode Island.
- **Texas:** Section 40.255 of the Natural Resource Code permits the state to "bring suit directly against any bond, insurer, guarantor or person providing evidence of financial responsibility . . ." Assistant Attorney General Ingrid Hansen said that the state has not yet written regulations for this statute.

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

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Senator Cotten
April 3, 1992
Page 3

- **Virginia:** State statutes require oil spill insurers to provide in-state service of process and "to provide that actions may be brought on such instrument or insurance, guaranty or surety directly against the insurer . . ." (62.1-44.34:16). According to Assistant Attorney General Steve Shepard, however, regulations exempt P&I clubs from the service of process requirement.
- **Washington:** During the 1991 legislative session, Washington exempted P&I clubs from proof of financial responsibility requirements [88.40.020 (c)].

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

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

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

Attachments

Coastal States Direct Action Requirements for Oil Spill Insurers

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

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

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

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

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

Alaska State Legislature

Legislative Research Agency



P.O. Box Y
Juneau, AK 99611-3100
Phone: (907) 465-3991
Fax: (907) 463-3351

March 12, 1990

MEMORANDUM

TO: Senator Mike Szymanski

FROM: Glenn T. Gray
Legislative Analyst

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

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

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

Summary

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

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

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

Background

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

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

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

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

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

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

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

⁵AS 46.04.040 provides for several different levels of proof of financial liability for transporters of oil. Tank vessels or oil barges transporting trans-Alaska pipeline oil are required to prove that they have financial responsibility for \$14 million as provided by 43 U.S.C. 1653(c)(3). Other oil barges must show financial responsibility for one million dollars and other tank vessels are required to prove financial responsibility for \$20 million (unless the Clean Water Act requires a greater responsibility). SB 504 of the 16th Alaska State Legislature, if passed into law, would require a \$500 million proof of financial responsibility for any tank vessel or barge carrying crude oil.

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

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

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

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

Insurance Rates

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

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

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

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

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

Tanker Tariffs

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

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

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

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

Availability of Insurance

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

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

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

Reluctance to Transport Oil to Cook Inlet

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

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

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

Senator Szymanski
March 12, 1990
Page 7

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

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

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

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ATTACHMENT B
Coastal State Statutes Regarding Direct Action

Discard Earlier Pocket Supplement

1992 POCKET SUPPLEMENT

ISSUED IN JANUARY, 1992

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

DEERING'S GOVERNMENT CODE

ANNOTATED

OF THE STATE OF CALIFORNIA

§§ 8000-11499

Annotated and Indexed by the Publisher's Editorial Staff

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

FEB 03 1992

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ITEM-65

GOVERNMENT CODE

GOVERNMENT CODE

§ 8670.37

ment, unless a contingency plan is approved or made

er 24, 1990.

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

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

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

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

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

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

er 24, 1990.

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

teragency Oil Spill Committee

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

er 24, 1990.

governing adequacy of oil spill contingency plans: Gov C

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

agency planning and oil spill response equipment and
reimbursement

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

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

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

ber 24, 1990.

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

ig in 1992.

ditions. *** indicate omissions.

[3 Gov C]

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

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

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

(2) Additional funding shall be provided for the purposes described in subdivision (a) through the budget
act process upon the request by the administrator.
Added Stats 1990 ch 1248 § 17 (SB 2040), effective September 24, 1990. Amended Stats 1991 ch 614 § 1 (AB 203),
effective October 6, 1991.

ARTICLE 5.5

Financial Responsibility

Section

- 8670.37.51. (Operative January 1, 1992) Certificate of financial responsibility
- 8670.37.52. Certificate as conclusive evidence
- 8670.37.53. Requirements for certificate
- 8670.37.54. Demonstration of financial responsibility; Adoption of requirements
- 8670.37.55. Certificate requirements for owner or operator of more than one vessel
- 8670.37.56. Suspension of certificate
- 8670.37.57. Maximum term of certificate

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

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

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

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

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

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

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

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

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

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

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

§ 8670.37.52. Certificate as conclusive evidence

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

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

§ 8670.37.53. Requirements for certificate

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

(a) For a certificate for a vessel or for all of the oil contained within a vessel, the applicant shall demonstrate
the financial ability to pay at least five hundred million dollars (\$500,000,000) for any damages which may
arise during the term of the certificate. The level of required financial responsibility shall increase to seven
hundred fifty million dollars (\$750,000,000) on July 1, 1995, and to one billion dollars (\$1,000,000,000) on
January 1, 2000. The administrator may establish a lower standard of financial responsibility for small

Beginning in 1992.

[3 Gov C]

Italics indicate changes or additions. *** indicate omissions.

barges. The standard shall be based on the quantity of oil that can be carried by the barge and the risk of spill from the barge into marine waters. The administrator shall not set a standard that is less than the expected costs from a reasonable worst case oil spill into marine waters.

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

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

- (1) The marine facility was operating on January 1, 1991.
- (2) Continued operation is necessary to finance abandonment of the marine facility.
- (3) The financial resources the operator is able to demonstrate are reasonably sufficient to cover the damages from foreseeable spills from the facility.

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

§ 8670.37.54. Demonstration of financial responsibility; Adoption of requirements

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

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

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

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

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

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

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

§ 8670.37.56. Suspension of certificate

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

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

§ 8670.37.57. Maximum term of certificate

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

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

ARTICLE 6

The Oil Spill Prevention and Administration Fund

Section

- 8670.38. Creation; "Fund"
- 8670.38.10. [Section repealed 1991.]
- 8670.39. Administration
- 8670.40. Oil spill prevention and administration fee

§ 8670.38. Creation; "Fund"

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

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

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

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

§ 8670.38.10. [Section repealed 1991.]

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

§ 8670.39. Administration

(a) The administrator shall

(b) The administrator may necessary to carry out and

Added Stats 1990 ch 1248 § 1

§ 8670.40. Oil spill preven

(a) The State Board of Equ

The amount of the annual

products.

(b) *** (1) The oil spill

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of crude oil or petroleum

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(2) Every owner of crude o

except that payment to a n

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(c) The moneys collected

(d) The board shall collect

(e) The fee described in th

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(2) To carry out studies w

(3) To finance environmen

(4) To reimburse the mem

implementation of this cha

7.8 (commencing with Sec

(5) To implement, install,

contain, and clean up oil s

(6) To reimburse the board

Part 24 (commencing with

(f) The moneys deposited

Added Stats 1991 ch 10 § 3.5

§ 2 (AB 1409), effective Augu

Former Sections:

Former § 8670.40, similar to

1990, amended Stats 1991 ch

operative July 1, 1991, by its

Editor's Notes—For severabili

Cross References:

"Feepayer": Rev & Tax C § 4

Administration and collection

Due date for fees: Rev & Tax

Section

8670.46. Creation; "

8670.47. Administra

8670.47.5. Deposit of

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Official
FLORIDA STATUTES
1991

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



Published by the
STATE OF FLORIDA
TALLAHASSEE

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

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

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

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

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

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

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

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

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

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

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

(h) The department may spend up to \$1 million per year from the principal of the fund to acquire, design, train, and maintain emergency cleanup response teams

and equipment located at appropriate ports throughout the state for the purpose of cleaning oil and other toxic materials from coastal waters. When the teams and equipment are not needed for these purposes they may be used for any other valid purpose of the department.

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

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

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

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

376.12 Liabilities and defenses of terminal facilities and vessels.—

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

appropriate ports throughout cleaning oil and other toxic substances. When the teams and these purposes they may impose of the department. Any transfer of funds in an amount to the Petroleum and Trust Fund as set forth

acquired using moneys in Trust Fund shall be held improvement Trust Fund, and pursuant to the proce-

recover to the use of the is causing the discharge jointly and severally, all the fund, pursuant to s. resulting from damage or other similar disaster the Florida Coastal Protection Revenue Fund so as general Revenue Fund of as a result of such disaster to the fund for the 30 days of demand, shall of Legal Affairs for col-

s. 2, ch. 71-137; s. 11, ch. 74-336; s. 14, ch. 83-339; s. 1, ch. 83-353; s. 86-159; s. 81, ch. 86-163; s. 30, ch. 87-243; s. 16, ch. 90-243;

uses of terminal facilities

ss. 376.011-376.21 to effective cleanup and damages, any vessel or its agents or prohibited discharge or place within state a fund for all costs of amount not to exceed on for any such vessel never is the greater, for 10 gross tons, \$2 million or is greater, and for any ants, \$500,000 or \$600 ter. When the department was the result of lful misconduct within owner or operator or ator shall be liable to such sums expended. occurs from a terminal atement and cleanup to exceed \$25 million, it can show that such il or gross negligence rivity or knowledge of er or operator shall be amount of such sums ing costs of cleanup.

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

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

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

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

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

1. Pays the civil penalty; or

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

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

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

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

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

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

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

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

(b) If either the claimant or the person determined by the director to be responsible for the discharge dis-

agrees with the amount of the damage award, such person may request a hearing pursuant to s. 120.57. If a hearing is requested, the final order shall be issued by the Governor and Cabinet as head of the department.

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

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

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

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

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

(a) An act of war.

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

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

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

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

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

(b) To provide reasonable cooperation and assistance requested by a state or federal on-scene coordinator in connection with cleanup activities. The responsible party must file an objection with the department if

such party deems that cooperation or assistance requested by a state or federal on-scene coordinator is unreasonable. Such an objection must be filed with the department within 48 hours of the request. If a request is determined by the department to be unreasonable, the responsible party shall be reimbursed the fund for expenses incurred in carrying out the request. The responsible party may not file an objection to a request based solely on the premise that requested activity did not have satisfactory results. If the responsible party complies with the requests of state and federal on-scene coordinators and the responsible party later pleads and proves a valid defense required by this section, all costs of cleanup shall be reimbursed to the responsible party from the fund.

(8) In the event the total awards against the fund shall exceed the present balance of the fund, the claimants shall be paid from the future income of the fund.

(9) In the event the total awards for a specific occurrence exceed the current balance of the fund, the immediate award shall be paid on a prorated basis, and claimants paid on a prorated basis shall be paid a rata share of all funds received by the fund until the amount of the proven damages is paid to the claimants. However, amounts collected by the department from the prosecution of causes of action pursuant to paragraph (5)(d) and ²subsection (8) shall be utilized to satisfy the claims as to which such prosecutions result to the extent theretofore unsatisfied.

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

(11) In addition to the civil penalty, the pilot and master of any vessel or person in charge of any terminal facility who fails to give immediate notification of a discharge to the department or the nearest Coast Guard station commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, a discharge of 1 gallon or less of gasoline from a vessel shall not be subject to felony penalties for failure to comply with the state notification requirements of subsection. After reporting a discharge, a vessel shall remain in the jurisdiction of the department sufficient time to prove financial responsibility for the damage resulting from the discharge. The pilot and master of a vessel which fails to remain in the jurisdiction of the department for a reasonable time after notice of a charge shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. In no event shall the department detain the vessel longer than 12 hours after proving financial responsibility. The department shall, by rule, require that the pilot designate a person at the terminal facility who shall be the person in charge of that facility for the purposes specified by this section.

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

Note.—Substituted for a reference to "subsection (5)" to conform to the renumbering of subsections of s. 376.12 by s. 18, ch. 90-54, and to correct an error.

Note.—Substituted for a reference to "subsection (4)" to conform to the renumbering of subsections of s. 376.12 by s. 18, ch. 90-54, and to correct an error.

376.121 Liability for damages to natural resources

The Legislature finds that extensive damage to the state's natural resources is the likely result of a pollutant

and that it is essential that the state adequately assess and recover the cost of such damages from responsible parties. It is the state's goal to recover the costs of restoration from the responsible parties and to restore damaged natural resources to their pre-spill condition. In many instances, however, restoration is not technically feasible. In such instances, the state has the responsibility to its citizens to recover the cost of all damages to nonrestorable natural resources. To ensure that the public does not bear a substantial loss as a result of the destruction of nonrestorable natural resources, a compensation schedule shall be used to assess the cost of damages to such resources.

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

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

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

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

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

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

(b) Establish a compensation schedule for assessing damages to nonrestorable natural resources with standards for determining the cost of any lost ecological, consumptive, intrinsic, recreational, scientific, economic, aesthetic, and educational values of such injured or destroyed resources. Nonrestorable natural resources may include all living things except human

beings, coastal waters, estuaries, tidal flats, beaches, lands adjoining the seacoasts of the state, and submerged lands. The amount of compensation assessed under this schedule shall be no less than \$1 per gallon of pollutant spilled or equivalent unit as determined by the department or per square foot of habitat impacted, and no greater than \$1,000 per gallon of pollutant spilled or equivalent unit as determined by the department or per square foot of habitat impacted. To establish the compensation schedule, the department shall take into account:

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

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

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

- The location of a spill.
- Habitat and living resource sensitivity.
- Seasonal distribution of living resources.
- Recreational use or aesthetic importance.
- The proximity of a spill to important habitats for animals and living things, or to species listed as threatened, endangered, or of special concern under state or federal law.
- Other ecological, educational, consumptive, intrinsic, scientific, and economic values of natural resources.

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

- Demonstrate a recognition and affirmative acceptance of responsibility for the spill, such as the immediate removal of the pollutant and the relative amount of pollutant removed from the environment; or
- Enhance or impede the detection of the spill, the determination of the amount of pollutant spilled, or the extent of damage, including the unauthorized removal of evidence such as affected fish or wildlife.

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

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

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

- Developing restoration and enhancement techniques for natural resources.
- Investigating methods for improving and refining techniques for containment, abatement, and removal of

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

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

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

5. Developing an adequate wildlife rescue and rehabilitation program.

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

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

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

History.—s. 19, ch. 90-54.

376.13 Emergency proclamation; Governor's powers.—

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

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

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

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

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

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

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

376.14 Terminal facilities and vessels; financial responsibility.—

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

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

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

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

376.15 Derelict vessels; removal from public waters.—

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

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

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

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

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

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

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

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

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

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WATERS AND WATER SUPPLY

Title 59

CLAIMS AGAINST PUBLIC ENTITIES

Appendix A

EMERGENCY AND TEMPORARY ACTS

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58:10-23.11q WATERS AND WATER SUPPLY

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

L.1976, c. 141, § 18.

¹ 58:10-23.11g.

Historical Note

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

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

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

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

L.1976, c. 141, § 19.

Historical Note

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

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

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

L.1976, c. 141, § 20.

Historical Note

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

58:10-23.11t Rules and regulations

The commissioner, the State Treasurer and the director, respectively, are authorized to adopt, amend, repeal, and

NEW JERSEY STATUTES ANNOTATED

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Claims Against Public Entities

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1991

Cumulative Annual Pocket Part

[For Use In 1991-1992]

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WATERS AND WATER SUPPLY

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

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

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

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

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WATERS AND WATER SUPPLY

58:10-23.11u

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

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

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

Notes of Decisions

1. Construction and application

Section (§ 58:10-23.11v) of Spill Compensation Fund Act providing that nothing in the Act shall be deemed to preclude pursuit of any other civil or injunctive remedy by any person is applicable

2. Payment prior to cleanup

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

58:10-23.11t. Rules and regulations

Law Review Commentaries

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

Notes of Decisions

Validity of regulations 3

3. Validity of regulations

Adoption of regulations governing expenditures under New Jersey Spill Fund and Compensation

where neither enforcement provision (§ 58:10-23.11q) relating to arbitration awards nor this section relating to direct claims permitted against persons who provide "financial responsibility" for those licensed under the Act, are applicable. *Kessler v. Tarrats*, 191 N.J. Super. 273, 466 A.2d 581 (Ch.1983) affirmed 194 N.J. Super. 136, 476 A.2d 326.

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

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

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

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

Last additions in text indicated by underline; deletions by strikeouts

79 N.J.S.A.-3
1991 P.P.

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New York Consolidated Laws Service

Cumulative Supplement
Issued December 1991

Volume 22

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

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

DEC 25 1991

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By the Editorial Staff of the Publisher

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IT-68

§ 190. Claims against insurers

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

HISTORY:

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

RESEARCH REFERENCES AND PRACTICE AIDS:

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

CASE NOTES

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

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

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

§ 190-a. Application of article

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

HISTORY:

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

RESEARCH REFERENCES AND PRACTICE AIDS:

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

Law Reviews:

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

Section

191. Joint rules

192. Enforcement

193. Control of bulk

194. Control of bulk

195. Control of bulk

196. Control of bulk

197. Control of bulk

198. Control of bulk

199. Control of bulk

HISTORY:

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

§ 191. Joint rules

The commissione repeal, and enforce procedure act, as article.

HISTORY:

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

The 1985 act d

tal conservat

RESEARCH REF

55 NY Jur 2d,

Department of En acted within its genera for petroleum bulk s § 191) and over all fac lution (CLS ECL §§ mulgating new bulk p though Control of Bul (L 1983, ch 613, codi et seq.) expressly ex preexisting nonmajor

§ 192. Enforcement

Any person who part of, or in resp removal costs, di otherwise violates thereunder or who liable to a penalty a court of compete during which it offense.

HISTORY:

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

WEST'S LOUISIANA STATUTES ANNOTATED

REVISED STATUTES

Official Classification

Sections 22:611 to 22:730

Volume 15A

1992

Cumulative Annual Pocket Part

Replacing 1991 pocket part in back of volume

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

**Includes laws through the 1991
Third Extraordinary Session**

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R.S. 22:654

Note 63

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

77. — Theft, terms in policy

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

91. Construction against insurer—In general

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

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

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

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

- (a) The insured has been adjudged a bankrupt by a court of competent jurisdiction or when proceedings to adjudge an insured a bankrupt have been commenced before a court of competent jurisdiction;
- (b) The insured is insolvent;
- (c) Service of citation or other process cannot be made on the insured;
- (d) When the cause of action is for damages as a result of an offense or quasi-offense between children and their parents or between married persons; or
- (e) When the insurer is an uninsured motorist carrier.

For Reenactment eff. Jan. 1, 1993, see Special Pamphlet.

INSURANCE

108. — Employees, persons covered

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

118. — Business pursuits, property or interests covered

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

125. Parties to contract and relation between them

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

INSURANCE

(2) This right upon was written contains a provision within the state affect the provisions of this statute.

C. It is the Section shall defenses which provided the laws of this state.

D. It is all limits are extended whom the insureds under a tortfeasor Amended by A.

This Section 42 does

1988 Legislation: The 1988 act main volume Section 2 of "This Act shall 1989, and shall on or after

In this section was inserted and commas and D follow subsec. B was and existing as subpara. 1 attendant changes, all of

Petition to rival claimant

Admiralty bill: The John T. Biez L.Rev. 1185

Applicability: eign insurer lane L.Rev.

Augment punitive damages La.L.Rev. 3

INSURANCE

— **Employees, persons covered**
The legislator was a "full-time employee" in the meaning of state employees life insurance policy, notwithstanding insurer's claim that legislator did not work a minimum 30 hours per week and therefore did not qualify for coverage under policy rider defining a "full-time employee" as one working not less than 30 hours per week. *Jetson v. CNA Ins. Companies*, App. 1 88, 536 So.2d 569, writ denied 537 So.2d 570.

— Business pursuits, property or interests covered

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

Parties to contract and relation between them

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

Effect of insured and inability to effect direct action against insurer

All policies issued or delivered in this state, whether by solvency or bankruptcy of the insured, shall cover damages for injuries sustained or loss of any judgment which may be rendered against which shall have become executory, whether by the insured, and an action may be brought by the insured person, or his heirs, or his estate, or his heirs against the insurer within the terms and conditions of the policy by the injured person, or his heirs mentioned in Subsection A, at the time of the accident or against the insurer alone, or against the insurer in the parish in which the accident or injury could be brought against either the insured or the insurer by Code of Civil Procedure, Art. 2315, or heirs against the insurer alone.

by a court of competent jurisdiction or if it has been commenced before a court of competent jurisdiction.

made on the insured;
as a result of an offense or quasi-offense committed by the insured;
carried persons; or
carrier.

see Special Pamphlet.

INSURANCE

R.S. 22:655

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

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

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

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

Comment—1989

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

Historical and Statutory Notes

1988 Legislation

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

Section 2 of Acts 1988, No. 934 provides:

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

In this section as amended in 1988, a comma was inserted in subsec. A following "survivors"; and commas were inserted in both subsecs. B and D following "and"; the existing material in subsec. B was designated as paragraph B(1); and existing pars. B(1) to B(5) were redesignated as subpars. B(1)(a) to B(1)(e) respectively, with attendant capitalization and punctuation changes, all on authority of R.S. 24:253.

1989 Legislation

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

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

Forms

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

Law Review Commentaries

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

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

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

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

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

For Reenactment eff. Jan. 1, 1992, see Special Pamphlet.

RE439/SUB A

91 -- H 6019 SUBSTITUTE A

Rhode Island

JT COMM. LEGISLATIVE SERVICES
LAW REVISION OFFICE

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 1991

AN ACT

RELATING TO WATERS AND NAVIGATION -
CONTAMINANTS

Introduced By: Representative Christopher Boyle

Date Introduced: February 13, 1991

Referred To: Joint Committee on Environment and Energy

It is enacted by the General Assembly as follows:

1 SECTION 1. Section 46-12.4-1 of the General Laws in Chapter
2 46-12.4 entitled "The Contaminants from Seagoing Vessels Act" is
3 hereby amended to read as follows:

4 46-12.4-1. Contaminants from seagoing vessels. --- Contaminants
5 from tank vessels. -- The owners, operators and/or their agents of any
6 oil--tanker tank vessel, as defined in section 1001 (34) of public law
7 101-380 as passed by the United States Congress, which transports
8 petroleum products for commercial purposes and which is a seagoing
9 vessel as defined in section 46-9-2 entering the waters or waterways
10 of this state and transporting any petroleum product shall possess a

committee
amendment
3/21/91
15

11 valid certificate of financial responsibility issued by the U.S.
12 Coast Guard as ~~fit~~ certification of a performance bond or other evi-
13 dence of financial responsibility applicable to or liability insurance
14 with the director of the department of environmental management in the
15 amount of twelve hundred (\$1200) dollars per gross ton -- of -- weight -- of
16 the -- vessel and its cargo -- to insure payment of any judgment entered on
17 behalf of the state of Rhode Island and Providence Plantations or any

*
or for vessels less than 500 gross tons, or other evidence of financial responsibility in accordance with the Federal Oil Pollution Act Sections 1004 and 1016

1 person aggrieved pursuant to the provisions of chapter 12.3 of title
 2 46. in-the-event-the-vessel-causes-damage-to-the-environment--the
 3 bond-shall-be-forfeited-or-payment-on-the-insurance-policy-made-to-the
 4 full-extent-of-the-costs-incurred-by-the-state-and/or-other-persons-to
 5 rectify--and--clean-up--the--damage--to--the--environment--and-natural
 6 resources-of-the-state-and-to-the-extent-of-any-award-made-pursuant-to
 7 the-provisions-of-chapter-12.3-or-title-46-or-any-other-law-for-the
 8 compensation--of--persons--sustaining--injury-to-the-person; damage-to
 9 their--property--and/or--economic--injury--resulting--therefrom: Any

10 seagoing tank vessel as-defined-in-section-46-9-2 entering waters or

11 waterways of this state without such valid certificate of financial

12 responsibility coverage shall be fined not more than one hundred thou-

13 sand dollars (\$100,000) or twice the amount required to rectify any

14 environmental damage caused by said vessel, whichever is greater.

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

19 The department of environmental management is hereby authorized
 20 to promulgate rules and regulations necessary to implement the provi-
 21 sions of this section.

22 SECTION 2. This act shall take effect upon passage.

*in the matter
 amendment
 2/26/91
 AS*

*or, for vessels less than 300 gross tons, other
 responsibility coverage shall be fined not more than one hundred thou-
 sand dollars (\$100,000) or twice the amount required to rectify any
 environmental damage caused by said vessel, whichever is greater.*

Vernon's
**TEXAS CODES
ANNOTATED**

Volume 1
NATURAL RESOURCES CODE
Sections 1.001 to 80

1992
Cumulative Annual Pocket Part
Replacing 1991 Pocket Part in back of volume
For Use In 1991-1992

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

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WEST PUBLISHING CO.

JAN 02 1992

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§ 40.254

PUBLIC DOMAIN
Title 2

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

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

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

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

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

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

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

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

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

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

§ 40.255. Actions

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

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

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

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

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

§ 40.256. Individual Cause of Action

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

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

PUBLIC DOMAIN
Title 2

§ 40.257.

(a) Venue brought in subject of t

(b) All ap district cou Texas Regis Added by Act

§ 40.258. F

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(2) The coastal di federal re outweigh

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§ 40.301. In

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CODE OF VIRGINIA

1950

1991 Cumulative Supplement

ANNOTATED

Prepared under the Supervision of
The Virginia Code Commission

BY

The Editorial Staff of the Publishers

Under the Direction of

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



VOLUME 9

1987 REPLACEMENT

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

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

THE MICHIE COMPANY

Law Publishers

CHARLOTTESVILLE, VIRGINIA

JUL 12 1991

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

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

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

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

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

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

1. Approval was obtained by fraud or misrepresentation;

2. The plan cannot be implemented as approved; or

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

Editor's note. — Acts 1990, c. 919, cl. 2 provides that the Board shall promulgate regulations implementing this section on or before January 1, 1992, and that subsection A of this

section shall become effective on July 1, 1992. Clause 3 of this act also stated that the Board should regard certain considerations in adopting such regulations.

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

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

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

subsection of a chan guaranty

D. Acce

1. One y cash depos Board may of evidenc

2. On th insurance,

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Editor's no provides that ti lations implem Jan. 1, 1992, section shall be effective date of provides that

§ 62.1-44. do not apply less than 25. handling or 917.)

§ 62.1-44.3 discharge. - storm drain s this section, oil that (i) vic of the Board of the water or beneath the

B. Any per or upon state which may r permitting a facility, vehic state waters, be expected to

covered by the plan that will update the plan periodically as more frequently than once every year of need, may require an oil spill contingency plan if the facility's or vessel's ability to respond is either before or after the plan is

approved for a conference pursuant to the discharge contingency plan if it

of any facility or vessel covered by or supplemented plan; experience or its inability to implement demonstrates a necessity for

the best available technology

for hearing, may revoke its approval if it determines that: misrepresentation; approved; or been violated. (1990, c. 917.)

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

— A. (For effective date see) vessel entering upon state waters shall be in the amount of \$500 per gallon received by the Board shall be Petroleum Storage Tank Fund. discharged in violation of this act, threat of such discharge from a vessel, any amount held in escrow damages imposed under this

a tank vessel from the cash deposit required by the operator of the tank vessel pursuant to the terms and conditions of the discharge contingency plan shall adopt requirements for evidence of financial responsibility which would be required for such financial responsibility may be guaranty or surety, or any other method may prescribe. To obtain an approval under this section: the operator shall appoint an agent for service of process authorized by the Commonwealth. Any instrument of insurance, bond, or other security may be brought on such discharge directly against the insurer, guarantor, or other party by the operator up to, but not exceeding the amount pledged. Approved by the Board under this

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

D. Acceptance of proof of financial responsibility shall expire:

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

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

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

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

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

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

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

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

Editor's note. — Acts 1990, c. 917, cl. 4 provides that the Board shall promulgate regulations implementing this section on or before Jan. 1, 1992, and that subsection A of this section shall become effective 90 days after the effective date of such regulations. Clause 4 also provides that in promulgating such regulations,

the Board shall provide that, if evidence of financial responsibility provided to the federal government or any other state meets the requirements of subsection C of this section, comments shall be accepted by the Board in full or partial satisfaction requirements of subsection A of this section as appropriate.

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

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

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

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

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

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

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

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

(11) "Office" means the office of marine safety established by RCW 43.211.010.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[1990-91 RCW Supp—page 1760]

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

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

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

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

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

Chapter 88.44

OIL SPILL FIRST RESPONSE

Sections	
88.44.005	Purpose.
88.44.010	Definitions.
88.44.020	Commission—Powers and duties.
88.44.030	Members—Meetings.
88.44.040	Terms—Vacancies.
88.44.050	through 88.44.070 Repealed.
88.44.080	Quorum—Compensation—Travel expenses.
88.44.090	Commission records as evidence.
88.44.100	Assessments.
88.44.110	Increase in assessments.
88.44.120	Collection—Lien.
88.44.130	Records of vessel transits.
88.44.140	Right to subpoena.
88.44.150	Manager—Secretary and/or treasurer—Treasurer's bond.
88.44.160	Rules.
88.44.170	Enforcement.
88.44.180	Claims enforceable against commission assets—Non-liability of other persons and entities.
88.44.190	Penalty.
88.44.200	Financing assistance for commission.
88.44.210	Bonds or loans issued only after certification of sufficiency of funds.
88.44.220	Captions not law.
88.44.900	Severability—1990 c 117.
88.44.901	Effective dates—1990 c 117.

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

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

U.S. LAW REPORT

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

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

The International Scene

- page 2... **P&I Clubs React to OPA 90.** Insurers have a lot to say about proposed financial responsibility requirements.
- page 3... **IMO Initiates Study on Alternatives to Double Hulls.** Proposed amendments to MARPOL put USCG plans on hold.
- page 3... **Foreign Shippers Form Their Own Response Group.** NORPOL, like the NRC, offers an alternative to MSRC for foreign shippers.

At the Federal Level

- page 4... **Agencies Release ANPRMs, NPRMs, and Draft Reports.** Many of OPA 90's minor tasks are expected to be completed in 1992.
- page 7... **NOAA Faces Tough Decisions in Writing NRDA Regulations.** Seven workshops helped NOAA draft its second NPRM.
- page 7... **USCG Establishes Centers to Administer Fund and Coordinate Strike Teams.** The two centers in Virginia and North Carolina are open for business.
- page 8... **Proposed COPR Regs Spark Showdown Between USCG and P&I Clubs.** Even Congress is involved in the financial responsibility debate.
- page 8... **USCG Forms Committee for Vessel Response Plan Regulations.** The negotiated rulemaking committee's formal announcement came December 27.
- page 9... **Agencies Complete Five-Year Research and Development Plan.** The USCG, the EPA, and the MMS all have their own agendas.

Activity in the States

- page 10... **Alaska Adopts Country's Toughest Regulations.** The lieutenant governor must still sign ADEC's final draft released in October.

- page 10... **California Appoints New Oil Spill Administrator.** Former Fish & Game Commissioner Peter Bontadelli begins January 2, 1992.
- page 16... **Connecticut Passes Small Percentage of Spill Bills.** Only two passed on immunity for responders and uses of the state fund.
- page 16... **Florida Implements 1990 Spill Act.** DNR says the next draft of the regulations will be released in January.
- page 17... **Louisiana Enacts Spill Bill in One Week.** New regulations are on hold until the state's new administration settles in.
- page 17... **Maine's Commission Judges Effectiveness of Laws.** The Commission to Study Maine's Oil Spill Cleanup Preparedness released its interim report in December.
- page 16... **Maryland Regulations Address Vessels and Aboveground Tanks.** Final regulations, as well as new spill bills, will be introduced soon.
- page 18... **New Jersey Adopts Aggressive Regulations.** Hundreds of facility owners say compliance will be costly.
- page 19... **Oregon Is Only State to Pass Compact Bill.** The other bills passed cover responder immunity and contingency plan requirements.
- page 19... **Texas Puts General Land Office in Charge.** Final regulations in accordance with SR 14 are expected in February.
- page 19... **Virginia Meets January Deadline for Spill Regulations.** The State Water Control Board released two final regulations on December 9.
- page 20... **Washington Forms New Marine Safety Office.** HB 1027 prompted officials, among other things, to write up an NRDA formula for the state.

- The Independent Liquid Terminals Association;
- The American Association of Port Authorities;
- The American Petroleum Institute;
- The Oil Companies' International Marine Forum;
- The National Ocean Industries Association;
- American Waterways Operators;
- The International Tanker Owners Pollution Federation;
- The International Association of Independent Tanker Owners;
- The Transportation Institute;
- The American Institute of Merchant Shipping;
- The Remedial Contractors Institute;
- The Spill Control Association of America;

- The National Response Corporation;
- The Coastal States Organization;
- The Prince William Sound Regional Citizens' Advisory Committee;
- The Natural Resources Defense Council; and
- The states of California, Louisiana, Maryland, and Michigan

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

Agencies Complete Five-Year Research and Development Plan

At a congressional hearing in June 1991 on oil spill research and development issues, a member of the interagency coordinating committee commented on how well the various federal agencies worked together this past year in developing the five-year plan required by the Oil Pollution Act of 1990 (OPA 90), despite their separate agendas. The interagency committee includes members of the US Coast Guard (USCG), the Environmental Protection Agency (EPA), and the Minerals Management Service (MMS). Though the plan has not yet been submitted to Congress (perhaps early in 1992), the agencies' priorities are well-known, since much of the work is already

underway: the EPA is focusing on dispersants, technology for inland spill containment, and especially bioremediation; MMS projects involve remote sensing, at-sea verification of dispersants and slick burning, strategies for shoreline cleanup, and the reopening of the Oil and Hazardous Materials Simulated Environmental Test Tank, which has been closed for many years; and the USCG has joined with the National Oceanic and Atmospheric Administration on a few studies involving spill response and data collection (see *OSLR*, July 1991). The committee had its last meeting in December 1991.

Activity in the States

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

A number of states, coastal states in particular, were quite aggressive in 1991. Some states —

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

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

federal regulations. And states like Washington and Florida are developing compensation formulas for natural resource damages way ahead of the National Oceanic and Atmospheric Administration.

In addition to individual state initiatives, discussions of joint efforts across state borders ensued throughout the year. Though the Pacific Ocean Resources Compact (between Alaska, Washington, Oregon, California, and Hawaii) never got off the ground (only Oregon passed a bill to ratify it; see *OSLR*, June 1991), the Gulf states (Texas, Louisiana, Mississippi, Alabama, and Florida) showed interest in signing a memorandum of understanding to pool their resources to prepare

and respond to spills more efficiently in the Gulf region (see *OSLR*, November 1991). The governors of the Great Lakes states are also working together to improve oil spill preparedness and response capabilities in their part of the nation. According to an *OSLR* source, they are examining their oil spill laws, comparing their regulations to proposed federal regulations, and are discussing the possibility of initiating new legislation in 1992.

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

Alaska Adopts Country's Toughest Regulations

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

review the issue of responder immunity and report to the legislature by January 15 (on schedule, said officials). A bill similar to the original HB 196 (SB 270), which was also introduced before the 1991 session, will likely be addressed in 1992.

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

California Appoints New Oil Spill Administrator

California was the first state to enact a comprehensive spill bill after the enactment of the Oil Pollution Act of 1990 (OPA 90). The Lempert-Keene-Seastrand Oil Spill Prevention and Response Act (SB 2040), enacted in September 1990, tasked state officials with promulgating regulations and standards for such issues as con-

tingency plans and financial responsibility. Although agencies successfully completed some requirements, progress overall has been slow due to "the politics in California," said one official. In fact, the governor waited until the end of 1991 to appoint an oil spill administrator. Peter Bonadelli, who was previously the director of the

State Oil Spill Legislation and Regulations: 1991

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

State Oil Spill Legislation and Regulations: 1991, continued

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

State Oil Spill Legislation and Regulations: 1991, continued

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

State Oil Spill Legislation and Regulations: 1991, continued

State	Lead State Agency	Oil Spill Legislation	Oil Spill Rules and Regulations	Spill Bills Passed in 1991
Missouri (MO)	Dept. of Natural Resources, Division of Emergency Response	Chapters 260 (Environmental Control) and 644 (Water Pollution) of the revised statutes of MO.	Code of State Regulations, Title 10, Division 24, Department of Natural Resources.	SB 45 on civil penalties signed May 12.
Montana (MT)	Dept. of Health & Environmental Sciences, Solid & Hazardous Waste Bureau	The MT Comprehensive Environmental Cleanup & Responsibility Act as amended in 1989 (Sections 75-10-701 through 724); and the Water Quality Act (Sections 75-5-101 and 102).	Administrative Rules of MT, Title 16, Ch. 20 (Water Quality).	HB 228 on cost recovery passed before the session ended.
Nebraska (NE)	Dept. of Environmental Control	The Petroleum Release Remedial Action Act, Ch. 66; Petroleum Products & Hazardous Substances Storage & Handling Act, Ch. 81, and Environmental Protection Act, 81-1505.	Rules & Regulations for Petroleum Release Remedial Action Reimbursement Fund, Title 200, NE Administrative Code.	None.
Nevada (NV)	Dept. of Environmental Protection; Dept. of Military, Division of Emergency Management	Chapter 459 of the NV Revised Statutes.	Chapter 445 and 459 of the NV Administrative Code.	None.
New Hampshire (NH)	Dept. of Environmental Services, Water Supply & Pollution Control Division	Revised Statute Annotated Title 10 (Public Health), Ch. 146-A and 146-D.	NH Code of Administrative Rules, Part Env-W's 412 (for groundwater pollution).	HB 565 on spill response signed May 13.
New Jersey (NJ)	Dept. of Environmental Protection	NJ Statutes Annotated, Title 58:10-23 11 (includes the Spill Compensation and Control Act, enacted in July 1990).	NJ Administrative Code, 7:1E (Discharges of Petroleum and Other Hazardous Substances). New regulations went into effect Sept 3 (see OSLR, Oct 1991).	AB 4752 on responder liability signed Aug 13.
New Mexico (NM)	Oil & Conservation Division; Environmental Dept.	Chapter 70 (Oil & Gas) and Chapter 74-6 (Water Quality Act) of NM Statutes Annotated.	Part 1-203, Water Quality Control Commission Regulations; Rule 3, Oil and Conservation Division Rules and Regulations.	None.
New York (NY)	Dept. of Environmental Conservation	Navigation Law (Article 12); Environmental Conservation Law (Articles 3, 17).	Parts 30-32 and 610 of the NY Codes, Rules, and Regulations.	None. AB 5327/SB 3429 on responder liability pending.
North Carolina (NC)	Dept. of Environment, Health & Natural Resources, Division of Environmental Management	NC General Statutes, Ch. 143-215.75 through .94 (the Oil Pollution & Hazardous Substances Control Act of 1978), which includes HB 1177 and SB 977 passed in 1989.	None. Revision of state contingency plan in the works.	HB 520 on responder liability standards signed June 27.
North Dakota (ND)	Dept. of Health & Consolidated Laboratories	Ch. 61-28 of ND's Century Code (Control, Prevention, and Abatement of Pollution of Surface Waters).	Surface Water Quality Standards (Rule 33-16-02).	None.
Ohio (OH)	Environmental Protection Agency, Division of Emergency & Remedial Response	Chapters 3750 and 6111 of the OH Revised Code.	Draft regulations expected in January 1992.	None.
Oklahoma (OK)	OK Corp. Commission; Dept. of Pollution Control; Dept. of Health/Water Resources Board	Titles 17, 52, 63, 82 of the OK Statutes.	None.	None.



Source: Marine Spill Response Corporation

Coastal States That Have Adopted the Federal Responder Immunity Standard

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



* Federal standard was adopted, but only for a maximum of 90 days.
 [Stippled Box] Indicates states that have passed responder immunity legislation.

PUERTO RICO

US VIRGIN ISLANDS

January 1, 1992

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

The first deadline assigned by SB 2040 was July 1991 for the establishment of harbor safety committees and the date by which vessels and facilities were required to submit interim contingency plans. The harbor committees are currently reviewing vessel operations and safety procedures in the San Francisco and Los Angeles harbors; safety plans for those harbors are due by January 1992. The last task completed in 1991 by state officials involved financial responsibility requirements. On August 15, 1991, DF&G issued regulations on certification procedures so that vessels and facilities could become certified by January 1, when financial respon-

sibility requirements under SB 2040 became operative (see *OSLR*, September 1991). California's financial responsibility regulations were lauded by the protection and indemnity (P&I) clubs.

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

Connecticut Passes Small Percentage of Spill Bills

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

The spill bills that died in committee covered a variety of issues. For example: HB 5031 would have required the development of standards for the use of bioremediation to mitigate heating oil contamination; HB 6628 would have allowed municipalities to get reimbursed for cleanup costs involving underground storage tanks; HB 6647 would have provided indemnity against contamination to waterways by vessels carrying petroleum products; HB 489 would have allowed

the commissioner of environmental protection to use the Underground Storage Tank Petroleum Cleanup Fund to investigate and remediate spills from underground tanks; and HB 5264 would have prevented certain companies from directly or indirectly charging their customers for the cleanup of oil spills. A few of these bills will likely be reintroduced in 1992.

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

Florida Implements 1990 Spill Act

Florida's 1991 spill activities, like California's, focused on implementing a comprehensive spill bill passed in 1990. Florida's *Pollutant Spill Prevention and Control Act* was signed June 11, 1990. Pursuant to that act, Florida's Department of Natural Resources (DNR) released draft regulations on September 13, 1991, that covered a lot of ground, including such issues as: annual fees; reimbursement for state cleanup costs;

notification procedures; changed boundary lines; prevention and response certificates; contingency plan requirements; and financial responsibility requirements (see *OSLR*, October 1991).

The industry's reaction to the draft thus far has been relatively mild. Most of the negative comments about the draft voiced at the few workshops DNR held in the fall focused on problems

with definitions and deadlines. Encouraging comments, on the other hand, focused on the draft's financial responsibility language, which, in accordance with SB 646, describes certification requirements that are acceptable to protection and indemnity (P&I) clubs. The governor signed SB 646 on May 28, 1991.

According to a DNR spokesperson, the next draft of the regulations will be released in early 1992.

Louisiana Enacts Spill Bill In One Week

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

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

compensation; a state oil spill contingency fund; and an interagency council of oil spill experts.

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

Maine's Commission Judges Effectiveness of Laws

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

tion plans. According to the act, the DEP must complete the contingency plan by April 30, 1992.

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

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

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

Maryland Regulations Address Vessels and Aboveground Tanks

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

Because the draft regulations were heavily criticized by industry, the DOE extended its comment period until December 6, 1991, one month

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

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

New Jersey Adopts Aggressive Regulations

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

The DEP released the first draft of the regulations on May 6, 1991. A month later, a number of industry representatives spoke out at a public hearing on the regulations sponsored by the DEP (see *OSLR*, August 1991). Their complaints focused on compliance problems, specifically

problems with the draft's training, mapping, and notification requirements. Despite the negative comments, though, the DEP made few significant changes in the final version, with the exception of the mapping requirements. (To avoid duplication, the DEP allowed companies to obtain information from state agencies to draw up maps of sensitive areas that could be affected by a spill.) The 15-minute notification requirement following the discovery of a spill remained unchanged (see *OSLR*, October 1991).

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

Oregon Is Only State to Pass Compact Bill

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

September 29, 1991) and contingency plan requirements (SB 242, signed July 22, 1991).

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

Texas Puts General Land Office in Charge

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

SB 14 complements the Oil Pollution Act of 1990 in many respects. The bill features language on such issues as liability, enforcement, limited immunity for responders, a new coastal protection

fund, inspections and drills, financial responsibility, contingency plans, and research and development. It directs the GLO to develop a statewide spill contingency plan and promulgate regulations on various issues in the act.

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

Virginia Meets January Deadline for Spill Regulations

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

Before the September 30, 1991, deadline for comments, the board sponsored three workshops to address various concerns regarding the regulations (see *OSLR*, October 1991). In the end, the board included a number of changes that made the final version of the contingency planning regulation stricter than the draft. The final financial responsibility requirements, however, varied little from the draft, except that the fees for ap-

proval are lower and the final version accepts "certificates of entry" as proof of liability coverage.

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

Washington Forms New Marine Safety Office

This past year saw plenty of action in Washington State regarding oil spill legislation and regulations. The momentum actually began to build on May 15, 1991, when Washington Governor Booth Gardner signed — but vetoed three sections of — HB 1027, one of the most detailed spill bills in the country (see *OSLR*, June 1991). Prompted by recommendations from the States/British Columbia Oil Spill Task Force, the bill features a number of significant changes to the state's approach to spill prevention and response, including: the establishment of a \$25 million response fund; limited immunity for responders; the addition of a citizens' advisory committee that reports to the governor; financial responsibility requirements acceptable to the protection and indemnity (P&I) clubs; and new requirements for prevention plans and contingency plans. In addition, HB 1027 established the Office of Marine Safety to focus on the prevention of spills from vessels, which took some of the bur-

den off the Department of Ecology (DOE). The DOE is currently responsible for responding to spills and ensuring that preventive measures are in place at facilities. (Around the first of October 1991, Gardner appointed Barbara Herman as the new administrator of the Marine Safety Office. Herman was formerly the chief litigator for the state of Alaska in the Exxon Valdez case.)

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

Hotline

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

Announcing...

The Business and Environment Group of Cutter Information Corp., publisher of the *Oil Spill US Law Report*, has just published the premier issue of *Environment Watch: Latin America*, a monthly newsletter service covering developments in Latin America in the areas of environmental regulation and corporate environmental initiatives. To receive a complimentary copy of this newsletter, please contact Kara Lovering at (617) 648-8700 (in the continental US call toll free at (800) 888-8939) or fax your request to (617) 678-8707.

Editor: Amy M. Stolls

Publisher: Karen Hine Coburn

Subscription Manager: Kim Leonard

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

Production Editor: Karen Kunkel Pasley

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Alaska State Legislature

Legislative Research Agency



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

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

March 13, 1992

MEMORANDUM

TO: Senator Sam Cotten

FROM: Glenn T. Gray^{ETG}
Legislative Analyst

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

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

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

- **Virginia:** Steve Shepard, an assistant attorney general for Virginia, said that his state currently requires insurance companies to provide instate "service of process." Protection and Indemnity (P&I) clubs, however, are exempted from this requirement (62.1-44.34:16). Protection and Indemnity clubs are mutuals made up of a number of tanker and oil companies.
- **New York:** According to Gordon Johnson, an assistant attorney general for New York, state statutes permit the state to assert claims directly against a bond or the insurer (Navigation Law Section 190).
- **Florida:** Debbie Prebble, an environmental administrator for the Office of Coastal Protection, said that in 1990 the legislature required all insurance companies to provide proof of financial security. The P&I clubs, however, refused to comply with this requirement and other insurance companies would not provide the necessary insurance. As a result, companies had to provide proof of self-insurance. Smaller companies were able to self-insure only for a few of their vessels at one time and therefore only provided proof of insurance for vessels when they were in Florida waters. Because the state was burdened with the continuous

Senator Cotten
March 13, 1992
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processing of insurance certificates, the law was changed in 1991 (FS 376.14).

Copies of the statutes from these three states are attached.

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

Attachments

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

REPLY TO:

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

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

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

March 11, 1992

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

Dear Senators Cotten & Hoffman:

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

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

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

Senator Sam Cotten
Senator Lyman F. Hoffman
Senate Select Committee on Oil and Gas

March 11, 1992
Page 2

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

Sincerely,

CHARLES E. COLE
Attorney General


By Breck Tostevin
Assistant Attorney General

BCT/jv

Enclosures (6)

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

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

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

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

127. See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

128. See *Baldwin v. New York*, 399 U.S. 66, 73-74 (1969).

129. NEELY, *supra* note 1, at 168.

130. *Id.* at 169.

COMMENTS

WILLAMETTE LAW REVIEW

21:2 Spring 1985

DIRECT ACTIONS AGAINST MARINE INSURERS: A CALL FOR UNIFORM LEGISLATION

INTRODUCTION

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

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

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

effortless recovery.²

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

I. BACKGROUND

A. Overview of Marine Protection and Indemnity Insurance

1. History and Definition

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

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

These insurance underwriters normally assumed only a part of

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

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

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

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

7. *Id.*

8. MARITIME LAW & PRACTICE, at 291.

9. Kierr, *supra* note 6, at 653.

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

11. *Id.* at 55.

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

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

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

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

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

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

3. BRITISH MARINE INSURANCE ACT, 1906 § 1.

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

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

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

2. Choice of Law

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

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

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

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

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

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

20. *Id.*

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

22. *Id.* at 316.

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

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

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

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

B. Development of Direct Action Statutes

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

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

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

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

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

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

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

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

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

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

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

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

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

II. MARINE P & I INSURANCE AND DIRECT ACTION STATUTES

A. Louisiana

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

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

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

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

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

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

36. Houdlett, *supra* note 12, at 562.

37. Kier, *supra* note 6, at 651.

38. *Id.*

39. LA. REV. STAT. ANN. § 22:655 (West 1978).

40. 347 U.S. 409.

41. 46 U.S.C.A. §§ 183, 186 (West 1958).

42. Courts have interpreted the statute to mean the value of the vessel and her freight after the accident. See, e.g., 347 U.S. at 414 n.4.

43. 46 U.S.C.A. §§ 183, 186.

44. 347 U.S. at 410-11.

45. *Id.* at 411-12 (referring to the Limitation of Liability Act, 46 U.S.C.A. § 183).

46. *Id.* at 412.

47. *Id.*

48. *Koehler v. Harvey Applicators, Inc.*, 416 F. Supp. 872, 573 (E.D. La. 1976) (quoting GILMORE & C. BLACK, *supra* note 5, at 908).

49. 347 U.S. at 422.

50. *Id.* at 436.

51. *Id.* at 427.

52. 419 F.2d 230 (5th Cir. 1969), *cert. denied*, 397 U.S. 987 (1970).

53. *Id.* at 236 (citing *Coleman v. Jahneke Serv., Inc.*, 341 F.2d 956 (5th Cir. 1965)).

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

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

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

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

54. *Id.* at 237.

55. *Id.* at 238.

56. *Koesler*, 416 F. Supp. at 873.

57. See also *American Sugar Co. v. Vainqueur Corp.*, 1970 A.M.C. 405 (E.D. La. 1970) (holding that the marine indemnity policy was written for the benefit of public protection; therefore, the right of direct action under Louisiana's statute should not have been denied to plaintiff).

58. 417 F.2d 1030, 1040 (5th Cir. 1969).

59. 43 U.S.C.A. § 1331 (West 1984).

60. 417 F.2d at 1037-40.

61. See *Nations v. Morris*, 483 F.2d 377 (5th Cir. 1973).

62. 416 F. Supp. at 875-76.

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

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

B. Puerto Rico

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

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

63. 327 F. Supp. 474, 476 (E.D. La. 1971).

64. *Id.* at 475-76.

65. *Id.* at 475.

66. L. BUGLASS, *supra* note 13, at 270-71.

67. See *Kierr*, *supra* note 6, at 663 n.121.

68. P.R. LAWS ANN. tit. 26 § 2001 (1976).

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

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

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

C. California

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

69. *Id.* at § 2003(1) (1977).

70. *Torres v. Interstate Fire & Cas. Co.*, 275 F. Supp. 784, 788 (D.P.R. 1967).

71. *Id.* at 789.

72. Recall that the value of the vessel plus pending freight is the maximum amount for which the vessel owner-employer could be held liable after a successful limitation proceeding. 46 U.S.C.A. § 183.

73. 379 F. Supp. 614, 635 (D.P.R. 1974).

74. *Id.* at 635.

75. *Id.* at 637.

76. *Id.* at 637-38.

77. Howdlett, *supra* note 12, at 561.

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

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

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

78. CAL. INS. CODE § 11580 (West Supp. 1984).

79. *Zahn v. Canadian Indem. Co.*, 57 Cal. App. 3d 509, 512-13, 129 Cal. Rptr. 286, 287-88 (1976) (quoting *Johnson v. Holmes Tuttle Lincoln-Mercury*, 160 Cal. App. 2d 290, 298, 325 P.2d 193, 198 (1958)).

80. 45 Wash. 2d 209, 212, 273 P.2d 803, 805 (1954).

81. *Id.*

82. *Id.* at 227, 273 P.2d at 813-14.

83. *Id.* at 228, 273 P.2d at 814 (relying on the fact that the vessel was out of a San Francisco port and that the insurance policy was "executed, issued, and delivered in the State of California").

84. *Id.* at 232, 273 P.2d at 816. The defendant insurance company also claimed that because the insurance policy was a maritime contract, application of the California statute was unconstitutional since Art. III, § 2 of the United States Constitution mandates that such contracts be interpreted according to the general admiralty law. *Id.* at 229-30, 273 P.2d at 815. The court, citing *Maryland Casualty*, see *supra* notes 40-51 and accompanying text, found no constitutional prohibition against applying the statute and held that the seaman was entitled to maintain an action thereon. *Id.* at 232, 273 P.2d at 816.

85. Examples of these are the Louisiana and Puerto Rico statutes.

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

III. DIRECT ACTIONS IN THE ABSENCE OF STATUTE

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

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

A. Joinder in Florida

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

policies.⁹²

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

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

Although federal courts had refused to permit joinder of an insurer on personal injury claims⁹⁷ and on claims arising out of torts on the high seas,⁹⁸ a federal district court in Florida did recently allow joinder of a liability insurer on a cargo claim. In that case a tortious act occurring in Florida waters resulted in loss of cargo on the high seas.⁹⁹ In making its decision, the court focused primarily on whether Florida's right of direct action conflicted with the general maritime law.¹⁰⁰ It concluded that "the constitutional imperative for the uniformity of Admiralty" was not offended by application of the judicially recognized right of action against insurers in maritime claims arising on inland waters of Florida.¹⁰¹

92. *Beta Eta House Corp. v. Gregory*, 237 So. 2d 163, 165 (Fla. 1970) (expanding the rule to allow joinder of liability insurance carrier for (fraternity house)).

93. *Van Bidder v. Hartford Accident & Indem. Insurance Co.*, 439 So. 2d 880, 882 (Fla. 1983) (upholding the constitutionality of FLA. STAT. § 627.7262 (West 1984)).

94. 414 F. Supp. 131, 132 (N.D. Fla. 1975).

95. *Id.* at 133.

96. *Id.*

97. *Id.* at 132-33.

98. See *Bangladesh Agricultural Dev. Corp. v. Millbank Shipping, Inc.*, 1983 A.M.C. 2631, 2632 (M.D. Fla. 1983) and cases cited therein.

99. *Bangladesh Agricultural Dev. Corp.*, 1983 A.M.C. at 2632.

100. *Id.*

101. *Id.* at 2633.

86. See, e.g., *Continental Oil Co. v. Bonanza Corp.*, 677 F.2d 455, 460 (5th Cir. 1982).

87. A. PARKS, *THE LAW OF TUG, TOW & PILOTAGE* 802 (2d ed. 1982).

88. *Id.* at 302-03.

89. 223 So. 2d 713, 715 (Fla. 1969).

90. *Id.*

91. FLA. P. CIV. PRO. 1.210(a).

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

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

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

B. New York's Anti-Direct Action Statute¹⁰⁵

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

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

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

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

106. N.Y. INS. LAW § 167(1)(a), 167(1)(b) (McKinney Supp. 1984).

107. *Id.* at § 112(2)(c)(1).

108. *Id.* at § 46(21).

109. 1969 A.M.C. 2334, 2335 (N.Y. 1969).

110. *Id.* at 2335.

111. *Id.*

112. *Id.* at 2336.

113. *Cowan v. Continental Ins. Co.*, 86 A.D.2d 646, 647, 446 N.Y.S.2d 412, 413 (N.Y. App. Div. 1982).

114. *Id.* at 647, 446 N.Y.S.2d at 414. The court further found, however, that Connecticut had the most significant contacts with the litigation and that therefore Connecticut law should be applied. Connecticut had a direct action statute authorizing direct recovery against an insurer by

102. 258 So.2d 485, 486 (Fla. App. 1972).

103. *Id.*

104. 439 So. 2d at 882.

105. New York's direct action statute has limited application, leading some commentators to refer to it as an anti-direct action statute. Houdlett, *supra* note 12, at 570.

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

While the West Coast courts were busy with the *Ahmed* claims, the Second Circuit was also occupied by claims involving New York's insurance law. In *Wabco Trade Co. v. S.S. Inger Skou*, the plaintiffs sought to bring suit directly against a carrier's insurance company to recover on a judgment obtained against the carrier for loss of goods.¹²⁰ The suit was based upon New York Civ. Prac. Law and Rules Section 5201(a) which provides that "[a] money judgment may be enforced against any debt . . . unless it is exempt from application to the satisfaction of a judgment. A debt may consist of a cause of action which could be assigned or transferred . . ."¹²¹ The Second Circuit, revers-

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

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

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

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

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

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

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

121. *Id.*

ing the district court,¹²² held that the specific prohibition in Section 167(4) relating to direct actions against marine insurers superseded the more general provisions of the rules of civil procedure. Hence, it found that, notwithstanding civil practice rule 3201(a), Section 167(4) precludes enforcement of a judgment against an assured by direct action against an insurer.¹²³

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

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

C. Other Jurisdictions

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

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

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

123. 663 F.2d at 371.

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

125. *Id.* at 1048.

126. *Id.* at 1049.

127. *Id.* at 1048.

128. *Id.* at 1049.

129. *Id.* at 1052.

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

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

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

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

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

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

133. *Id.*

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

135. *Id.*

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

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

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

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

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

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

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

140. *Id.* at 919.

141. *Id.*

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

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

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

145. *Id.* at 65.

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

147. *Id.* at 459.

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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.¹⁴⁸

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.¹⁴⁹

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.¹⁵⁰ 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.¹⁵¹ 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.'"¹⁵²

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.¹⁵³ This conclusion is rendered more certain by the courts' repeated expressions that creation of such a remedy is best left to the legislature.¹⁵⁴

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."¹⁵⁵ Over the years Congress and the federal courts have formulated a variety of general policies which are protective of seamen in personal injury litigation.¹⁵⁶ 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.¹⁵⁷ 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,¹⁵⁸ whether insurers can avail themselves of other defenses generally considered personal to the assured,¹⁵⁹ and whether actions should be permitted on claims not arising out of torts committed on the territorial waters of a particular court's jurisdiction.¹⁶⁰

Probably the most difficult of these questions would be those arising out of the inevitable clash with the Limitation of Liability Act.¹⁶¹ 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.¹⁶² The United States Supreme Court, however, has yet to address the issue and reach a definitive resolution of the problem.¹⁶³ 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.¹⁶⁴ 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,¹⁶⁵ as well as increased jurisdictional and conflict of law litigation.¹⁶⁶

Uniformity of law is a paramount principle in Admiralty jurisdiction.¹⁶⁷ 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 insurance¹⁶⁸ 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 Act¹⁶⁹ a seaman could not bring a negligence action against his employer. The defense of the fellow servant rule inevitably quashed such an attempt.¹⁷⁰ 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.¹⁷¹

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]."¹⁷²

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.¹⁷³ 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.¹⁷⁴ The Act is applicable to maritime liability policies.¹⁷⁵

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.¹⁷⁶ 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.¹⁷⁷

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,¹⁷⁸ and the unique nature of the traditional P & I club.¹⁷⁹

Neither of these factors compels a conclusion that direct action is inappropriate. First, virtually all marine risks are insured¹⁸⁰ and the majority of modern jurors must surely be aware of this.¹⁸¹ 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.¹⁸² 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.¹⁸³ 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.¹⁸⁴ 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.¹⁸⁵

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 Constitution¹ prohibits cruel and unusual punishment. Although prisoners may lose many rights as a result of incarceration, they retain their rights under the eighth amendment.² Historically, courts have been very reluctant to strictly enforce this constitutional provision.³ 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.⁴ The Court of Appeals for the Ninth Circuit applies a "discrete conditions" approach, although it appears to combine this test with the totality analysis.⁵ This Comment will explore the historical treatment of comprehensive challenges to the eighth amendment,⁶ examine the differences between the two tests applied in this area,⁷ and analyze the approach taken by the Court of Appeals for the Ninth Circuit.⁸

I. HISTORY

Traditionally, federal judges took a "hands off" approach⁹ 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 Convention⁸³ 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*⁸⁴ 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*,¹ 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.²

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.³ 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, although⁴ 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.⁵

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,⁶ 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*,⁷ 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*.⁸ 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)⁹ 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 1851,¹⁰ 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.¹¹ They are equally free to enact their own penalties.¹²

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 Fund¹³ 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,¹⁴ 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.¹⁵ 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.¹⁶

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 Act¹⁷ 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 section¹⁸ 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.¹⁹ 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,²⁰ 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.²¹ 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 Law¹ takes into account the existence and opportunities offered by the Luxembourg banking and insurance sector and fully implements the core of the EEC Treaty,² 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.³ 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 ships⁴ that intend to operate under the Luxembourg flag have to register with the Record Keeper of Maritime Mortgages.⁵ 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 removal costs is a developing picture. It appears that \$700 million (more than 50% of the tankers are said to have \$500 million in excess pollution liability cover over the \$200 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.*
Penrod Drilling Co.

Kevin J. Neese 151

Questioning the Use of a Declaratory
Judgment in a Maintenance and
Cure Action: *Rowan Companies*
v. Griffin

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It's Best to Answer When the Coast
Guard Comes Knocking: *United States*
v. Victoria

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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 amends and replaces 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),¹ 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).² Although the United States has not adopted either of the major international conventions regarding liability for oil pollution,³ 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.⁵

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.⁶

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.⁷ In addition to civil penalties under the Clean Water Act,⁸ both the Clean Water Act⁹ and the Refuse Act of

1899¹⁰ provided criminal penalties. While the Refuse Act creates a strict liability crime,¹¹ the Clean Water Act imposed criminal penalties only for negligent or knowing violations.¹² 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.¹³

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.¹⁴ 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.¹⁵ The Clean Water Act not only created liability in personam, but recognized liability in rem where the source of the discharge was a vessel.¹⁶ 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.¹⁷

The Clean Water Act provided very limited defenses,¹⁸ 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."¹⁹ In such a case, the responsible party was liable for the full removal costs.²⁰

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.²¹ However, when the source of the discharge was a vessel, such claims were subject to the Limitation of Liability Act (Limitation Act).²²

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.²³

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.²⁴ The same limited defenses to liability available to a responsible party were available to a third party.²⁵ 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.²⁶

With regard to responsible parties, the Clean Water Act provided the exclusive remedy for recovery of cleanup costs by the United States.²⁷ However, the Clean Water Act was not the government's exclusive remedy against a third party solely responsible for a discharge.²⁸ 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.²⁹

C. Comprehensive Environmental Response, Compensation, and Liability Act

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

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.³³ 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.³⁴ CERCLA allows recovery regardless of physical damage to the proprietary interest of the claimant.³⁵ 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.³⁶ 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.³⁷ Although the defenses available are limited,³⁸ CERCLA limits the liability of vessels on the basis of vessel type, nature of the cargo, and tonnage.³⁹ The Act also allows claims directly against the insurer.⁴⁰ Finally, CERCLA imposes civil penalties for breach of certain statutory requirements.⁴¹

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 1978,⁴² the Trans-Alaska Pipeline Authorization Act,⁴³ and the Deepwater Port Act.⁴⁴ The liability provisions of these statutes have been replaced by those of the Oil Pollution Act.⁴⁵

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.⁴⁶ Liability under the Act was joint, several, and strict⁴⁷ with tonnage-based liability limits for vessels.⁴⁸ Defenses were similar to those under the Clean Water Act.⁴⁹

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.⁵⁰ 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.⁵¹

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)⁵² applies *inter alia* to vessels loaded with oil transported through the Trans-Alaska Pipeline destined for ports or terminal facilities under United States jurisdiction.⁵³ 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.⁵⁴ TAPAA preempted inconsistent provisions in the Clean Water Act⁵⁵ and provided a maximum limit of exposure in all cases.⁵⁶ 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.⁵⁷ 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.⁵⁸ TAPAA does not allow a direct action remedy against insurers.

3. Deepwater Port Act

The Deepwater Port Act,⁵⁹ 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 sea⁶⁰ and was structured similarly to the other activity-based pollution acts.⁶¹

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,⁶² except that the Clean Water Act preempts state legislation when federal statutes or agency regulations occupy the field.⁶³ 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.⁶⁴ Because the Oil Pollution Act permits states to impose additional liabilities on a discharger,⁶⁵ state laws now assume an added significance. To date, most coastal states and the Great Lakes states have enacted oil pollution legislation,⁶⁶ 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.⁶⁷ 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.⁶⁸ 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 zone⁶⁹ 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).⁷⁰ 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.⁷¹ 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,⁷² the Intervention on the High Seas Act,⁷³ or state law as well as removal costs incurred by any person for acts consistent with the National Contingency Plan.⁷⁴

In addition to removal costs, the responsible party shall be liable for damages for injury to natural resources,⁷⁵ 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.⁷⁶

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.⁷⁷ 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.⁷⁸

The federal government is mandated by the Oil Pollution Act to issue regulations for the assessment of natural resource damages.⁷⁹ 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.⁸⁰ Once the regulations are issued, a determination of damages pursuant to these regulations acquires the force of a rebuttable presumption⁸¹ and thus will be difficult to overturn.⁸² 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.⁸³ 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.⁸⁴ 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.⁸⁵ 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.⁸⁶ *Louisiana ex rel. Guste v. M/V Testbank*⁸⁷ 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.⁸⁸

Under the maritime law prevailing in most circuits, none of these claimants could recover.⁸⁹ Although, the Oil Pollution Act allows recovery for lost profits or impairment of earning capacity,⁹⁰ 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.⁹¹ 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.⁹²

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.⁹³ 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.⁹⁴

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.⁹⁵ By contrast, under the Clean Water Act the limit was \$150 per gross ton or \$250,000, whichever was greater.⁹⁶ 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 \$2,000,000,000.⁹⁷

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.⁹⁸ 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.⁹⁹ 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,¹⁰⁰ 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.¹⁰¹ By its terms, when this last provision applies, it contains no limit of liability.¹⁰²

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.¹⁰³ 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.¹⁰⁴

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.¹⁰⁵ However, the new statute specifically allows states to impose additional liabilities, penalties, and other requirements on vessel owners for oil pollution.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ The amount due in interest is not subject to the limitation provisions of the Act.¹⁰⁹

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.¹¹⁰ 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.¹¹¹ 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.¹¹² 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 \$125,000.¹¹³ 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.¹¹⁴

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.¹¹⁵

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

D. Direct Action Against Insurers

The Oil Pollution Act requires the responsible party for essentially all vessels¹¹⁷ to have evidence of "financial responsibility"¹¹⁸ 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.¹¹⁹ The Act provides for a right of direct action against the guarantor for claims for removal costs and damages.¹²⁰ 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.¹²¹ A noncomplying vessel found in United States navigable waters shall be subject to seizure and forfeiture to the United States.¹²²

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.¹²³ The Act grants United States district courts federal question jurisdiction with regard to all controversies arising under the Act.¹²⁴ Venue is proper in any district in which the discharge, injury, or damages occurred.¹²⁵ 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.¹²⁶ 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;¹²⁷ however, a transfer rests to a large extent in the discretion of the court.¹²⁸

A more significant problem is that the Act also grants state courts jurisdiction to consider claims under the Act.¹²⁹ 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.¹³⁰ 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).¹³¹ 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.¹³² 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.¹³³ 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.¹³⁴ 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.¹³⁵

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.¹³⁶ 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.¹³⁷ 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 2015.¹³⁸ 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.¹³⁹

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;¹⁴⁰ alterations to manning standards for foreign tank vessels;¹⁴¹ 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;¹⁴² special provisions regarding navigation and facilities in Prince William Sound¹⁴³ (the site of the EXXON VALDEZ grounding); reforms to the land-based application of the Trans-Alaska Pipeline Authorization Act;¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶

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.¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹ The Act establishes a national planning and response system,¹⁵⁰ 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.¹⁵¹ 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.¹⁵² 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.¹⁵³

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.¹⁵⁴ 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.¹⁵⁵ The Act's higher limits and the potential for unlimited liability under state law render ratification impossible.¹⁵⁶

(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).¹⁵⁷ Shell explained that the risks of unlimited liability in the United States outweighed the commercial rewards.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹ The extent to which this excess cover will be available in February 1991 is currently not clear.¹⁶² 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.¹⁶³ 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.¹⁶⁴

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.'"¹⁶⁵ 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.¹⁶⁶

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.¹⁶⁷ 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."¹⁶⁸

Additionally, part of the industry-sponsored voluntary pollution schemes includes CRISTAL,¹⁶⁹ 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 TOVALOP¹⁷⁰ 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.¹⁷¹ Finally, the House of Representatives original version of the Oil Pollution Act created secondary strict liability on the part of the cargo owner.¹⁷² 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.¹

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,² federal courts have begun to accept and enforce the validity of such clauses. However, there are differing degrees of acceptance between the various circuits.³ In *M/S Bremen v. Zapata Off-Shore Co.*,⁴ the Supreme Court brought American law substantially into accord with the law of other common law countries by holding forum selection clauses generally enforceable.⁵ 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 oil¹ which will provide a readily accessible fund for prompt and certain recovery of pollution damages.² Prompt and fair claims compensation under a "simpler, clearer, more predictable legal and regulatory system" has long been a principal objective of this legislation.³ 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.⁴

*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).

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

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

³*Id.* at 10333.

⁴See, 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 review the development of oil spill liability programs from 1970 to passage of the Oil Pollution Act. Part II 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 III 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),⁵ 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),⁶ the Deepwater Ports Act of 1974 (DPA)⁷ and the

Outer-Continental Shelf Lands Act Amendments of 1978 (OCSLA).⁸ 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.⁹ 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.¹⁰ 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).¹¹ Subsequently, the International Convention for the Establishment of an International Fund for Oil Pollution Damage, 1971 (Fund Convention)¹² 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.¹³ The Fund Convention establishes an international

⁵ 33 U.S.C. § 1251 *et seq.*

⁶ Jones, *supra* note 2, at 10333; H.R. Rep. No. 1489, 94th Cong., Pt. 1; see also Straube, *Is 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").

⁷ Jones, *supra* note 2, at 10334-37.

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

⁹ Jones, *supra* note 2, at 10334-37.

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

¹¹ 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).

¹² 33 U.S.C. § 1251 *et seq.*

¹³ 43 U.S.C. § 1651 *et seq.*

¹⁴ 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.¹⁴

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.¹⁵ 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.¹⁶

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").

¹⁴Fund Convention, *supra* note 12, Articles 4, 5, 10.

¹⁵*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.

¹⁶The 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.¹⁷

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.¹⁸ 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

¹⁷Temple, 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).

¹⁸*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.¹⁹ Responsible parties are owners and operators of vessels, facilities and pipelines and licensees of deepwater ports.²⁰ 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."²¹

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.²² 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.²³

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.²⁴ "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.²⁵ There is no liability to a claimant whose gross negligence or willful misconduct caused the incident.²⁶ 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.²⁷

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.²⁸

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.²⁹

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.³⁰ 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.³¹ Notwithstanding the defenses and limitations noted above, federal, state

¹⁹Id., § 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.

²⁰Id., § 1003(b).

²¹Id., § 1003(c).

²²Id., § 1002(b).

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

²⁴OPA, § 1004(c)(1).

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

¹⁹Oil Pollution Act of 1990 § 1002(a) ("OPA").

²⁰Id., § 1001(32).

²¹Id., § 1002(a)(1); § 1001(30).

²²Id., § 1002(b)(2).

²³Id., § 1006(d)(1).

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

removal costs for a discharge from an OCS³² facility or a vessel carrying OCS oil as cargo "shall be borne by the owner or operator."³³

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.³⁴ 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.³⁵ 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.³⁶

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."³⁷ 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).³⁸ The statutory basis for such executive authority is not explicit. Presum-

³²Outer-Continental Shelf.

³³OPA, § 1004(c)(3).

³⁴FWPCA, § 311(c)(1) (33 U.S.C. § 1321(c)(1)).

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

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

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

³⁸The 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.³⁹ 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.⁴⁰ This exemption does apply to a responsible party, to a response under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),⁴¹ with respect to a personal injury or death, or in the event of gross negligence or willful misconduct.⁴²

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.⁴³ 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.⁴⁴

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

³⁹*Id.*, § 1012(a).

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

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

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

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

⁴⁴FWPCA, § 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.⁴⁵ 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.⁴⁶

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.⁴⁷

Section 4107 amends the Ports and Waterways Safety Act⁴⁸ 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 1971⁴⁹ 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.⁵⁰ Regulations are also mandated for warning devices to prevent overfills and devices to monitor pressure of oil tanks.⁵¹

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.⁵²

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.⁵³ 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.⁵⁴

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 1851⁵⁵ 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,⁵⁶ or under state law or "common law." The Act expressly preserves state funds for costs or damages related to oil pollution.⁵⁷ Lastly, nothing in the Act, the Limitation of Liability Act or the Internal Revenue Code setting up the domestic fund⁵⁸ 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.⁵⁹

⁴⁵OPA, §§ 4101-03.

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

⁴⁷*Id.*, § 4106.

⁴⁸33 U.S.C. § 1223.

⁴⁹33 U.S.C. § 1203.

⁵⁰OPA, § 4109.

⁵¹*Id.*, § 4110.

⁵²*Id.*, § 4115.

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

⁵⁴OPA, § 4302.

⁵⁵33 U.S.C. § 183 *et seq.*

⁵⁶42 U.S.C. § 6901 *et seq.*

⁵⁷OPA, § 1018(b).

⁵⁸26 U.S.C. § 9509 *et seq.*

⁵⁹OPA, § 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.⁶⁰

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.⁶¹

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.⁶² 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.⁶³

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.⁶⁴ 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,

⁶⁰Id., § 3001.

⁶¹Id., § 1014.

⁶²Id., § 1013.

⁶³Id., § 1013(b)(2), (c) and (d).

⁶⁴Id., § 1015(f).

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

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.⁶⁶ 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.⁶⁷ 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 report⁶⁸ 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 litigation⁶⁹;
- potential increase of criminal and civil penalties and judicial and administration authority⁷⁰;

⁶⁵Id., § 1015(b).

⁶⁶Id., § 1017(b)(c).

⁶⁷Jones, *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.

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

⁶⁹Id., at 35; see also Straube, *supra* note 9, at 10340.

⁷⁰Skinner & Reilly, *supra* note 68.

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

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.⁷³ 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.⁷⁴

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

⁷¹*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.

⁷²*Skinner & Reilly*, *supra* note 68.

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

⁷⁴There 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.⁷⁵ 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.⁷⁶ 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.⁷⁷ 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.⁷⁸

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.⁷⁹ Others argued that while the discharger should be primarily liable for

⁷⁵See, 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).

⁷⁶*Id.*

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

⁷⁸*Id.*, at 2589, *Straube*, *supra* note 9, at 10340, 10341.

⁷⁹*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.⁸⁰ 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.⁸¹

Against this back-drop of confusion, disagreement and lack of appropriate funding, the Act provides access to a permanent domestic fund for removal operations.⁸² 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.⁸³ 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.⁸⁴

With respect to statutory limits, the language of the Act demonstrates that the limits are applicable to the statutory liability and removal costs⁸⁵ 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-

⁸⁰Rowland, *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.

⁸¹United 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).

⁸²OPA, § 1012(a).

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

⁸⁴See discussion *supra*.

⁸⁵OPA, § 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.⁸⁶ Vessel and facility plans must be coordinated with area plans which, in turn, must be in harmony with the National Contingency Plan.⁸⁷ 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.⁸⁸ 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.⁸⁹

⁸⁶Id., § 4202.

⁸⁷Id., §§ 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.

⁸⁸See *James*, *supra* note 4, at 6, 7.

⁸⁹The 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.⁹⁰ 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.⁹¹ In the balance, Congress may have severely compromised America's position with respect to future international safety and environmental conventions.⁹²

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.⁹³

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).

⁹⁰See note 17, *supra*.

⁹¹Implementation 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.

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

⁹³In 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 reforms²⁸² 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*,²⁸³ "the Constitution recognizes higher values than speed and efficiency."²⁸⁴

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.¹ Louisiana's Insurance Code contains such a statute.² The provisions of the Louisiana Insurance Code are limited, however, to "insurance other than ocean marine and foreign trade insurances. . . ."³ 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.⁴ 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.⁵ 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 act⁶ to combat insurance companies who were escaping liability through "no action" clauses.⁷ 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.⁸ 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.⁹ This inequitable result aroused public policy considerations because the fund created by the payment of premiums for the coverage was not being used.¹⁰ 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."¹¹

In 1956, the legislature expressed the legislative intent behind the statute.¹² 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."¹³ One commentator¹⁴ 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.*¹⁵ 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."¹⁶ 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.¹⁷ All that is required to prove that an insured is insolvent is a judgment against the insured tortfeasor which has become executory.¹⁸ 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.¹⁹

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.²⁰ The plaintiff's right of direct action, however, is limited to the terms and limits of the policy.²¹ Moreover, the insurer remains entitled to any lawful defenses available under the terms of the policy.²² 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.²³ 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.²⁴

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*.²⁵ 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.²⁶ 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.²⁷ 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.²⁸ When a petition to

²⁵ "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.

²⁶ 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).

²⁷ *Cushing*, 99 F. Supp. at 682.

²⁸ *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.²⁹ 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.³⁰ 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.³¹ 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.³² The court further observed that the Code draws a distinction between liability insurance³³ and marine and transportation (inland marine) insurance.³⁴ 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.³⁵ 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."³⁶ 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.³⁷ 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?"³⁸

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.³⁹ 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.⁴⁰ 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.⁴¹ 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."⁴² After discussing the purpose of the limitation of the liability statute and its origin,⁴³ 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.⁴⁴

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.⁴⁵ 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."⁴⁶

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.⁴⁷ 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."⁴⁸ 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.⁴⁹

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.*,⁵⁰ 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.⁵¹ The policy sued on was a "standard workmen's

compensation and employers' liability policy" with a maritime endorsement.⁵² 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.⁵³

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.⁵⁴ 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.⁵⁵ 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.⁵⁶

Not until 1965, did a court directly address the ocean marine exclusion in the Insurance Code. In *Coleman v. Jahncke Services, Inc.*,⁵⁷ 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.⁵⁸ Additionally, a Winn-Dixie trailer-truck, which was crossing the causeway at the point of collision, was damaged and lost some of its freight.⁵⁹ 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.⁶⁰ 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.⁶¹

The district court attributed THE CLARIBEL'S unseaworthiness to Jahncke, thereby precluding application of the Limited Liability Act.⁶² Thus, the court's focus was not on whether the application of the direct action statute interfered with exclusive federal jurisdiction,⁶³ 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."⁶⁴ 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.'⁶⁵

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.*⁶⁶ 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.⁶⁷ Nebel Towing successfully petitioned the court to limit its liability under the Limitation of Liability Act.⁶⁸ 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.⁶⁹ 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.⁷⁰

In analyzing the insurer's argument, the appellate court relied on the *Coleman v. Jahncke Services* decision.⁷¹ 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.⁷²

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."⁷³

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.⁷⁴ 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.⁷⁵ In response, the court simply stated that the language relied on did not preclude a direct action.⁷⁶

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.⁷⁷ 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.*,⁷⁸ the Louisiana Supreme Court proclaimed that the statutes which comprise the Insurance Code do not apply to ocean marine insurance.⁷⁹ In *Deshotels*, Joseph Deshotels was injured while working on a jack-up rig operating in the Gulf of Mexico.⁸⁰ Deshotels became ill, necessitating that he be transferred in a personnel basket to a crew boat.⁸¹ The crane operator, while lowering the personnel basket, slammed it into the crewboat's deck.⁸² Following the accident, Deshotels

sued his employer, SHRM, and Magnum-Marine,⁸³ the company that owned the rig and employed the crane operator, in federal court for negligence under both the Jones Act⁸⁴ and the general maritime law.⁸⁵ 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.⁸⁶

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.⁸⁷ Subsequent to the institution of the action, Transit Casualty was declared insolvent.⁸⁸ Accordingly, Deshotels filed a third party demand against the Louisiana Insurance Guaranty Association (LIGA).⁸⁹ LIGA denied the claim, pointing to the "ocean marine" exclusion in the statute.⁹⁰ 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.⁹¹

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?"⁹² The court initially noted that the Louisiana Insurance Code does not define "ocean marine" insurance.⁹³ 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"⁹⁴ and that the definition includes insurance against liability of the insured for personal injury.⁹⁵ 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.⁹⁶ 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.⁹⁷ 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.⁹⁸ 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.⁹⁹

To define ocean marine insurance, the court contrasted traditional marine insurance and the definition of marine protection insurance in the Insurance Code.¹⁰⁰ 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."¹⁰¹ 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.*,¹⁰² the court noted that an insurance policy that includes coverage for seaman's injuries is not a policy of ocean marine insurance.¹⁰³ 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.¹⁰⁴ 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."¹⁰⁵ 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.¹⁰⁶ 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."¹⁰⁷ 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.¹⁰⁸

Subsequent to the *Deshotels* decision, the Louisiana Supreme Court changed its analysis concerning what constitutes ocean marine insurance. In *Backhus v. Transit Casualty Co.*,¹⁰⁹ the court set forth that protection and indemnity insurance is ocean marine insurance even if it covers claims for personal injuries.¹¹⁰ 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.¹¹¹ 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.¹¹² 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.¹¹³

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.¹¹⁴ 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.¹¹⁵ 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."¹¹⁶ 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.¹¹⁷

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.¹¹⁸ 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,"¹¹⁹ the court concluded that "[p]rotection and indemnity insurance is consistently treated as marine insurance within the industry."¹²⁰ 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."¹²¹ 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.¹²²

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.*¹²³ 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.*,¹²⁴ 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.¹²⁵ Citing *Sifers* and *Backhus*, the court noted that protection and indemnity policies constitute "ocean marine" insurance within the meaning of the Louisiana Insurance Code.¹²⁶ 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.¹²⁷ Furthermore, the court acknowledged that prior cases exist in which a plaintiff sued a protection and indemnity insurer under the direct action statute.¹²⁸ 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*.¹²⁹

CONCLUSION

The Louisiana Insurance Code prohibits the application of its provisions to ocean marine insurance.¹³⁰ 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.¹³¹ This public policy provides that all policies of insurance are issued for the good of the public, rather than the good of the insured.¹³² 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.¹³³ Recent Louisiana

Supreme Court decisions, however, by defining ocean marine insurance to include protection and indemnity insurance,¹³⁴ seemingly provide that the ocean marine exclusion precludes an injured party from having a right of direct action against a protection and indemnity insurer.¹³⁵ 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.*,¹³⁶ 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.¹³⁷ 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.*¹³⁸ 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.¹³⁹ Instead, the court held that protection and indemnity insurance is ocean marine insurance, and therefore, excluded from LIGA coverage.¹⁴⁰ The court's holding was based on an absence of legislative intent to protect individuals entitled to recover under protection and indemnity policies.¹⁴¹ 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.¹⁴² 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.¹ 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.² She alleged negligence under the Jones Act³ 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."⁴

Miles sought compensation for loss of support and services and for loss of society of her son.⁵ 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."⁶

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.⁷

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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Bob Williams

ANNE SCHWARTZ, President
PATRICK CHAPMAN, Secretary
LARRY GUTTMAN, Treasurer
JOHN JACOB, Chairman
GREGORY S. JOHNSON, Director

ROSEMARY PLATT, President
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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

tion lamps program.

The manufacturing ban prevents the Bell companies from making everything from telephones to advanced switching equipment. Worse, it prevents them from doing applied

many barriers from long-distance, the Bell had to use long-distance and technology.

J. Commerce & Commercial
Sept 13, 1991
P 4 A(1)

Sent To You By
Legislative Research Agency
"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,

however, we need interest rates that are strong enough to buy.

Businesses, earnings, by taxes. We borrowing are taxed. prefers to create equity.

One solution, or be. But exempt would reduce when the (e) and rising.

An alternative: reduce the amount on interest on loans. equity financing. able to return. Rec deductions any reduction on home in.

Governor of national missed as "lag," the government as the difficult expenditure the government private savings is a danger. One of

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.

shrink, but way, noted few people anyone else the ruble, get their hands on such as do change the

Mr. Borzov States and should for suggestions such as y state-owned and strong in stability form, he is the unfold. And, b means the called to r