

SCOMM

79:18

(7)

Date Referred: February 18, 1992

FURTHER REFERRALS:

Resources
Judiciary

Date of Committee Action: 4/28/92

The HOUSE SPECIAL COMMITTEE ON OIL AND GAS Committee considered:

HB 501

HOUSE BILL NO. 501

OIL FINANCIAL RESPONSIBILITY LAWS

"An Act relating to evidence of financial responsibility provided by persons who conduct oil operations; and providing for an effective date."

RECOMMENDATIONS:

be replaced with CS & B 501 (O&G). ☒ the same title
☐ a new title

☐ have attached amendments(s)

☐ do pass

☐ do not pass

☐ no recommendations

☒ individual recommendations

☐ additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

APPROVES PREVIOUS: (Dept/Date)

☐ fiscal impact _____

☐ fiscal note(s) _____

☐ zero fiscal note _____

☐ zero fiscal note(s) _____

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Mike Savane</i>	☒				
<i>Larry Brown</i>	☒				
<i>Larry Phillips</i>	☒				
<i>Bill Hudson</i>	☒				
<i>Paul Uy</i>	☒				

Bill Hudson
CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 501

Revision Date: _____ Department Affected: Environmental
Title: Financial Responsibility for Oil Operations Conservation
Sponsor: Representative Foster BRU: Spill Prevention and Response
Requestor: (H) Oil and Gas Component Spill Prevention, Planning and Management

COMPONENT SERIAL NO. 1 4 3 0

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE						
FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
FUND SOURCE:						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current year impact: none

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Janice Adair

Division: Commissioner's Office

Phone: 465-5010

Date: 3/6/92

Approved by Commissioner: Janice Adair for John Sander

Agency: Environmental Conservation

Date: 3/6/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

TO: Representative Bill Hudson
Chairman, Oil and Gas Committee

FROM Representative Richard Foster
House District 23

SUBJECT: HB 501

As HB 501 has a companion bill SB 405, I have provided you with a quick synopsis of the current status of both bills.

HB 501 and SB 405 (Senator Hoffman) are currently identical.

SB 405 was heard yesterday in Senate Oil and Gas. Several differences between the department, the AG's office and the sponsor were identified. Basically, the major problem is "DIRECT ACTION" The department require it, the insurance companies won't provide it, therefore the non-crude operators are out of compliance and therefore subject to being shut down.

HB 501 and SB 405 propose:

1. limiting financial responsibility of insurer to maximum amount covered by insurance policy.
2. Limits the current waiver of "direct action" requirements to crude oil operations, requiring a minimum of \$50 million direct action insurance. A crude operator may obtain insurance for any amount of \$50 million from a company who does not have direct access.
2. Gives authority for DEC to waive direct action requirement for non-crude oil operation. Non-crude operators may obtain insurance from a company, however, the company may not have agreed to direct access.

The Department of Environmental Conservation propose:

1. clarifies that insurers are only liable up to the amounts specified in their policies.
2. Narrows scope to allow an injured Alaskan to sue to insurer in Alaska court, however, jurisdiction would be limited to the limits of the insurance policy.

HB 501
FINANCIAL RESPONSIBILITY
OF NONCRUDE OPERATORS
SPONSOR STATEMENT

In 1989, the legislature enacted strong legislation dealing with oil spill prevention and clean up standards. HB 567, which passed in 1990, made three major changes in state oil spill protection:

1. It established new response planning standards
2. Allowed Department of Environmental Conservation to give credits for incorporating prevention measures into contingency plans
3. imposed new financial responsibility requirements for contingency plan holders.

Although HB 567 was passed as a result of the Exxon Valdez oil spill and was aimed at the crude oil industry, non-crude carriers and facilities were also subject to the changes. Regulations implementing these changes have been drafted by the Department of Environmental Conservation, and are still being reviewed by the Department of Law.

PROBLEM

Smaller fuel distributors, barge lines that transport refined petroleum products, and rural electric utilities that must maintain fuel stores have found it all but impossible to meet the new financial responsibility requirements imposed by HB 567. Although these non-crude operators are able to purchase the required amounts of pollution insurance, underwriters in both the domestic and overseas markets steadfastly refuse to include the "direct action" clause in these policies that Alaska law requires.

WHY?

The insurance companies perceive the risk as far too great. With Alaska state courts seemingly allowing large direct action claims, the insurance industry feel the their liability is unlimited.

Alaska's direct action requirements have been in effect since 1981. The provision allows an action to be brought in state court directly against the insurer, rather than going first to the responsible party. Ambiguities about whether insurers are limited to the face amount of the policy, plus the greatly increased amounts of coverage required since the *Exxon Valdez* spill, have combined to produce the current unavailability of direct action coverage.

When it became clear by early 1991 that insurers would not provide direct action coverage, Senator Lyman Hoffman introduced legislation to delay the effective date of HB 567's financial responsibility requirements for non-crude operators. The hope was that over the year's time, either the insurance markets would overcome their objections to providing direct action, or that perhaps a risk pool could be developed to provide such coverage. The Legislature unanimously approved Senator Hoffman's bill.

Sen. Hoffman's legislation also delayed the effective date of the enhanced oil discharge prevention and contingency plans HB 567 required of non-crude operators; most operators appear to be prepared to meet the new requirements and no further delay in complying with them is being sought.

Nearly one year later, however, there has been no change in the insurance markets' position on direct action coverage, and development of an insurance pool so far has proved unfeasible. With the June 1, 1992, effective date of the financial responsibility requirements approaching, and the unavailability of direct action coverage just as complete as it was in 1991, non-crude operators once again face the prospect of either operating out of compliance with Alaska law or ceasing operations. The large crude oil operators do not face this problem, because they have sufficient assets and working capital to either self-insure or comply with the law through other means, such as surety bonds or letters of credit.

Over the past two years, DEC has given conditional waivers to some non-crude operators who have been unable to obtain direct action insurance but who in all other respects meet the state's financial responsibility requirements. Whether DEC has authority to grant such waivers is highly questionable, however, and the agency recently decided to end the practice.

SOLUTION

HB 501 does several things:

1. It clarifies that financial responsibility of an insurer is limited to the maximum amount covered by the insurance policy, except for traditional exceptions such as attorney fees, litigation costs, or bad faith failures to settle claims.
2. It limits the current quasi-waiver of the "direct action" requirements to crude oil operators, which requires a minimum of \$50,000 of "direct action" insurance.
3. It gives new authority to DEC to waive the "direct action" requirement for non-crude oil operations, with no minimum "direct action" insurance requirement.

CSHB 501
FINANCIAL RESPONSIBILITY
OF NONCRUDE OPERATORS
Background Paper

History: On March 24, 1989 the Exxon Valdez ran aground on Bligh Reef in Prince William Sound, causing the largest crude oil spill in United States history. As a result, the Alaska Legislature and the United States Congress significantly strengthened oil spill prevention and cleanup standards. One bill, HB 567, passed in 1990, made three major changes in state oil spill protection. It 1) established new response planning standards; 2) imposed new financial responsibility requirements for contingency plan holders; and 3) allowed the Department of Environmental Conservation to give credits for incorporating prevention measures into contingency plans. These major changes were to have gone into effect on and after June 1, 1991.

Although HB 567 was passed as a result of the Exxon Valdez oil spill and was aimed at the crude oil industry, non-crude carriers and facilities were also subject to the changes. Regulations implementing these changes have been drafted by the Department of Environmental Conservation, and are still being reviewed by the Department of Law.

Problem: Smaller fuel distributors, barge lines that transport refined petroleum products, and rural electric utilities that must maintain fuel stores have found it all but impossible to meet the new financial responsibility requirements imposed by HB 567. Although these non-crude operators are able to purchase the required amounts of pollution insurance, underwriters in both the domestic and overseas markets steadfastly refuse to include the "direct action" clause in these policies that Alaska law requires.

Alaska's direct action requirements have been in effect since 1981. The provision allows an action to be brought in state court directly against the insurer, rather than going first to the responsible party.

Ambiguities about whether insurers are limited to the face amount of the policy, plus the greatly increased amounts of coverage required since the Exxon Valdez spill, have combined to produce the current unavailability of direct action coverage.

When it became clear by early 1991 that insurers would not provide direct action coverage, Senator Lyman Hoffman introduced legislation to delay the effective date of HB 567's financial responsibility requirements for non-crude operators. The hope was that over the year's time, either the insurance markets would overcome their objections to providing direct action, or that perhaps a risk pool could be developed to provide such coverage. The Legislature unanimously approved Senator Hoffman's bill.

Sen. Hoffman's legislation also delayed the effective date of the enhanced oil discharge prevention and contingency plans HB 567 required of non-crude operators; most operators appear to be prepared to meet the new requirements and no further delay in complying with them is being sought at this time.

Nearly one year later, however, there has been no change in the insurance markets' position on direct action coverage, and development of an insurance pool so far has proved unfeasible. With the June 1, 1992, effective date of the financial responsibility requirements approaching, and the unavailability of direct action coverage just as complete as it was in 1991, non-crude operators once again face the prospect of either operating out of compliance with Alaska law or ceasing operations. The large crude oil operators do not face this problem, because they have sufficient assets and working capital to either self-insure or comply with the law through other means, such as surety bonds or letters of credit.

Over the past two years, DEC has given conditional waivers to some non-crude operators who have been unable to obtain direct action insurance but who in all other respects meet the state's financial responsibility requirements. Whether DEC has authority to grant such waivers is highly questionable, however, and the agency recently decided to end the practice.

Solution: CS HB 501 (O&G) does several things:

- Section 1 clarifies that the financial responsibility of an insurer is limited to the type of risk assumed and the amount of coverage specified in the proof of financial responsibility. It also clarifies that these limits do not apply to an applicant who self-insures.
- Section 2 gives new authority to DEC to approve an applicant's proof of financial responsibility if the applicant attests in a sworn statement that direct action insurance has been diligently sought, but is determined to be unavailable; if such efforts are made and proven every six months; and if all other financial responsibility requirements are met.
- Sections 3 and 4 ratify similar exemptions made by DEC during the past year.
- Sections 5,6 and 7 calls for an immediate effective date; if that date is after June 1, 1992, makes it retroactive to June 1, 1992; and repeals the exemption law on June 1, 1994.
- Letter of intent adopted by the Senate Oil and Gas Committee directs DEC, the Division of Insurance within Commerce Department, and the Legislative Research Agency to research possible alternative solutions to assist non-crude operators in meeting the state's financial responsibility requirements for oil spill pollution coverage.

CS HB 501 (O&G) Sectional Analysis

- **Section 1** clarifies that the financial responsibility of an insurer is limited to the type of risk assumed and the amount of coverage specified in the proof of financial responsibility. It also clarifies that these limits do not apply to an applicant who self-insures.
- **Section 2** gives new authority to DEC to approve an applicant's proof of financial responsibility if the applicant attests in a sworn statement that direct action insurance has been diligently sought, but is determined to be unavailable; if such efforts are made and proven every six months; and if all other financial responsibility requirements are met.
- **Sections 3 and 4** ratify similar exemptions made by DEC during the past year.
- **Sections 5,6 and 7** calls for an immediate effective date; if that date is after June 1, 1992, makes it retroactive to June 1, 1992; and repeals the exemption law on June 1, 1994.
- A letter of intent adopted has been adopted by the Senate Oil and Gas Committee to the companion bill SB 405. This letter directs DEC, the Division of Insurance within Commerce Department, and the Legislative Research Agency to research possible alternative solutions to assist non-crude operators in meeting the state's financial responsibility requirements for oil spill pollution coverage.

adopted

Revised Letter of intent to SB 405:

The Department of Environmental Conservation, the Division of Insurance within the Department of Commerce and Economic Development, and the Legislative Research Agency shall research the possibility of group pooling or other mechanisms to assist non-crude operators in meeting the state's financial responsibility requirements for oil spill pollution coverage, and shall report back to the Legislature with their findings and recommendations by February 1, 1993.

letter of intent adopted by Senate (orig)
for companion bill SB 405



Senator Lyman F. Hoffman

Alaska State Senate

P.O. Box V • Juneau, Alaska 99811 • (907) 465-4453

District M
Akiachak
Akiaak
Alatna
Aliakaket
Andreasky
Aniak
Anvik
Arctic Village
Atmautluak
Beaver
Bethel
Bettles
Birch Creek
Chaikyltsik
Cheforak
Chuathbaluk
Crooked Creek
Eek
Evansville
Fort Yukon
Galena
Goodnews Bay
Graying
Holy Cross
Hughes
Huslia
Kaiskag
Kaltag
Kasigluk
Kionuk
Kongiganak
Kovukuk
Kwethiuk
Kwigillingok
Lake Minchumina
Lime Village
Lower Kaiskag
Manley Hot Springs
Marshfield
McGrath
Mekoryuk
Minto
Mountain Village
Napakiak
Napaskiak
Newtok
Nightmute
Nikolai
Nulato
Nunapitchuk
Oscarville
Pilot Station
Pitkas Point
Platinum
Quinhagak
Rampart
Red Devil
Ruby
Russian Mission
Shageluk
Sleetmute
St. Mary's
Stevens Village
Stony River
Takotna
Tanana
Telida
Toksook Bay
Tuluksak
Tuntutuliak
Tununguk
Tyonek
Venetie
Wiseman

SB 405 FINANCIAL RESPONSIBILITY OF NONCRUDE OPERATORS Background Paper

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Problem: Smaller fuel distributors, barge lines that transport refined petroleum products, and rural electric utilities that must maintain fuel stores have found it all but impossible to meet the new financial responsibility requirements imposed by HB 567. Although these non-crude operators are able to purchase the required amounts of pollution insurance, underwriters in both the domestic and overseas markets steadfastly refuse to include the "direct action" clause in these policies that Alaska law requires.

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Solution: SB 405 does several things:

- It clarifies that financial responsibility of an insurer is limited to the maximum amount covered by the insurance policy, except for traditional exceptions such as attorney fees, litigation costs, or bad faith failures to settle claims.

- It limits the current quasi-waiver of the "direct action" requirement to crude oil operations, which requires a minimum of \$50,000,000 of "direct action" insurance.

- It gives new authority to DEC to waive the "direct action" requirement for non-crude oil operations, with no minimum "direct action" insurance requirement.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY

STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

240 Main Street, Suite 500
Juneau, Alaska 99801-2101

MEMORANDUM

February 24, 1992

SUBJECT: Sectional Analysis (SB 405)

TO: Senator Lyman Hoffman

FROM: Terri Lauterbach
Legislative Counsel



Following is a sectional analysis of SB 405, a bill relating to financial responsibility laws affecting the oil industry:

Section 1 clarifies the extent of liability borne by an insurance carrier or P & I group that agrees to help an insured demonstrate financial responsibility. While the first sentence of this section (current law) demands that the financial responsibility extend to certain types of losses and assessments, the second sentence (new law) limits the amount of exposure of the insurer or group to the face amount of the policy issued or the group's agreement. Full liability for amounts above the insurance policy would be borne by the person who is insured.

This clarification is intended to address a fear that has reportedly been expressed by insurers and P & I clubs. As I understand it, they have feared that their exposure might be unlimited, regardless of what the face amount of their policy or agreement is. DEC tried to address this fear in its regulations, but the insurers and clubs have reportedly not been satisfied that DEC has such authority to interpret the law's intent.

This section is made retroactive by sec. 6. Retroactivity will have the effect of ratifying DEC's practice of requiring a "face amount" endorsement on policies and agreements since the effective date of the new financial responsibility requirements -- June 1, 1991.

Section 2 amends a subsection of current law under which DEC can accept some evidence of financial responsibility that does not allow for an action to be filed directly against the insurer as long as the applicant shows that the first \$50 million of liability is covered by "direct action" insurance. The applicant must also show that

Senator Lyman Hoffman
February 24, 1992
Page 2

additional "direct action" insurance is unavailable. The amendment limits the applicability of this section to crude oil operations.

Section 3 enacts a new subsection of law that applies only to noncrude oil operations. The new law would allow DEC to accept evidence of financial responsibility that does not allow for an action to be filed directly against the insurer without any minimum amount of "direct action" insurance being provided. The applicant would still have to show that "direct action" insurance is unavailable.

Section 4 repeals the new noncrude "direct action" exemption of section 3 in 1994.

Section 5 repeals a 1991 session law that provides that all of the new 1990 changes in financial responsibility laws apply on June 1, 1992, to noncrude operators. The repeal is necessary because SB 405 would make changes in the 1990 Act. If SB 405 passes, it would no longer be true that all of the 1990 changes will apply to noncrudes in 1992. They will all apply, except as amended by SB 405.

Section 6 makes sections 1 - 3 of this bill retroactive to June 1, 1991 (the effective date of the new financial responsibility laws passed in 1990). This will ratify actions taken by DEC since that date that may have been done with questionable authority with respect to "face amount" endorsements and waiver of the "direct action" requirement for noncrudes.

Section 7 ensures that the repealer of section 5 will apply as of June 1, 1992, even if the governor signs SB 405 after June 1. This will cover transmittal delays and the delay involved in reviewing bills before the governor signs them. Without this section, late signing of SB 405 could mean that for some time period the full financial responsibility changes made in 1990 would apply to noncrude operations without the amendments made by SB 405.

Section 8 gives SB 405 an immediate effective date.

I hope you find this description helpful. Please let me know if you have further questions.

TML:pl
92-125.plm

7-LS2072D

Lauterbach

4/21/92

CS FOR HOUSE BILL NO. 501 (O&G)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE SPECIAL COMMITTEE ON OIL AND GAS

Offered:

Referred:

Sponsor(s): REPRESENTATIVES FOSTER, Lincoln, G.Phillips

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to evidence of financial responsibility provided by persons who conduct
2 oil operations; and providing for an effective date."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 * Section 1. AS 46.04.040(e) is amended to read:

5 (e) Financial responsibility may be demonstrated by (1) self-insurance, (2) insurance, (3)
6 surety, (4) guarantee, (5) letter of credit approved by the department, or (6) other proof of
7 financial responsibility approved by the department, including proof of financial responsibility
8 provided by a group of insureds who have agreed to cover pollution risks of members of the
9 group under terms the department may prescribe. An action brought under AS 46.03.758,
10 46.03.759, 46.03.760(a) or (e), 46.03.822, or as 46.04.030(g) may be brought in a state court
11 directly against the insurer, the group, or another person providing evidence of financial
12 responsibility; however, the liability under this section of a third-party insurer is limited to
13 the type of risk assumed and the amount of coverage specified in the proof of financial
14 responsibility furnished to and approved by the department. The applicant, and an insurer,

surety, guarantor, person furnishing an approved letter of credit, or other group or person providing proof of financial responsibility approved by the department shall appoint an agent for service of process in the state. For purposes of this subsection, an insurer, other than a group of insureds whose agreement has been approved by the department, must either be authorized by the Department of Commerce and Economic Development to sell insurance in the state or be an unauthorized insurer listed by the Department of Commerce and Economic Development as not disapproved for use in the state. In this subsection, "third-party insurer" means a third-party insurer, surety, guarantor, person furnishing a letter of credit, or other group or person providing proof of financial responsibility on behalf of an applicant under this section; "third-party insurer" does not include the applicant.

* Sec. 2. TEMPORARY LAW APPLICABLE TO NONCRUDE OIL OPERATIONS.

Notwithstanding AS 46.04.040, the Department of Environmental Conservation may, with respect to noncrude oil operations, approve proof of financial responsibility by a person, other than the applicant, who does not agree to be subject to a direct action in the state or to appoint an agent for service of process if the applicant

(1) provides proof of financial responsibility in the form and amounts otherwise required under AS 46.04.040;

(2) provides a sworn statement that

(A) is acceptable to the department;

(B) attests that the applicant has diligently attempted to obtain a form of proof of financial responsibility that would provide for a direct action and appointment of an agent for service of process;

(C) describes the steps the applicant has taken to obtain a form of proof of financial responsibility that would provide for a direct action and appointment of an agent for service of process;

(D) states that a form of proof of financial responsibility that would provide for a direct action and appointment of an agent for service of process is unavailable to the applicant;

(3) continues diligent efforts to obtain a form of proof of financial responsibility that would provide for a direct action and appointment of an agent for service of process and provides a sworn statement every six months that is acceptable to the department, containing the information required in (2) of this section.

1 * Sec. 3. RATIFICATION OF PREVIOUS EXEMPTIONS GIVEN BY DEPARTMENT OF
2 ENVIRONMENTAL CONSERVATION TO NONCRUDE OIL OPERATIONS. Notwithstanding
3 AS 46.04.040, the Department of Environmental Conservation may, with respect to noncrude oil
4 operations, approve proof of financial responsibility by a person, other than the applicant, who does not
5 agree to be subject to a direct action in the state or to appoint an agent for service of process if the
6 applicant, before June 1, 1992,

7 (1) provides proof of financial responsibility in the form and amounts otherwise required
8 under AS 46.04.040;

9 (2) attests in a statement to the department that the applicant has diligently attempted to
10 obtain a form of proof of financial responsibility that would provide for a direct action and appointment
11 of an agent for service of process and that this form of proof is unavailable to the applicant; and

12 (3) agrees to continue diligent efforts to obtain a form of proof of financial responsibility
13 that would provide for a direct action and appointment of an agent for service of process.

14 * Sec. 4. Section 3 of this Act is retroactive to June 1, 1991.

15 * Sec. 5. If this Act takes effect after June 1, 1992, sec. 2 of this Act is retroactive to June 1, 1992.

16 * Sec. 6. Section 2 of this Act is repealed June 1, 1994.

17 * Sec. 7. This Act takes effect immediately under AS 01.10.070(c).

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

REPLY TO:

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ANCHORAGE, ALASKA 99501-1954
PHONE: (907) 269-5100
FAX: (907) 273-3697

☐ KEY BANK BUILDING
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FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1558
FAX: (907) 458-1317

☐ P.O. BOX K - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3500
FAX: (907) 463-5295

February 24, 1992

The Honorable Lyman Hoffman
Alaska State Senate
Room 510, Capitol
P.O. Box V
Juneau, AK 99811

RE: SB 405 DEC Alternative

Dear Senator Hoffman:

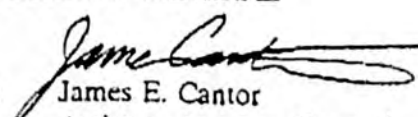
I am enclosing an alternative to SB 405 which the Department of Environmental Conservation would like to propose for consideration. SB 405 deals with the oil spill financial responsibility requirements which oil facility operators must meet. SB 405 was proposed because operators are generally no longer able to obtain insurance which complies with state law. SB 405 puts a two year moratorium on the financial responsibility requirements.

The attached alternative does not propose a moratorium. Instead, the alternative directly addresses the insurance industry's reasons for not writing policies. The most important points in the proposal are contained in subsection (j).

Subsection (j) clarifies that insurers are only liable under AS 46.04.040 up to the amounts specified in their policies. With subsection (j), the financial responsibility law could not subject an insurer to unlimited liability.

Subsection (j) also narrows the potential scope of the current direct action requirement. Subsection (j) would allow an injured Alaskan to sue the insurer in Alaska court, as is currently allowed. However, jurisdiction would be limited so that an insurer appearing pursuant to this section could not be sued for additional damages, above and beyond the limits of the insurance policy.

CHARLES E. COLE
ATTORNEY GENERAL

By: 
James E. Cantor
Assistant Attorney General

JEC:bn

Encl

cc: Janice Adair
Deborah Behr

MEM: AG's Office - Jim Cantor

TO: Glenn Adams JUNEAU/ADEC

DATE: 02-20-92

TIME: 16:00

CC:

SUBJECT: Financial Responsibility

PRIORITY: R

ATTACHMENTS: fr

Glenn: I am attaching a copy of our proposal for tightening up AS
46.04.040. Look particularly a subsection (j). Please call me if you have
any comments. Also, I sent a copy of Sen. Hoffman's bill (SB 405) via fax to
Lynn.

Jim Cantor

=====

oil barge has furnished to the department, and the department has approved, proof of financial ability to respond in damages. Proof of financial responsibility required under this subsection is

(1) \$300, per incident, for each barrel of storage capacity or \$100,000,000, whichever is greater, for a tank vessel or barge carrying crude oil;

(2) \$100, per incident, for each barrel of storage capacity or \$1,000,000, whichever is greater, subject to a maximum of \$35,000,000, for a tank vessel or barge carrying noncrude oil.

~~[(d) Except as provided in (k) of this section, it is not a defense to an action brought for violation of (a) (c) of this section that the person charged believed in good faith that proof of financial ability to respond in damages had been furnished to, and approved by, the department.]~~

Current subsection (d) concerns defending against actions brought for violation AS 46.04.040. In this proposal, current subsection (d) has been moved and combined below with subsection (k), which addresses the same topic.

(d) ~~[(e)]~~ Financial responsibility may be demonstrated by (1) self-insurance, (2) insurance, (3) surety, (4) guarantee, (5) letter of credit approved by the department, or (6) other proof of financial responsibility approved by the department, including proof of financial responsibility provided by a group of insureds who have agreed to cover pollution risks of members of the group under terms the department may prescribe. ~~[An action brought under AS 46.03.758, 46.03.759, 46.03.760(a) or (e), 46.03.822, or AS 46.04.030(g) may be brought in a state court directly against the insurer, the group, or another person providing evidence of financial responsibility. The applicant, and an insurer, surety,~~

~~guarantor, person furnishing an approved letter of credit, or other group or person providing proof of financial responsibility approved by the department shall appoint an agent for service of process in the state.]~~ For purposes of this subsection, an insurer, other than a group of insureds whose agreement has been approved by the department, must either be authorized by the Department of Commerce and Economic Development to sell insurance in the state or be an unauthorized insurer listed by the Department of Commerce and Economic Development as not disapproved for use in the state.

The deleted portions of current subsection (e) have been moved to proposed subsection (j), below.

(e) Upon acceptance and approval of proof of financial responsibility under this section, the department shall issue to the applicant a certificate stating that the state's financial responsibility requirements have been satisfied. The certificate must include the name of the facility, pipeline, tank vessel, or oil barge for which it is issued and the expiration date of the certificate.

Proposed subsection (e) is exactly the same as current subsection (j). This organizational change is proposed to aid the readability and logic of this increasingly complex statute.

- (f) Acceptance of proof of financial responsibility expires
- (1) one year from its issuance for self-insurance;
 - (2) on the effective date of change in the surety bond, guarantee, insurance agreement, letter of credit, or other proof of financial responsibility; or
 - (3) on the expiration or cancellation of the surety bond, guarantee, insurance agreement, letter of credit, or other proof of financial responsibility.

(g) The person whose proof of financial responsibility is accepted by the department under this section shall notify the department at least 30 days before the effective date of a change, expiration or cancellation in the self-insurance, surety bond, guarantee, insurance agreement, letter of credit, or other proof of financial responsibility. Application for renewal of acceptance of proof of financial responsibility under this section must be filed at least 30 days before the date of expiration.

(h) The department, after notice and hearing, may revoke acceptance of proof of financial responsibility if it determines that

- (1) acceptance was procured by fraud or misrepresentation; or
- (2) a change of circumstance has occurred other than a change specified in (f)(1) — (3) of this section, which would have warranted denial of the application.

(i) Financial responsibility under this section extends to a loss compensable under AS 46.03.760(e) or 46.03.822 and an assessment under AS 46.03.758, 46.03.759, 46.03.760(a), or AS 46.04.030(g). The applicant shall appoint an agent for service of process in the state.

The concept of an applicant appointing an agent for service of process was moved here from current subsection (e).

(j) An action brought under AS 46.03.758, 46.03.759, 46.03.760(a) or (e), 46.03.822 or AS 46.04.030(g) may be brought in a state court directly against the third-party insurer, surety, guarantor, person furnishing a letter of credit, [the] group [;] or [another] person providing evidence of financial responsibility;[;]

The above sentence was moved to proposed subsection (j) from current subsection (e). Additions to the current language are indicated with a double underline. Deletions to the current language are indicated with brackets. The additions do not change or add to the current meaning of the statute. The

additions are necessary because moving the sentence detaches introductory language contained in what was formerly a preceding sentence.

(1) Any third-party [an] insurer, surety, guarantor, person furnishing an approved letter of credit, or other group or person providing proof of financial responsibility approved by the department shall appoint an agent for service of process in the state of those actions specifically authorized by this section .

The requirement that an applicant appoint an agent for service was moved from current subsection (e) to proposed subsection (i). Except as noted by double underlines or brackets, the remainder of the current sentence concerning the appointment of an agent for service was moved here from current subsection (e). For third party insurers, etc., the role of the agent has been limited to accepting service of those actions specifically authorized by this section.

(2) The liability under this section of a third-party insurer, surety, guarantor, person furnishing a letter of credit, group or person providing proof of financial responsibility shall be limited to the type of risk assumed and amount of coverage provided in those contractual documents between the applicant and the third-party which have been approved by the department;

The main concern expressed by the insurance industry over Alaska's current financial responsibility law is that the law does not clearly specify that an insurer is only liable up to the limits of the insurance policy. Insurers are afraid that they might be held responsible for the full cost of a cleanup, even though they may have only provided coverage for a fraction of that amount. Proposed subsection (j)(2) specifies that an insurer shall only be liable for those types of risks assumed by the insurer, up to the amount of coverage provided by the policy. Proposed subsection (j)(2) refers to "the type of risk assumed [by an insurer]" because a single insurer may not provide coverage for all risks; an operator may use more than one policy to prove the full amount of financial responsibility required by law.

(3) Jurisdiction obtained over any third-party providing proof of financial responsibility pursuant to this section shall be limited to issues concerning the liability

imposed by this section and the sections cited in this section; third-parties appearing pursuant to this section shall not by reason of their appearance be subject to service of process for any other purposes, even if those other purposes arise from the same transactions or occurrences for which jurisdiction is already asserted;

The insurance industry is concerned that enterprising plaintiffs and courts will utilize the deep-pocket opportunity created when an insurance company appears in an Alaska court to assert additional claims against the insurer. Proposed subsection (j)(3) limits the jurisdiction a court may assert over the insurer. The proposed subsection also specifies that a foreign insurer, by virtue of the fact that it has appeared in Alaska, shall not waive the protections offered by the current rules of service. By limiting service and jurisdiction, a court could not automatically entertain collateral claims brought against an insurance company for, say, bad faith treatment of an injured third party.

(4) Any third-party wishing to tender the full amount of its potential liability under those contractual documents approved by the department may appear solely for the purpose of interpleader and shall be dismissed from an action brought pursuant to this section once the full amount has been deposited with the court and potential claimants have been notified;

Proposed subsection (j)(4) allows an insurer to tender the full amount of its policy in situations where the amount of damage will exceed the policy limits. Claimants are protected because the full amount of the policy will be interpled with the court. Insurers are protected because they "shall" be dismissed from the action, and thus cannot be present as a target for creative courts.

(5) Except as otherwise stated, this section does not enlarge or diminish jurisdiction and service for other purposes under other laws, regulations, or court rules. If jurisdiction and service are properly attained, a court may order consolidation with an action brought pursuant to this section.

Proposed subsection (j)(5) clarifies that none of the proposed changes to AS 46.04.040 will change other aspects of existing law. A claimant who would have

had a claim against an insurer under some other aspect of existing law may still assert the claim by following the current rules for jurisdiction and service, independent of the rules for jurisdiction or service under AS 46.04.040.

~~[(j)] Upon acceptance and approval of proof of financial responsibility under this section, the department shall issue to the applicant a certificate stating that the state's financial responsibility requirements have been satisfied. The certificate must include the name of the facility, pipeline, tank vessel, or oil barge for which it is issued and the expiration date of the certificate.]~~

In this proposal, current subsection (j) has been relabeled to become (e), above.

(k) It is not a defense to an action brought for violation of (a) — (c) of this section that the person charged believed in good faith that proof of financial ability to respond in damages had been furnished to, and approved by, the department unless ~~[It is a defense to an action brought for violation of (a) — (c) of this section that]~~ the person charged relied on a certificate of approval issued under (e) [(j)] of this section ~~[unless the person knew or had reason]~~ and the person did not know or have reason to know at the time of the alleged violation that the approval had been revoked or was expired.

Proposed subsection (k) combines two current subsections, (d) and (k), both dealing with the topic of defenses.

(l) Notwithstanding the requirements of (d) [(e)] of this section, the applicant may provide evidence of financial responsibility provided by an insurer or other person who does not agree to be subject to direct action in state courts or to appoint an agent for service of process if

(1) the department is satisfied that the insurance or other form of financial responsibility covers judgments under the statutes listed in (i) [(e)] of this section;

(2) the applicant provides proof of \$50,000,000, or the amount required by ~~(a)~~ — (c) of this section, whichever is less, in insurance or other form of financial responsibility that meets the requirements of (j) ~~(e)~~ of this section; and

(3) the applicant provides a sworn statement or affidavit that insurance or other form of financial responsibility that meets the requirements of (j) ~~(e)~~ of this section is not available in greater amounts.

(m) The State of Alaska is not liable for any damages arising from its actions or omissions relating to any proof of financial responsibility required under this section.

This section clarifies that the State of Alaska is not liable for an operator's inability to obtain insurance when that inability is caused by the international insurance industry's refusal to write oil spill pollution policies. The State of Alaska also cannot be held responsible for interpreting the complex contractual documents which form the policy between a private insurer and a private operator. This section is important to assure that in the event of an oil spill, the state is able to focus its litigation efforts on the culpable parties and that the state is not obligated to fight expensive and unnecessary countersuits.

(n) ~~(m)~~ A tank vessel or oil barge that is conducting, or is available only for conducting, oil discharge response operations is exempt from the requirements of (c) of this section if the tank vessel or oil barge has received prior approval of the department. The department may approve an exemption under this subsection upon application and presentation of information required by the department.

(§ 2 ch 116 SLA 1980; §§ 117, 118 ch 59 SLA 1982; am §§ 7, 8 ch 41 SLA 1989; am §§ 11 — 18 ch 191 SLA 1990; am § 60 ch 21 SLA 1991; am § __ ch __ SLA 1992)

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

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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.

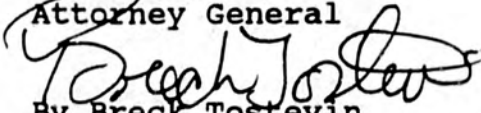
Senator Sam Cotten
Senator Lyman F. Hoffman
Senate Select Committee on Oil and Gas

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)

PROOF OF FINANCIAL RESPONSIBILITY

Type of Facility	Before June 1, 1991	After June 1, 1991
OIL TERMINALS		
Oil Terminals/Crude (5,000 barrel (bbl.) and up)	\$10 per bbl. of storage capacity or \$1,000,000, whichever is greater, \$50,000,000 maximum	\$50,000,000 per incident
Oil Terminals/Non-Crude (10,000 bbl. and up)	Same as above	\$25 per bbl. of storage capacity or \$1,000,000, whichever is greater, \$50,000,000 maximum
Oil Terminals/Crude and Non-Crude combined	Same as above	If mostly crude - \$50,000,000 per incident. If mostly non-crude - \$25 per bbl. of total capacity
PIPELINES & EXPLORATION FACILITIES		
Pipelines and Offshore Exploration or Production	\$35,000,000 per incident	\$50,000,000 per incident
Onshore Production	EXEMPT	\$20,000,000 per incident
Onshore Exploration	EXEMPT	\$5,000,000 per incident
VESSELS & BARGES		
Tank Vessel & Oil Barge/Crude	Trans-Alaska Pipeline related: \$14,000,000. Other tankers: per Clean Water Act or \$20,000,000, whichever is greater. Other barges: per CWA or \$1,000,000.	\$300 per bbl. per incident storage capacity or \$100,000,000, whichever is greater
Tank Vessel & Barge/Non-Crude	Same as above	\$100 per bbl. storage capacity per incident or \$1,000,000, whichever is greater, \$35,000,000 maximum



Alaska
Department of
Environmental
Conservation

DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Division of Spill Prevention and Response

DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Division of Spill Prevention and Response

SUBJECT: Insurance Not Approved as Proof of Financial Responsibility

The following is a list of applicants that have insurance that does not comply or are trying to get insurance. Some of these applicants are trying to get coverage by some other means, but most have run out of sources.

File #	Name	Subject	Insurance Coverage Type
074	Alaska Marine Charters	barge	Lloyds'
061	Anderas Oil Co.	terminal	* looking for insurance
088	Bering Sea Fisheries	barges	Lloyds'
108	Bethel Fuel Sales	terminal	Lloyds'
025	Boyer Towing	barges	P&I club
036	Brix Maritime Co.	barges	P&I club
119	City of Galena	terminal	* looking for insurance
150	City of Saint Paul	terminal	Lloyds' & ILU
133	Dojer, Ltd.	barges	Lloyds'
129	Forty Niner Transportation	barges	P&I club
071	Kugkaktik Limited	barge	Lloyds'
087	Moody's Sea Lighterage	barges	Lloyds'
079	Northland Services, Inc.	barge	Water Quality Insurance Syndicate
095	Nushagak Electric Cooperative	terminal	ILU
089	Orca Fuel Co.	terminal	Lloyds' & ILU
065	Smith Lighterage Co.	barges	Lloyds' & ILU
070	Terminal Oil Sales	terminal	Lloyds
109	UIC Construction, Inc.	terminal	Agricultural Excess & Surplus Ins.
035	Yutana Barge Lines, Inc.	barges	P&I club
146	Island Providers Transp. Co.	vessel	WOIS/Lloyd's
102	Kodiak Oil Sales, Inc.	terminal	Lloyds' & ILU
040	Samson Tug & Barge Co, Inc.	barges	WOIS
072	Saupe' Enterprises Inc.	terminal	Lloyds' & ILU
045	Sitka Fuels, Inc.	terminal	Union Fire Insurance Co.
084	Arctic Slope Regional Corp.	terminal	Agricultural Excess & Surplus Ins.

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At the present time: Oil barges are required to have \$1 million in coverage, after June 1, 1992 the amount will be \$100 per barrel of storage capacity or \$1 million whichever is greater to a maximum of \$35 million. Most of the above barges are small enough that they will remain in the minimum amount next year, at the most I would say that \$1½ million would be the maximum.

Noncrude terminals are required to have coverage in an amount of \$10 per barrel of storage capacity with \$1 million minimum, after June 1, 1992 it will be \$25 per barrel. Because of storage capacity, some terminals will need up to \$ 2 million in coverage next year.

One company, Island Providers, has a landing craft vessel classified as a noncrude tanker that now requires \$20 million but will drop to \$1 million next year because of small storage capacity.

Pipelines are required to provide \$50 million in coverage. Cook Inlet Pipeline was able to get an insurance policy that meets the requirements.

We found that the barge operated by Brice Inc. could be classified as exempt because it only supplied fuel to other company vessels and to deck equipment.

Trident Seafoods was able to cover their barges and terminals with a letter of credit.

The Agricultural Excess and Insurance Co. thinks they will be able to provide a policy with the required endorsement, we are still waiting to hear from them.

Adams

United States Coast Guard

National Pollution Funds Center

4200 Wilson Blvd

Suite 1000

Arlington, Va 22203-1804

COPY TO

LYNN

C. LYNN

Fax Transmittal Sheet

RECEIVED

FEB 06 1992

STATE OF ALASKA
DEPT OF ENVIRONMENTAL CONSERVATION
DIV OF OIL PREVENTION & RESPONSE



MIKE C
JIM CARTER, INC
PTN TO MIKE M

Number of Pages Including this page 11

Date:

2-6-92

From

Bob Skell

To

Mike Manser

Fax #

(FTS)

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Fax #

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Voice#

(FTS)

(703)

225-4704

Voice#

(FTS)

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Subject: Here are all I could find: some old thoughts on
a 1985 bill and our Admiral's Nov. 16, 1991
testimony on our proposed COFR rules -- see issue
10-2 on p. 4

Transmitted By

*Thoughts re S. 51
amendments to Superfund C. 106
Burr 8/7*

DIRECT ACTION

1. It is doubtful that many companies, especially single-vessel "paper" corporations, will pay substantial amounts for pollution damages without being forced to. That means litigation and forced liquidation proceedings at DOJ/Coast Guard (taxpayer's) expense. Jurisdiction over a solvent vessel operator might easily be obtained, but to what end if assets are few or can't be reached? The most obvious asset, the vessel, may have been a total loss or may be worth only scrap value or may have been chartered. In the latter case, why would a completely innocent vessel owner pay for the charterer's actions without a judgement? Again, that means litigation and forced liquidation expenses for taxpayers.

2. In the absence of direct action, if a liable vessel operator is solvent, but has insufficient assets to pay claims, the superfund will pay for the pollution damages. That should not be favored by the Administration because a superfund tax on oil/chemical companies is actually a tax on consumers. Had we been able to comment on these legislative changes, we would have explained that the current financial responsibility system under the FWPCA works exceptionally well because of direct action. CERCLA should not be any different in connection with vessel liability.

3. With respect to vessel liability insurance under a financial responsibility system, CERCLA's current direct action provision doesn't change the traditional way of writing coverage -- it's the only way it has ever been written for vessels. Vessel insurers live with direct action and are not testifying against it. It is the shoreside insurers who are testifying and lobbying against it -- they never had it and they are afraid of it because of the bizarre court decisions being handed down in waste dump cases. Because these Love Canal-type cases involve many technically liable entities spread over a number of years, with a resulting insoluble legal tangle, socially minded judges are creating insurance coverage where none exists and thus forcing shoreside insurers to pay claims for non-culpable insureds from whom insurers never received adequate premiums. In the case of a spill from a vessel, however, either the spiller is liable or it isn't. If it is, equity demands that under a financial responsibility system the insurer who accepted the premiums and took the risk should pay; not consumers and taxpayers. Vessel insurers, incidentally, are not being driven out of business and are not threatening to stop writing pollution coverage for vessels.

4. CERCLA coverage for vessel liability is attractive and is being sold today, everywhere. Vessel underwriters, however, require and deserve a legislative fix in order to write CERCLA coverage as "guarantors" within the meaning of CERCLA. Basically such fix involves common sense changes such as allowing an insurer to know, beforehand, the maximum dollar amount of its potential liability and limiting its liability to section 107(a)(1) of CERCLA.

5. Nothing in the Treasury Department's study of June 1983 points to direct action itself as a reason why CERCLA guarantees will not be written by vessel insurers.

POLICY DEFENSES

1. Allowing an insurer/guarantor any defense it wishes makes no sense under a financial responsibility program. Either an insurer agrees to pay under predetermined circumstances or it doesn't. Unknown, unlisted policy defenses (failure of the insured to pay premiums that month, or failure of the insured to remember and notify the insurer of all of the different hazardous substances it may be able to transport, or failure to notice and correct a minor state of disrepair that leads to a spill, etc., etc.) fly in the face of a financial responsibility program. Only statutorily permitted defenses should be permitted (e.g., Act of God, fault of the claimant) to an insurer/guarantor. Those insurers who thereafter choose not to act as guarantors are free to do so.

2. Vessel underwriters do not like the absence of so-called policy defenses in the current CERCLA, but they either cannot or will not satisfactorily explain why. These same insurers readily write coverage (OCS vessel liability) without the benefit of policy defenses and have never invoked a policy defense under a financial responsibility system even when they could have done so. Moreover, the CLC international regime, in force since 1975 and ratified by 55 countries, proscribes policy defenses but suffers from no lack of ready and willing insurers -- insurers who currently issue CERCLA coverage and who would willingly act as CERCLA guarantors if CERCLA's guarantor liability provisions were amended as urged by the Coast Guard. The lack of policy defenses is not anathema to vessel underwriters, but they will not look a gift horse (S.51) in the mouth.

3. There was no actual analysis or study of the policy defenses issue in the Treasury Department's "study". All it did was restate the insurers' dislike of the absence of policy defenses. The Coast Guard's Financial Responsibility Division is certain that the availability of policy defenses is not mandatory to the execution of CERCLA insurance. If in fact some defense, now termed a policy defense, was absolutely necessary, that defense would have been articulated and added to the law years ago.

DEPARTMENT OF TRANSPORTATION
U. S. COAST GUARD
STATEMENT OF REAR ADMIRAL RICHARD A. APPELBAUM
ON VESSEL FINANCIAL RESPONSIBILITY FOR WATER POLLUTION
BEFORE THE
SUBCOMMITTEE ON COAST GUARD AND NAVIGATION
COMMITTEE ON MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES
NOVEMBER 6, 1991

GOOD MORNING, MR. CHAIRMAN. I AM HONORED TO APPEAR BEFORE THIS DISTINGUISHED SUBCOMMITTEE TODAY TO DISCUSS THE STATUS OF THE COAST GUARD'S ACTIONS TO IMPLEMENT THE VESSEL FINANCIAL RESPONSIBILITY PROVISIONS IN THE OIL POLLUTION ACT OF 1990 (OPA 90) AND THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA). IT IS ONE OF THE RESPONSIBILITIES OF MY COMMAND, THE NATIONAL POLLUTION FUNDS CENTER, TO CARRY OUT THE VESSEL FINANCIAL RESPONSIBILITY PROVISIONS OF THESE ACTS.

THE COAST GUARD PUBLISHED A NOTICE OF PROPOSED RULEMAKING IN THE FEDERAL REGISTER ON SEPTEMBER 26, 1991 (CGD 91-005). THIS NOTICE ALLOWS A PERIOD FOR THE PUBLIC TO SUBMIT COMMENTS. AFTER THE COMMENT PERIOD CLOSES, WE PLAN TO PUBLISH A FINAL RULE WHICH WILL INCORPORATE ANY CHANGES MADE. WE LOOK FORWARD TO RECEIVING THE PUBLIC'S INPUT TO HELP US CRAFT THE BEST REGULATORY PACKAGE.

IN ADDITION TO THE USUAL REGULATORY EVALUATION, THE COAST GUARD WILL PREPARE A REGULATORY IMPACT ANALYSIS. THIS ANALYSIS WILL ASSESS THE POTENTIAL EFFECTS ARISING FROM DIFFICULTIES OCEANGOING OPERATORS MAY ENCOUNTER IN OBTAINING THE USUAL GUARANTIES OF INSURANCE FROM THEIR INSURANCE ENTITIES ONCE THE RULE GOES INTO EFFECT. TO ASSIST IN PREPARING THIS ANALYSIS, THE NOTICE OF PROPOSED RULEMAKING CONTAINS A LIST OF QUESTIONS

SOLICITING SPECIFIC INFORMATION REGARDING SOME OF THE SUBJECTS THAT MAY BE ADDRESSED IN THE ANALYSIS. UPON CONSIDERATION OF THE COMMENTS AND OTHER INFORMATION RECEIVED, THE ANALYSIS WILL BE COMPLETED AND NOTICE OF ITS AVAILABILITY WILL BE PLACED IN THE FEDERAL REGISTER. BASED ON THE COMMENTS RECEIVED IN RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING, IF ADDITIONAL OPPORTUNITY FOR PUBLIC COMMENT ON THE ANALYSIS IS INDICATED, THE COAST GUARD WILL PROVIDE AN OPPORTUNITY FOR SUCH COMMENT BEFORE PUBLISHING A FINAL RULE.

CURRENTLY, PENDING PROMULGATION OF A FINAL RULE, FOR PURPOSES OF CERTIFICATION (AS CONTRASTED WITH LIABILITY), WE ARE USING VESSEL FINANCIAL RESPONSIBILITY NUMBERS THAT ARE PROVIDED IN PRE-OPA 90 LAWS, SUCH AS THE CLEAN WATER ACT. TODAY, TO OBTAIN A CERTIFICATE AND OPERATE IN THE U.S., A VESSEL OPERATOR NEED ONLY PROVIDE EVIDENCE OF FINANCIAL RESPONSIBILITY WHICH IS A FRACTION OF THAT PRESCRIBED IN OPA 90. THAT OWNER OR OPERATOR MAY BE LIABLE UP TO MUCH HIGHER AMOUNTS, BUT ABSENT UPDATED RULES, THERE IS NO REQUIREMENT TO PRODUCE EVIDENCE OF FINANCIAL RESPONSIBILITY COMMENSURATE WITH SUCH HIGHER AMOUNTS. THE PROPOSED RULE SEEKS TO BLEND THE SPECIFIC REQUIREMENTS OF THE ACT, INCLUDING ITS INCREASED LIMITS OF LIABILITY WITH BASIC PROCEDURAL STEPS THAT HAVE BEEN IN EFFECT FOR MANY YEARS.

THE REQUIREMENTS FOR VESSEL FINANCIAL RESPONSIBILITY HAVE BEEN IN EFFECT IN THE U.S. SINCE 1971. OPA 90 HAS NOT CHANGED THE MECHANICS OF THIS SYSTEM. ALTHOUGH THE STATUTORY LIMITS AND SCOPE OF LIABILITY HAVE INCREASED THROUGHOUT THE YEARS, THE SYSTEM FOR ESTABLISHING FINANCIAL RESPONSIBILITY HAS REMAINED THE

SAME. HISTORICALLY, FOUR WORKABLE METHODS FOR ESTABLISHING FINANCIAL RESPONSIBILITY HAVE BEEN IDENTIFIED BY INDUSTRY AND GOVERNMENT: 1) INSURANCE GUARANTIES, 2) SURETY BOND GUARANTIES, 3) SELF-INSURANCE AND 4) FINANCIAL GUARANTIES, WHICH ARE SIMILAR TO SELF-INSURANCE. OF THESE METHODS, INSURANCE GUARANTIES ARE, BY FAR, THE MOST FREQUENTLY USED, PARTICULARLY IN THE INTERNATIONAL VESSEL OPERATING COMMUNITY.

THE COAST GUARD CERTIFICATION PROCESS IS SIMPLE: ONCE THE OWNER/OPERATOR AND THE VESSELS ARE IDENTIFIED ON AN APPLICATION FORM, AND THE GUARANTOR OR SELF-INSURER HAS PROVIDED THE COAST GUARD WITH SUFFICIENT EVIDENCE OF FINANCIAL RESPONSIBILITY, THE AFFECTED VESSELS ARE ISSUED CERTIFICATES OF FINANCIAL RESPONSIBILITY (COFR'S). APPLICATION AND CERTIFICATION FEES MUST BE PAID. IN GENERAL TERMS, VESSELS LACKING VALID COFR'S ARE PROHIBITED BY THE COAST GUARD, AS WELL AS THE U.S. CUSTOMS SERVICE, FROM OPERATING IN U.S. WATERS, ENTERING OR LEAVING U.S. PORTS. OPA 90 AND CERCLA CONTINUE TO MANDATE SUCH ENFORCEMENT.

OVER THE PAST SEVERAL MONTHS, THE NATIONAL POLLUTION FUNDS CENTER HAS BEEN NOTIFIED OF SEVERAL CONCERNS OF THE MARITIME COMMUNITY. I WILL IDENTIFY THE PRINCIPAL ISSUES RAISED THUS FAR.

ONE CONCERNS THE LIMITS OF LIABILITY. UNDER OPA 90, THE LIMITS OF LIABILITY FOR TANK VESSELS GENERALLY ARE SEVERAL TIMES HIGHER THAN UNDER THE PREVIOUS STATUTES. BUT, EVEN WITH THIS INCREASE, THE LIMITS OF LIABILITY ARE WELL BELOW THE COVERAGE THAT WE UNDERSTAND IS ROUTINELY PROVIDED BY THE INTERNATIONAL SHIPPING COMMUNITY'S INSURANCE ENTITIES, CALLED PROTECTION AND INDEMNITY (P&I) CLUBS. ALSO, THE LIMITS OF LIABILITY ARE

SPECIFIED IN THE STATUTE AND THERE ARE NO NEW PROCEDURAL CONCEPTS IN THE PROPOSED RULE. VIRTUALLY ALL OCEANGOING OPERATORS WHO USE U.S. WATERS ALREADY WOULD HAVE MORE THAN THE NECESSARY INSURANCE COVERAGE FOR FEDERAL PURPOSES FROM THEIR P&I CLUBS. ALL THAT IS REQUIRED BY OPA 90 AND CERCLA, AND THEREFORE BY THE PROPOSED RULE, IS THAT THE COVERAGE BE SUBMITTED IN A FORM ACCEPTABLE TO ESTABLISH EVIDENCE OF FINANCIAL RESPONSIBILITY, BUT ONLY UP TO THE LIMITS OF OPA 90 AND CERCLA. I SHOULD ADD HERE THAT FOR THE GREAT MAJORITY OF OCEANGOING VESSELS, THE P&I CLUBS HAVE ALWAYS BEEN THE GUARANTORS FOR U.S. FINANCIAL RESPONSIBILITY PURPOSES. THE CLUBS ALSO PROVIDE FINANCIAL SECURITY FOR THE OIL POLLUTION DAMAGE LIABILITY OF SHIP OWNERS WHO TRADE IN, OR FLY THE FLAGS OF, SIXTY-NINE OTHER COUNTRIES PARTY TO THE 1969 CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE. WE UNDERSTAND THAT INSURANCE GUARANTIES FOR THE NON-OCEANGOING OR "BROWN WATER" VESSEL OPERATORS ARE READILY AVAILABLE FROM THE COMMERCIAL MARINE INSURANCE INDUSTRY IN THE UNITED STATES. I AM TOLD THAT THEY WILL REMAIN AVAILABLE.

A SECOND ISSUE RAISED IS THAT OF DIRECT ACTION AGAINST A GUARANTOR BY PRIVATE CLAIMANTS. OPA 90 REQUIRES THAT CLAIMANTS, INCLUDING PRIVATE CLAIMANTS, BE ABLE TO PRESENT A CLAIM FOR REMOVAL COSTS OR DAMAGES DIRECTLY AGAINST AN INSURER OR OTHER GUARANTOR SHOULD A VESSEL BE INVOLVED IN A POLLUTION INCIDENT. DIRECT ACTION BY PRIVATE CLAIMANTS IS NOT A NEW CONCEPT. ALTHOUGH ONLY THE FEDERAL GOVERNMENT COULD TAKE DIRECT ACTION AGAINST THE GUARANTOR UNDER THE CLEAN WATER ACT, DIRECT ACTION BY PRIVATE CLAIMANTS WAS A FEATURE OF THE FINANCIAL RESPONSIBILITY

REQUIREMENTS UNDER THE TRANS-ALASKA PIPELINE AUTHORIZATION ACT OF 1973 AND THE OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS OF 1978. DIRECT ACTION BY PRIVATE CLAIMANTS AGAINST AN INSURER OR OTHER PERSON PROVIDING FINANCIAL SECURITY IS ALSO AN UNDERPINNING OF THE SCHEME UNDER THE 1969 CIVIL LIABILITY CONVENTION. WHILE NEITHER THE 1969 CONVENTION NOR THE 1984 PROTOCOLS TO THAT CONVENTION HAVE BEEN RATIFIED BY THE UNITED STATES, THE 1969 CONVENTION HAS BEEN IN EFFECT SINCE AS EARLY AS 1975 IN THE NATIONS PARTY TO THE CONVENTION (CURRENTLY SIXTY-NINE IN NUMBER). THEREFORE, COVERAGE OF OIL POLLUTION RISK UNDER BOTH OPA 90 AND THE CURRENT PRIMARY INTERNATIONAL REGIME REQUIRES DIRECT ACTION AGAINST INSURERS BY PRIVATE CLAIMANTS.

A THIRD ISSUE CONCERNS THE MATTER OF FEDERAL PREEMPTION. OPA 90 DOES NOT PREEMPT STATES FROM IMPOSING ADDITIONAL LIABILITY OR OTHER REQUIREMENTS WITH REGARD TO OIL POLLUTION. WE UNDERSTAND THAT SOME OPERATORS HAVE EXPRESSED CONCERN THAT, IN THE AFTERMATH OF THE EXXON VALDEZ INCIDENT, SOME STATES MAY LEGISLATE PROHIBITIVELY IN THIS AREA. STATE LIABILITY REQUIREMENTS DO NOT AFFECT OPA 90 FINANCIAL RESPONSIBILITY REQUIREMENTS. STATE AND FEDERAL REGULATIONS ON THE SUBJECT OF FINANCIAL RESPONSIBILITY ARE SEPARATE AND DISTINCT.

A FOURTH ISSUE IS THAT OF UNLIMITED FEDERAL LIABILITY. OPA 90 EXPRESSLY PROVIDES LIMITS OF FEDERAL LIABILITY FOR RESPONSIBLE PARTIES INVOLVED IN AN OIL POLLUTION INCIDENT. THE PROPOSED RULE REFLECTS THOSE LIMITS, HOWEVER, IF AN INCIDENT WAS CAUSED BY GROSS NEGLIGENCE, WILLFUL MISCONDUCT OR A VIOLATION OF CERTAIN FEDERAL REGULATIONS, THE LIMITS OF LIABILITY WOULD NOT APPLY. IN

A CASE WHERE A RESPONSIBLE PARTY'S LIMIT OF LIABILITY IS BROKEN, THE GUARANTOR WOULD STILL ONLY BE LIABLE UP TO THE LIMITS OF ITS GUARANTEE. IN THE EVENT OF THE RESPONSIBLE PARTY'S WILLFUL MISCONDUCT, THE GUARANTOR IS NOT LIABLE AT ALL. IT IS THE RESPONSIBLE PARTY - NAMELY THE OWNER AND/OR OPERATOR OF THE VESSEL - WHO WOULD BE RESPONSIBLE FOR ANY UNLIMITED LIABILITY.

A FIFTH ISSUE CONCERNS POLICY DEFENSES. INSURANCE GUARANTIES, TO HAVE ANY PRACTICAL MEANING, CANNOT CONTAIN POLICY DEFENSES, WHICH ARE A HOST OF EXCLUSIONS IN THE UNDERLYING INSURANCE CONTRACT, AS WELL AS IN CASE LAW, BETWEEN THE INSURER AND INSURED. THESE DEFENSES OR EXCLUSIONS VOID THE UNDERLYING INSURANCE FOR A VARIETY OF REASONS. WHILE OPA 90 ALLOWS THE SECRETARY TO SPECIFY NECESSARY POLICY DEFENSES IN PROMULGATING FINANCIAL RESPONSIBILITY REQUIREMENTS, WE HAVE FOUND NONE, OTHER THAN THOSE PERMITTED BY STATUTE, THAT WOULD "EFFECTUATE THE PURPOSES OF THIS ACT." IT APPEARS TO US THAT CONGRESS INTENDED DIRECT ACTION TO BE A PRINCIPAL FEATURE OF THE LAW, AND POLICY DEFENSES APPEAR TO RUN COUNTER TO THE CONCEPT OF DIRECT ACTION.

THE FINAL ISSUE CONCERNS SELF-INSURANCE. SELF-INSURANCE IS ONE OF THE STATUTORILY-PERMITTED METHODS OF ESTABLISHING FINANCIAL RESPONSIBILITY. THE MEANS OF ESTABLISHING SELF-INSURANCE IN THE PROPOSED RULE HAVE NOT CHANGED FROM CURRENT REGULATIONS. TO SUMMARIZE THEIR REQUIREMENTS: A SELF-INSURER MUST HAVE ASSETS IN THE U.S. THAT CAN BE ATTACHED BY CLAIMANTS (INCLUDING THE OIL SPILL LIABILITY TRUST FUND), IF NECESSARY TO SATISFY A JUDGMENT. IN ADDITION, U.S. ASSETS MUST BE BALANCED AGAINST INTERNATIONAL LIABILITIES. THAT IS, A SELF-INSURER'S

WORLDWIDE LIABILITIES MUST BE LESS THAN ITS U.S. ASSETS. THIS IS TO HELP ENSURE THAT THE U.S. ASSETS REMAIN AVAILABLE TO U.S. CLAIMANTS AND ARE NOT DEPLETED IN MEETING FOREIGN LIABILITIES.

I HAVE RECENTLY HEARD OF A PROPOSAL TO ALLOW THE USE OF P&I CLUB MEMBERSHIP OR INSURANCE AS AN "ASSET" FOR SELF-INSURANCE PURPOSES. THERE ARE SEVERAL POINTS I WOULD LIKE TO MAKE CONCERNING THIS PROPOSAL. FIRST, AS BETWEEN THE INSURED AND THE INSURER, INSURANCE IS SUBJECT TO POLICY DEFENSES, SOME OF WHICH MAY NOT BE EXPLICIT IN INSURANCE CONTRACTS. FOR A HOST OF REASONS, AN INSURED MAY END UP WITHOUT ANY COVERAGE. THAT, BY ITSELF, SEEMS TO ELIMINATE AVAILABILITY OF MEMBERSHIP OR INSURANCE AS AN ASSET FOR SELF-INSURANCE PURPOSES. SECOND, TYPICALLY, P&I CLUB INSURANCE SPECIFICALLY PROHIBITS ATTACHMENT OR DIRECT ACTION BY CLAIMANTS. IF SOMETHING CAN NOT BE ATTACHED, IT PROBABLY SHOULD NOT BE USED AS AN ASSET FOR PURPOSES OF SELF-INSURANCE. THIRD, WE UNDERSTAND THAT P&I INSURANCE NORMALLY CAN BE CANCELLED WITHOUT THE CONSENT OF THE SHIPOWNER AND WITHOUT THE KNOWLEDGE OF THE COAST GUARD. FOURTH, P&I INSURANCE IS TYPICALLY CHARACTERIZED AS INDEMNITY INSURANCE. THAT MEANS THAT IF A VESSEL COVERED BY A P&I CLUB HAS AN OIL SPILL, THE INSURED MUST FIRST PAY FOR THE REMOVAL COST AND DAMAGES OUT OF ITS OWN POCKET. THEN, AND ONLY THEN, WOULD THE SHIPOWNER HAVE LEGAL STANDING TO DEMAND THAT THE P&I CLUB PAY UP; PROVIDED, OF COURSE, THAT THE CLUB DID NOT HAVE THE RIGHT TO ASSERT A POLICY DEFENSE. AS AN EXAMPLE, THE SUBCOMMITTEE RECENTLY WROTE THE COMMANDANT CONCERNING A CASE INVOLVING THE GIERT SAVANNAH SPILL IN WHICH A POLICY DEFENSE WAS EMPLOYED AGAINST THE INSURED. WHILE THIS DID

NOT AFFECT THE GUARANTEE OF FINANCIAL RESPONSIBILITY TO THE COAST GUARD, IT DEMONSTRATES ONE OF THE SHORTCOMINGS OF USING INSURANCE AS AN ASSET.

IN SHORT, OUR ANALYSIS TO DATE INDICATES THAT USE OF TYPICAL MEMBERSHIP OR INSURANCE AS AN "ASSET" FOR SELF-INSURANCE PURPOSES WOULD NOT ENSURE FINANCIAL RESPONSIBILITY. MOREOVER, MR. CHAIRMAN, OPA 90 DEFINES ANY PERSON, OTHER THAN THE RESPONSIBLE PARTY, WHO PROVIDES EVIDENCE OF FINANCIAL RESPONSIBILITY AS A "GUARANTOR." IT FURTHER PROVIDES FOR DIRECT ACTION AGAINST ANY "GUARANTOR." IF REGULATIONS PERMITTED AN INSURANCE POLICY TO BE COUNTED AS AN ASSET, THEREBY ALLOWING THE INSURER TO AVOID THE DIRECT ACTION REQUIREMENTS OF OPA 90, THE REGULATIONS WOULD APPEAR TO BE CONTRARY TO THE SPIRIT OF THE LAW.

MR. CHAIRMAN, I WILL BE GLAD TO RESPOND TO ANY QUESTIONS YOU OR THE OTHER MEMBERS OF THE SUBCOMMITTEE MAY HAVE.

Testimony of Virginia Wade, Executive Vice President,
Gene Sause & Co. Regarding House Bill 501

My employer, Gene Sause, has provided me with a copy of House Bill No. 501 for my review and comment. Gene Sause & Company has been working with the State of Alaska for approximately ten years regarding their various insurance regulations and compliance by our clients who have operations in the State of Alaska. We worked closely with the regulators when the first regulations were being developed and provided a great deal of the language that went into those first regulations.

Gene Sause & Company is exclusively a marine broker of insurance. We are fortunate enough to have clients in Oregon, Washington, Alaska, California and Hawaii. Consequently, we work with a large number of insurance companies and Protection and Indemnity Clubs, and have a sufficiently large book of business to be able to negotiate fairly broad insurance coverages at competitive rates. I only explain this background to enable you to understand that our firm should be able to obtain any form of marine insurance if it is available in the marketplace.

Until the latest Financial Responsibility regulations in the State of Alaska, our firm has been able to obtain the necessary coverages, limits, direct action and service of suit required by the State. Sometimes it was necessary to negotiate this coverage for our clients by utilizing pressure on a reluctant underwriter who only agreed to write the coverage for a particular client due to his longstanding relationship with that client. But, nevertheless, we have always been able to satisfy the State of Alaska's requirements by utilizing insurance companies directly or through the pooling arrangements of the Water Quality Insurance Syndicate in New York.

However, as the nation became concerned over environmental issues and clean up expenses rose, vessel and cargo owners began seeking higher limits of liability and insurance coverage for Fines and Penalties. The only viable market for high limits and fines and penalties was the Protection and Indemnity Clubs, where shipowners share the cost of reinsurance, administration, and claims with others on a mutual basis. Because they are mutual, however, each Club clearly states in their rule books that the Club will indemnify the shipowner if he should become liable to pay a claim and shall have, in fact, paid the claim. Any direct action statute would create a breach of this indemnity requirement. The P & I Clubs recently fought two suits through the English Court of Appeals, both of which tried to establish a right by third parties to bring claims directly against the Clubs. The Appeals Court upheld the Club's rules on this matter.

We are, consequently, pleased to see and feel it is vital for the State of Alaska to provide an alternative to their requirement for Direct Action and Service of Suit. However, in reviewing this bill, there still seems to reference to the Insurer's limit of liability. The Section 1 amendment talks about the Insurer's maximum liability. I quote in part "Financial responsibility under this section extends to a loss compensable under AS 46... However, if financial responsibility is demonstrated by use of insurance or evidence that a group of insureds has agreed to cover pollution risks of members of the group, the maximum liability of the Insurer is limited to the maximum amount covered by the Insurance Policy". This reference to the Insurer's maximum liability gives one the impression

Testimony of Virginia Wade
Gene Sause & Co.
Re: House Bill 501
March 6, 1992

that the state is still trying to deal directly with the Insurer. They must direct their requirements to the Shipowner's maximum limit of liability which may be indemnified by his Insurers, subject always to the policy provisions and defenses. The Insurer must have the right to deny indemnification to their shipowner if that shipowner breached a policy warranty or rule, such as in the case of willful misconduct. And the Insurer's limit of liability to his shipowner will never be more than the specific policy limits that have been negotiated. Again, these matters are between the Shipowner and his Insurer.

When further examining Section 1, your bill states that the maximum policy limits are subject to the limitations or restrictions normally associated with these arrangements, such as when there is evidence that an Insurer has, in bad faith, failed to settle a claim or when attorney fees and other costs of litigation are payable in addition to the face amount of the policy or other agreement. Such statements are perceived by the Clubs as increasing the maximum policy limit for which they may indemnify their shipowner. And the matter of bad faith claims must lie between the Shipowner and their Insurer at the time that Shipowner seeks indemnification for his losses.

Since the inception of Oil Pollution Act of 1990, the Insurers who previously wrote Pollution coverage in Alaska with Direct Action endorsements have also withdrawn from this coverage. They feel they cannot comply with both the Federal and State regulations, nor is reinsurance for State regulations readily available.

Consequently, Alaskan regulators must state their bill in such a manner that the requirements lie between the Shipowner and the State of Alaska. No requirements can be placed directly on Insurers, if coverage is to remain available for Alaskan exposures. Other states have written their financial responsibility regulations in such a manner that Shipowners are held financially accountable, but not by any requirements not commercially available to their citizens. The goal must be to protect the state waterways and environment, have funds available in case a spill does occur, while still allowing citizens to be employed in the maritime industry. Developing insurance regulations which the employer cannot insure simply will put that firm out of business and its employees out of work. We know regulators do not desire this end result, and we urge them to modify House Bill 501 accordingly. We then hope that both the House and Senate bills will be passed quickly before innocent citizens are put out of work. No other insurance is available for the existing regulations and we are unable to find sureties who are willing to be involved in this critical area. Since very few firms can demonstrate self-insurance, failure to modify the existing regulations will lead to many maritime firms being faced with non-compliance.

March 6, 1992
Portland, Oregon

ROBINS, KAPLAN, MILLER & CIRESI

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January 22, 1992

VIA HAND DELIVERY

Executive Secretary
Marine Safety Council
G-LRA-2/3406
CGD 91-005
U.S. Coast Guard Headquarters
2100 Second Street, S.W.
Washington, D.C. 20593-0001

Re: Notice of Proposed Rulemaking
[CGD 91-005] -- Financial Responsibility
for Water Pollution (Vessels)

Dear Sir or Madam:

Submitted herewith, on behalf of the International Group of PandI Clubs ("the Group"), are comments on the above-referenced Notice of Proposed Rulemaking (the "NRPM").

I. INTRODUCTION

The Group consists of seventeen mutual insurance companies ("PandI Clubs" or "Clubs") who between them insure the liabilities of over 95% of the world's ocean going merchant fleet. This includes effectively all oil tankers and almost all dry cargo ships trading to the United States together with a substantial proportion of the U.S. coastal traders. All the Clubs in the Group are linked by reinsurance arrangements so that they form what is in effect one insurance pool for the larger liability risks of shipowners worldwide.

The constituent PandI Clubs of the Group are mutual, non-profit organizations which exist to insure the liabilities of their

shipowner Members. In this capacity, the Clubs provide shipowners with services extending to up-front claims handling, including the appointment of lawyers, surveyors and other experts and the swift settlement of claims. This is particularly true in the case of oil pollution where Clubs play an active role in the shipowners' response to a spill. (This approach contrasts with that of the traditional commercial insurance industry, which normally leaves the insured to deal with the incident and reviews the insurance implications after the event.) The Clubs therefore have many years of experience throughout the world in responding to oil spills both as regards clean-up and damage settlement.

The Clubs are virtually the sole providers of insurance backing for the certificates currently issued by the US Coast Guard ("USCG") under the Clean Water Act ("CWA") for ocean going vessels. The only significant exception to this is a group of US insurers known as the Water Quality Insurance Syndicate ("WQIS") who provide certificates limited to USD 5 million for certain small coastal and inland waterway carriers.

In addition, the Clubs are effectively the sole providers of the insurance certificates required by international law under the 1969 Civil Liability Convention ("1969 CLC") in order for participating countries to issue certificates of financial responsibility to oil tankers under that international Convention. This position has enabled the Clubs to cooperate closely with the Director of the International Oil Pollution Compensation Fund ("the Fund") both in the handling and settlement of oil spills under the 1969 CLC and under the 1971 Fund Conventions.

In the circumstances it would be fair to state that the smooth working of both the CWA and the 1969 CLC owes much to the Clubs.

These comments submitted on behalf of the Clubs consist of: (1) general comments concerning the position of the Clubs on the issue of certification and the role of the Clubs as mutual indemnity insurers; (2) a discussion of the financial responsibility requirements of the Oil Pollution Act of 1990 ("OPA 90") and the NPRM; (3) the Group's responses to the specific questions posed in the NPRM; and (4) a discussion of possible changes to the NPRM.

II. GENERAL COMMENTS

A. The Position of the Clubs on Cover and Certification

1. Cover

The Clubs currently provide insurance cover for their shipowner members which is wide enough in scope to include all US civil liabilities and in terms of oil pollution is more than sufficient in amount to meet the financial responsibility require-

ments of OPA 90. It is the current intention of the Clubs to maintain this cover.

2. Certificates of Financial Responsibility

In debates during the legislative process which culminated in OPA 90, the Clubs consistently stated the position that they would not provide certification of financial responsibility under any law which differed markedly from the 1984 Protocols to the 1969 CLC. The Clubs' position remains the same, and they will not be providing certification under OPA 90 or under any of the state oil pollution laws.

3. Cover but no Certification

Although the Clubs do not exclude liabilities under OPA 90 from the cover under their Rules, they will not provide certification of financial responsibility. The reasons for this may be summarized in the statement that the Clubs' function is to act as indemnity insurers not guarantors. As a general policy the Clubs have consistently refused to give anticipatory guarantees. Exceptions have been made to this with regard to certificates required under International Conventions where different criteria apply, and the limited certification under the CWA. (The basis for each of these exceptions is discussed later in these comments.) In addition, the Clubs believe that the reinsurances which they obtain from the commercial insurance market, and which are vital to their coverage, would be imperilled by the giving of certificates under OPA 90.

B. The Clubs are Indemnity Underwriters, not Guarantors

The essential role of the Clubs is to act as indemnity insurers, not guarantors. The Clubs have a longstanding policy of not providing anticipatory guarantees for the potential liabilities of their shipowner members. The reasons for this policy become clear on consideration of the consequences of acting as guarantor for all the potential liabilities arising from many different risks (not just oil pollution) in every country of the world in respect of every merchant ship currently trading.

Exceptions have been made to this policy in providing the insurance backing to the USCG certificates currently issued under the CWA and the insurance backing given to the government certificates issued under the 1969 CLC. As to the first exception, in this context it should be recalled that the Clubs have always supported the policy of prompt and even voluntary clean-up. The giving of USCG certificates in 1970 was consistent with that policy as they were specifically limited in scope to federal costs of oil spill clean-up, and in amount to USD 150 per grt. In addition, the CWA did not require that insurers giving certification forego the

policy defenses which are abrogated under OPA 90. The decision to issue such certificates came at the time of the first CWA (1970) when the United States was seen as introducing interim protection for federal clean-up costs in advance of the 1969 CLC coming into force (1975) and in the expectation that the USA would ratify the Convention when it came into force. That expectation was never fulfilled. With respect to the second exception, the Clubs have traditionally supported International Conventions in the interests of international uniformity of approach and consider that such Conventions provide a consistent and predictable liability regime.

C. The Extraordinary Scope of the Liabilities to be Guaranteed under OPA 90

Our discussion is confined to the issue of certification. Accordingly it does not include a full review of the liability provisions of OPA 90. However, in order to understand the position taken by the Clubs on certification it is necessary to be aware of the overall effect of those provisions. OPA 90 has drastically increased the liability of shipowners in respect of oil spills, both in amount and scope. Liability under the CWA was limited in amount to USD 150 per gross ton and, as stated above, applied to the federal government's costs of clean-up. OPA 90 has increased liability limits fourfold for dry cargo vessels (more for smaller ships) and eightfold for tank vessels. Moreover, OPA 90 has introduced a completely new range of liabilities and penalties relating to oil spills which extend to both economic and non-economic losses, including losses relating to damages to natural resources calculated under OPA 90's Natural Resource Damage Assessment procedure and expenses of state and local governments for fire, police and other safety services. Even more significantly, OPA 90 abandons the principles of the Robins Dry Dock case so that "claimants" could apparently include anyone who has suffered any loss whatsoever from the spill, whether or not they have any direct connection with the incident. This change runs counter to the policy which has been adopted by the US Courts for many years and which was justified and explained very neatly by Chief Justice Cardozo when he said that without such a direct connection defendants would be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class" Ultramares Corporation v. Touche, 255 NY 170, 174 N.E. 441 (N.Y. 1931). This is precisely the unfortunate situation in which shipowners now find themselves. OPA 90 also makes specific provision for individual states to introduce their own legislation which may be inconsistent with or additional to Federal requirements, thus introducing a series of potentially overlapping additional liabilities and indeed financial responsibility requirements. Thus the way is cleared for speculative damages which are potentially recoverable by an exceptionally wide range of plaintiffs.

The limitation of liability for shipowners provided for in OPA 90 is equal to the amount for which certification of financial responsibility is required. However, it is generally agreed that the limitation of liability provided in OPA 90 is illusory. OPA 90's liability limit is not available if the incident is proximately caused by the gross negligence of the responsible party, his servants, agents or contractors, or if it is caused by the violation of an applicable federal safety, construction or operating regulation by the responsible party, his servants, agents or contractors. Given the likelihood of establishing a breach of some applicable federal regulation and the unknown and highly flexible nature of the test for "gross negligence" at the shipboard level, denial of the right to limit liability is a probability in any major spill.

It may be argued that OPA 90 only requires an insurer to certify up to the fixed amounts stated in OPA 90. However if, as the NPRM proposes, the insurer is forced to submit to the jurisdiction of the US federal courts as a guarantor (which submission will probably also be construed as de facto submission to the jurisdiction of state courts), he will lose the contractual defenses which are a very important part of the cover given by any insurer and he will become exposed as the deepest available pocket to the risk of having to pay sums in excess of the amount certified, or even insured. It may be said that this should not happen, but all insurers genuinely fear the possibility of a US federal or state court finding some reason to impose such excess liability.

In addition, the Act contains a number of penalties which attach to the handling of a spill and its settlement, for all of which the guarantor itself could be personally liable. This introduces a new and serious risk. Indeed, it places a financial guarantor in an extraordinary position in which he is transformed by the Act from financial guarantor into spiller.

As a consequence of the foregoing, the Clubs are not willing to act as guarantors under OPA 90. While, as has always been the case, they are prepared to live up to their obligations to pay claims pursuant to the terms of their contracts of insurance, they are not prepared to offer themselves to the US courts as guarantors directly responsible for all claims made as a consequence of oil spills of their shipowner Members, thus in effect becoming the property insurers for claimants under OPA 90 rather than the liability insurers of shipowners.

D. The Mutuality of the Clubs

The shipowner directors of the Clubs have a special responsibility to the totality of their membership, many of whom never trade to the United States, to ensure that the mutual insurance structure and the reinsurance arrangements which protect

that structure are not put at risk. There is frequent pressure on the Clubs in various parts of the world to give anticipatory guarantees for unknown claims in unknown circumstances to potential claimants, both Governments and private parties. These pressures have always been firmly resisted. In this regard it is important to distinguish between on the one hand, a Club indemnifying its Members' liabilities, with policy defenses preserved, and, on the other, becoming a financial guarantor of those liabilities in each jurisdiction in which the liability may arise. Moreover, a fragmented approach to the certification of oil pollution liabilities would seriously weaken the development of the International Conventions by encouraging countries to believe that the Conventions have no future and that the only way forward is to follow the example of the United States, take unilateral action and demand their own certification. This would not only be detrimental to the development of orderly international law, but also would lead to (1) administrative chaos, (2) serious repercussions in terms of insurance cost, and (3) much more importantly in the long term, severe reduction in the availability of adequate insurance coverage for shipowners' liabilities generally.

The United States has chosen not to ratify the International Conventions in this area and has in their place created its own uniquely onerous liability regime for oil spills. Those who insure risks worldwide on behalf of an international community must take this unique risk into account. The Clubs and their international shipowner Members have given careful consideration to the exposure created by OPA 90 and have concluded that it would be wrong for them to give certificates and submit to United States jurisdiction as guarantors. It is difficult to justify providing certificates in respect of one risk in a single country, however important, when this exposes the whole international system to the dangers described above.

E. Other Insurers Take the Same Position

The Clubs are not alone in taking this position.

Other insurers in the international market have reacted to OPA 90 and state certification by ensuring that all their policies contain a standard market clause which reads as follows:

"This policy of insurance is not evidence of financial responsibility under the Oil Pollution Act of 1990 or any similar federal or state laws and may not be shown or tendered to the USCG or any federal or state agency as evidence of financial responsibility or evidence of insurance. The insurers do not consent to be guarantors."

The only possible exception to this relates to certification for small domestic inland and coastal vessels. However, the scope of the cover provided by WQIS is limited, as described in particular in the oral testimony of its president, Robert S. Lagatolla, at the November 6, 1991 Hearing before the House Merchant Marine and Fisheries Subcommittee on Coast Guard and Navigation. (The printed transcript of the Hearing containing this oral testimony is expected to be publicly released in the near future. As soon as it becomes available, pertinent portions will be provided for the record herein.)

F. The Clubs' Reinsurers are Likely to React Adversely to Certification

The Clubs, although competing for business between themselves, combine to purchase reinsurance collectively. The resultant economy of scale enables each Club to purchase more coverage than would be available to it as a separate entity, and also at reduced cost. Furthermore, this approach, combined with the arrangements between the Clubs for pooling their losses above a certain figure, helps to ensure continuity and stability in a highly cyclical market. The Group's reinsurance contract is one of the biggest liability contracts in the world and absorbs the available cover worldwide. There is no alternative reinsurance market. Indeed, some of the largest insurers in the world are reluctant to accept the risk of providing the necessary reinsurance -- less than ten percent of the current reinsurance contract is underwritten in the United States.

The worldwide reinsurance market for large risks of this type is very limited and in effect all large insurance claims worldwide are paid by the same limited number of reinsurers. This market has been badly affected recently by an unusually large number of major incidents such as, for example, the Piper Alpha oil platform explosion, the Phillips refinery fire, the EXXON VALDEZ oil spill, Hurricane Hugo and severe storm damage in Europe. This has led to a dramatic contraction of the market and greatly increased cost.

When an insurance market enters this phase of its cycle, underwriters are forced to cut back on the risks they accept and attempt to exclude the most dangerous or uncertain.

OPA 90 and the emotion attendant on the EXXON VALDEZ oil spill are considered to have increased the US oil pollution risk very significantly. This is against the background that the US is already considered a high risk area, with an unpredictable and expensive legal system. Nowhere is this fear greater than in uncertain areas of claims, and OPA 90 has made US oil pollution claims highly uncertain. The market has reacted to the possibility

of being asked or deemed to have certified liabilities under OPA 90 with the sort of exclusionary wording set out above.

The existing reinsurances of the Clubs are provided on the basis of the stated position of the Clubs that they will not provide certificates under OPA 90. If the Clubs were to depart from this position it is understood that many of the existing reinsurers would refuse to continue their reinsurances.

Reference is made above to the importance for the Clubs of maintaining the present mutual structure, including the necessary reinsurances. In that regard, it is now clear that the giving of certificates under OPA 90 is not a merely theoretical or long term threat to that structure and those reinsurances, but that it could provoke an immediate withdrawal of support from the reinsurance market. (See specifically in this regard the testimony of J. Richard L. Youell at the November 6, 1991 Hearing before the House Merchant Marine and Fisheries Subcommittee on Coast Guard and Navigation, attached as an Exhibit hereto.)

III. FINANCIAL RESPONSIBILITY REQUIREMENTS OF OPA AND THE NPRM

A. General Comments on the NPRM

Since a high percentage of existing USCG certificates are issued on the basis of insurance certificates provided by the Clubs and the Clubs will not be issuing the certificates required under OPA 90, there must be the possibility that ocean going operators of all vessels, not just tankers, will encounter difficulty in complying with the financial responsibility requirements of OPA 90.

It is correct for the NPRM to state that the Clubs have continued and propose to continue to provide the insurance cover against liabilities under both OPA 90 and state legislation and thus that virtually all shipowners using US waters have obtained insurance to meet OPA 90 financial responsibility limits.

It is, however, not correct to state as does the NPRM that "without the higher [than existing USCG] guarantees, the value of the insurance in the event of a catastrophic spill is highly questionable."

Since the EXXON VALDEZ spill in March 1989 there have been more than twenty serious spills in the United States including the incidents involving WORLD PRODIGY, PRESIDENT RIVERA, AMERICAN TRADER, B.T. NAUTILUS, MEGA BORG and SAMMI SUPERSTARS. Many of these incidents had financial consequences in excess of the CWA guarantee limits and liabilities. In every case where the Clubs were insurers they have responded in full under the terms of their cover. However Clubs are insurers of legal liability and therefore naturally reserve the right to examine all claims and resist those

which are exaggerated or spurious. Equally where an assured has breached the terms of his insurance policy, cover will be withheld.

Since the USCG certificates were first issued in 1970 there have been a large number of incidents insured by the Clubs where liabilities have considerably exceeded the limits and liabilities of the CWA guarantee with perhaps the most notable instance of an insurance payment in excess of the CWA guarantee being the USD 400 million paid to Exxon following the EXXON VALDEZ incident. This represented the limit of insurance cover as opposed to the maximum liability under the CWA certificate of USD 14,249,850.

(It is however true that there is no means of obtaining any form of guarantee from a ship exercising the right of innocent passage or not entering US waters, other than under an International Convention. Oil may of course be spilled from a vessel passing along either the East or West Coast of the US or indeed visiting a Caribbean, Latin American or Canadian port and this oil can have a serious impact on the US coastline. The 1969 CLC and the 1984 Protocol to the CLC were expressly designed to deal with this sort of problem.)

B. The NPRM's Treatment of Section 1016 of OPA 90

We would note that the Coast Guard has made no reference in its NPRM to key portions of the statute bearing upon certification. OPA 90 provides that financial responsibility "may be established by any one, or a combination of the following methods which the Secretary determines to be acceptable: evidence of insurance, surety bond, guaranty, letters of credit, qualification as a self-insurer, or other evidence of financial responsibility." (emphasis added)

Despite the flexibility in approaches to financial responsibility contemplated under OPA 90, the NPRM proposes only insurance, surety bonds, guarantees and self insurance as means of establishing financial responsibility and makes no mention of any "other evidence of financial responsibility" that might be utilized in satisfying the statutory requirements.

In addition, the NPRM does not in any way address the issue of what policy conditions and defences might be utilized in establishing evidence of financial responsibility. The Act, however, authorizes the Coast Guard, in promulgating financial responsibility requirements, to "specify policy or other contractual terms, conditions, or defenses which are necessary or which are unacceptable." (emphasis added) Moreover, as stated at pages 119-120 of the Conference Report which accompanied OPA 90, the Coast Guard's authority in this regard is to be exercised in a manner

that will "foster a continuing market for providers of financial responsibility."

A possible explanation for these omissions is that the USCG have taken a restrictive view of what Congress intended in passing OPA 90.

The Clubs also note with concern that Sections 130.8 and 130.9 of the NPRM do not appear to reflect accurately the provisions of Section 1016(a) of OPA which require proof of financial responsibility only in respect of the largest vessel in a fleet and not for each vessel individually in the aggregate.

C. Consolidation of Financial Responsibility Requirements Under OPA 90 and CERCLA

The NPRM proposes that the financial responsibility requirements of OPA 90 should be combined with those of the Comprehensive Environmental Response, Compensation and Liability Act [42 USC 9601] ("CERCLA"). CERCLA concerns liability for hazardous substances and has been in force since 1980. Regulations implementing its financial responsibility provisions, however, have never been issued because no insurer could be found willing to provide the necessary certificates. By combining the two regimes the NPRM increases the amount required under each vessel certificate by USD 300 per grt and significantly extends the already large potential liabilities of OPA 90. In effect every vessel trading in US waters will require a minimum USD 5 million certificate under CERCLA.

The Clubs note with interest Section 108(b)(2) of CERCLA which states that:

"To the maximum extent practicable the President shall co-operate with and seek the advice of the commercial insurance industry in developing financial responsibility requirements."

And the Clubs note also with considerable concern the ambiguity inherent in Section 108(d) of the NPRM which appears to expose a guarantor to liability beyond the amount of his guarantee. The section reads:

"Any guarantor acting in good faith shall be liable only up to the monetary limits of the policy of insurance or indemnity contract such guarantor has undertaken or of the

guaranty or other evidence of financial responsibility furnished"

D. Continuation of Present Regulations

The NPRM suggests that it might be possible to allow existing certificates to remain valid until their normal expiry date "if evidence of financial responsibility sufficient to meet OPA and CERCLA requirements is established and maintained." The reason for this is "to avoid unnecessary disruption of commerce and the burden on vessel operators."

It would seem, however, that this proposed administrative short cut will only be possible if the existing insurance guarantors are willing to provide the new certificates. In the case of the Clubs this is not the case.

E. Regulatory Evaluation

The NPRM states that "This proposal is not major under Executive Order 12291" (EO 12991). The Clubs disagree; the criteria under EO 12291 define a "major rule" as any regulation which is likely to result in:

- an annual effect on the economy of \$100 million or more; or
- a major increase in cost or prices for consumers, individual industries, federal, state or local government agencies, or geographic regions; or
- significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of US based enterprises to compete with foreign-based enterprises in domestic or export markets.

There can be no doubt that the proposed regulations qualify as a major rule under not just one but under each of the criteria. Indeed, the Clubs consider that the potential impact of the present NPRM on owners of all types of vessels is so serious that preparation of a Regulatory Impact Statement ("RIA") pursuant to Executive Order 12291 is essential and that the promulgation of any final rule should be postponed until the fullest possible opportunity for comment on the RIA and reconsideration of the NPRM has been given.

IV. THE QUESTIONS

The Group submits the following responses to the questions posed in the NPRM. Paragraph numbers correspond to the numbers assigned to each question in the NPRM.

1. The Clubs would suggest relaxation of the criteria necessary to qualify as a self-insurer and consideration of the "other evidence of financial responsibility" permitted under OPA 90.
2. & 3. The Clubs consider that the requirement for net worth in the US is likely to have a very restrictive effect on the ability of foreign shipowners to meet the self-insurance requirements.
4. The Clubs cannot comment.
5. See 2 and 3 above.
- 6,7,8,9. The Clubs are not in a position to comment.
10. The percentage of oil imported by the major oil companies is relatively small and it seems unlikely that the oil companies would be willing to provide guarantees for independent companies or non-tank vessels.
11. The Clubs consider it unlikely that any independent vessel operator would be able to meet the standard of self-insurance proposed in the NPRM.
- 12,13,14,15. The Clubs are not in the best position to answer these questions.
16. No, for the reasons set out above. The amount of the guarantee is not the only or the most important factor.

V. POSSIBLE CHANGES IN THE NPRM

With regard to possible changes to the NPRM, two important considerations need to be taken into account. The first is that the Clubs currently provide insurance cover which is wide enough in scope to meet the civil liabilities imposed by both Federal and

State legislation and sufficient in amount to more than satisfy the maximum financial responsibility requirements of both OPA 90 and CERCLA. The Clubs cannot guarantee that this cover will always be available, but they intend to continue it if possible. The reality of the position is therefore that any owner who has entered his vessel in one of the Clubs with full oil pollution cover has shown financial responsibility sufficient to meet the requirements of OPA 90.

The second consideration is that the NPRM takes a restrictive view of OPA 90. The self-insurance requirements could be made considerably less onerous and "other evidence of financial responsibility" could be taken into account.

Regulatory agencies and legislatures in the states of California, Washington, Florida and Virginia, which have already considered the question of financial responsibility, do not share the USCG's opinion that "the value of insurance in the event of a catastrophic spill is highly questionable because of the multitude of policy defences, exclusions and conditions." Indeed, these states have all accepted entry in a PandI Club as sufficient proof of financial responsibility in itself without requiring the Clubs to submit to direct action, even where applicable authorising legislation permits direct action against insurers. Their only concern has been with how this entry should be evidenced.

We understand there is a difference of views as to whether or not there is any legal impediment to the Coast Guard adopting a similar approach in drafting federal regulations. However, given the severity of the consequences of the Coast Guard's narrow view on possible methods for certification of financial responsibility, careful and thorough consideration should be given to expanding those regulations. If this is not possible, then legislative amendment may be called for.

Failing such action, either in a regulatory or legislative framework, certification of financial responsibility under OPA 90 will not be possible for tanker and dry cargo vessels presently operating to and from the United States.

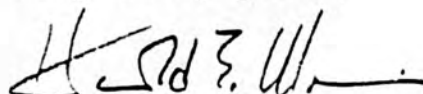
VI. CONCLUSION

In conclusion, OPA 90 is fundamentally different from comparable legislation elsewhere in the world. It departs from the norm of the civil liability conventions and their attendant protocols, and encourages the problem of multiple state and federal liabilities and penalties.

The Clubs cannot agree to provide any form of certification under OPA 90 not because of any one aspect of the law, but rather because of the cumulative effect of its individual provisions.

There is therefore nothing which can be done by way of regulation or minor legislative amendment which will enable the Clubs to change their position. The Clubs, however, are striving to maintain their cover and do not object if a way can be found through regulation or legislative change to utilize the existence of this cover so as to enable shipowners to demonstrate their financial responsibility under OPA 90, provided that the Clubs do not thus become guarantors under the Act. In permitting their cover to be used in this way the Clubs are going beyond the position adopted by commercial insurers in an effort to enable their members to continue to trade to the United States.

Very truly yours,



Harold E. Mesirow
Robert J. Stefani
Robins, Kaplan, Miller & Ciresi

Counsel for The International
Group of P&I Clubs

HEM:RJS:vmc
Attachment

STATEMENT OF J. RICHARD L. YUELL
BEFORE THE
HOUSE MERCHANT MARINE AND FISHERIES
SUBCOMMITTEE ON COAST GUARD
AND NAVIGATION

November 6, 1991

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to appear before you today.

My name is J. Richard L. Youell. I am a marine Underwriter at Lloyd's of London and Chairman of Janson Green Marine Ltd., which is an underwriting agency at Lloyd's. Lloyd's is one of the oldest insurance institutions in the world, having begun in 1688. Lloyd's, however, is not a company but a marketplace of some 27,000 individual underwriting members. These underwriting members operate through some 300 syndicates, and I am the principal professional Underwriter for several of the syndicates managed by the Janson Green agency.

Because Lloyd's is a marketplace in which each syndicate decides for itself what risks it will accept, there is no one voice which can speak for the whole of the Lloyd's market on

This material is prepared by Richard Youell of One Lime Street, London, England and LaBoeuf, Lamb Leiby & MacRae, 1875 Connecticut Avenue, N.W., Washington, D.C., who are registered with the Department of Justice, Washington, D.C. under the Foreign Agents Registration Act as agents of Lloyd's of London, One Lime Street, London, England. This material is filed with the Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the contents of the material by the United States Government.

any matter of underwriting judgment. Therefore, my remarks today are, strictly speaking, only one Underwriter's view.

Nevertheless, as an Underwriter with 26 years' experience at Lloyd's and as a member of several market committees within the Lloyd's community, I believe I can fairly say that my views on guaranteeing financial responsibility under the U.S. Oil Pollution Act of 1990 (OPA) are widely held among marine Underwriters at Lloyd's.

The Lloyd's market collectively is one of the largest sources of insurance capacity in the world, and over its 303-year history it has earned a reputation for innovative and flexible responses to unusual risks, as well as unsurpassed security. Lloyd's pioneered marine oil pollution insurance, and Lloyd's is still one of the world's principal sources for such cover for both offshore production facilities and tankers and other vessels. Indeed, the U.S. insurance market generates virtually no capacity for liability insurance for oil pollution from vessels. London and other non-U.S. markets provide most of the coverage worldwide. We at Lloyd's have every intention of continuing to provide oil pollution insurance for our many insureds, some of whom have been insured at Lloyd's for many years. We would hope to go on providing this insurance for U.S. waters even though the growing multiplicity of liability rules imposed at the Federal and State levels makes this cover increasingly difficult to underwrite.

Although the amount of coverage available at Lloyd's or elsewhere in the world varies from year to year, our capacity at this moment in time is more than sufficient to meet on an indemnity basis the monetary limits of the financial responsibility requirements of OPA for vessels and offshore facilities. However, because the vessel owner's limit of liability might be easily breached under OPA Section 1004(c) and further because OPA does not preempt State laws imposing additional liability for the same incident, vessel owners may have exposures well in excess of the OPA financial responsibility requirements for which they endeavor to buy insurance cover to cover this risk. For example, the Lloyd's market currently makes available a layer of \$200 million per incident in excess of the \$500 million primary cover offered by P&I Clubs to all tanker owners. However, the owner's U.S. liability risk from these cumulative sources may now be well beyond the bounds of insurance cover available even if the owner meets the applicable financial responsibility amounts.

Please be assured that we are in the business of writing difficult classes of insurance, and we take pride in providing our insureds with continuity of coverage even in difficult times. We will continue to provide as much insurance capacity as possible to these insureds. However, we are unable to provide unlimited insurance coverage, because such risk cannot be quantified to determine the appropriate premium, nor can we be sure of our ability to respond, for an unlimited amount, to the

promise to pay that is a fundamental element of an insurance contract.

The proposed financial responsibility rules under OPA present us with a situation which is fundamentally different from simply entering into contracts of insurance with our insureds. As a result, while we expect to continue writing pollution insurance for U.S. waters, it is clear that we cannot responsibly agree to be a "guarantor" under these rules. As indemnity insurers, we promise an insured that we will make good any liability losses he sustains within the terms and limits of the contract. As I have said, the promise is not for an unlimited amount and is subject to contractual restrictions, such as safe warranties which the insured ignores at his peril. Such requirements serve to concentrate the insured's mind on his responsibilities under the contract, on which any recovery relies.

Moreover, our contract is with the insured, not the rest of the world. By specific endorsement, insurance contracts are often amended to name additional parties as loss payees, such as banks holding mortgage interests or consignees. These parties might then be entitled to receive the policy proceeds directly, but always subject to the terms and conditions of the original contract. These parties are always identified in advance and specifically agreed to by the insurer.

In the past, we have considered the insurance form required by the 1972 Clean Water Act (Form CG 5358-9) to be, effectively a policy endorsement naming the U.S. Government as a loss payee. We support the prompt clean-up of oil spills. We have been willing to deal directly with the U.S. Government under the terms of Form CG 5358-9, but always with the expectation that Federal legislation would eventually be harmonized with international convention. That hope was dashed by OPA. We do not, however, customarily agree to be sued directly by unnamed, indeed unimagined third parties.

Added to this is the problem that OPA Section 1014 appears to require a guarantor, if the responsible party fails to act, begin local advertising and the like immediately after the spill. Until regulations defining the scope of this responsibility are written, it is another reason why insurers must refuse to be a guarantor.

The proposed OPA version of Form CG 5358-9 (the "OPA Insurance Form") is, superficially, similar to the Clean Water Act version, but it poses very different problems. First, it would require the insurer to agree to non-governmental third-party direct actions. Second, the insurer's policy defenses in direct action are not clearly preserved. OPA Section 1016(e) gives the Secretary of Transportation authority to specify which original policy defenses (and other terms and conditions) are preserved in direct actions. Yet the proposed OPA Insurance I

states "[t]he Insurer shall be entitled to invoke only the rights and defenses specifically permitted to guarantors by the Act under which the action is brought." Unfortunately, this begs the question. The Act, OPA, says that the Coast Guard will by regulation, specify which terms, conditions and policy defenses will be permitted or not in a direct action. But the regulation fails to do so.

Third, OPA's failure to preempt State liability and certification laws leaves open the possibility that third-party claimants will be able to assert State law claims outside of OPA against an insurer/guarantor, creating the possibility of horizontal exposure to multiple limits against an insurer for which no premium was collected and no insurance capacity remained. Our fear is that every State requesting a certificate will construe it to be a separate limit for the same spill thus multiplying the amount an insurer would have to pay for a single spill. Worse, already we have seen a law passed in Texas after OPA's enactment which seems to say that if an insurer files an Insurance Form CG 5358-9 with the Coast Guard in Washington, Texas will assert the right of its citizens to sue that insurer in Texas courts under the Texas law, possibly for damages in excess of the limit the insurer may have agreed to pay paid out under the OPA certificate. This may occur even though the insurer in no way may have consented to providing evidence of financial responsibility to Texas. Thus, he may be powerless

limit his Federal Insurance Form to its intended purpose of certifying a single limit of liability to the Coast Guard.

We at Lloyd's wish to respond in a constructive fashion to the insurance requirements which arise any where in the world. However, it is impossible to justify employing our capital and resources in an insurance environment where some of the fundamental principles of insurance practice are not able to operate. If the OPA rules were no less arbitrary than those enforced under the Clean Water Act and the risk of multiple limits under State legislation for a single spill were removed, then we would earnestly endeavor to continue to provide the protection to our insureds that your laws require.

Thank you.



American Steamship Owners Mutual Protection and Indemnity Association, Inc.
Shipowners Claims Bureau, Inc., manager

Five Hanover Square, New York, N.Y. 10004
(212) 269-2350

Cable Address "PANDICLUB"
Telex No. 222091
Telefax (212) 825-1391

February 25, 1992

TO ALL MEMBERS

RE: CERTIFICATES OF ENTRY

Dear Sirs:

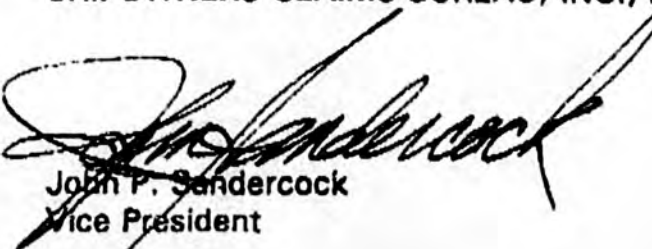
For 1992/93 all policies which are issued by the Club will automatically contain the following endorsement:

"This policy is evidence only of the contract of indemnity insurance between the above named Member(s) and the Association and shall not be construed as evidence of any undertaking, financial or otherwise, on the part of the Association to any other party.

If a Member tenders this policy as evidence of insurance under any applicable law relating to financial responsibility, or otherwise shows or offers it to any other party as evidence of insurance, such use of this policy by the Member is not to be taken as any indication that the Association thereby consents to act as guarantor or to be sued directly in any jurisdiction whatsoever. The Association does not so consent".

The purpose of the endorsement is to make clear to Members and to any person who may receive a copy of a policy or confirmation from a Member or his agent that the document is no more than evidence of the Member's entry in the Club at a particular date.

Very truly yours,
SHIPOWNERS CLAIMS BUREAU, INC., MANAGER



John P. Sandercock
Vice President



JOSEPH H. LANGJAHR
Vice President & General Counsel

March 5, 1992

Re: Oil Pollution Financial Responsibility
HB 501 and SB 405

To: House and Senate Oil and Gas Committees

Foss Maritime Company respectfully submits the attached material as supplemental information to the testimony we offered, along with several other representatives of non-crude oil operators, before the Senate Oil and Gas Committee on February 25, 1992.

To briefly reiterate, while we can demonstrate financial responsibility through pollution insurance that provides us coverage of up to \$500 million -- far in excess of the amount required by HB 567 -- the Protection and Indemnity (P&I) Clubs that offer such coverage flatly refuse to submit to Alaska's "direct action" provision. We have had numerous conversations with representatives of the P&I Clubs, and their message remains unchanged: They are indemnity insurers only; they will not act as a guarantor available to be sued by third parties; they will not submit themselves to direct action lawsuits in the courts of any state or federal government.

As evidence of the clubs' steadfastness on this issue, I submit a letter from Harold E. Mesirow, a Washington, D. C. attorney for the International Group of P&I Clubs, and a transcript of a statement given before the U. S. House Merchant Marine Committee by J. Richard Youell, chairman of Janson Green Marine Ltd., a marine underwriting agency at Lloyd's of London. Although the subject at hand in both documents is the federal Oil Pollution Act of 1990 (like HB 567, OPA 90 was enacted in response to the EXXON VALDEZ spill) the primary issue addressed is the same -- the refusal of the clubs to act as guarantor or submit to direct action legal claims.

This situation has not entered into a category of crisis on the federal level so far, because the U. S. Coast Guard is under no deadline to promulgate its financial responsibility regulations and is not expected to do so before the end of the year.

The position of Alaska's smaller fuel distributors, vessel operators and rural electric utilities that maintain fuel stores find ourselves in is decidedly more urgent because we will have to come into compliance with Alaska's new rules on June 1, 1992. With that deadline now just over three months away, the simple fact is that we have found no commercially available alternatives to P&I Club coverage that can meet the state's direct action requirement. And, because most small operators lack the necessary working capital, self-

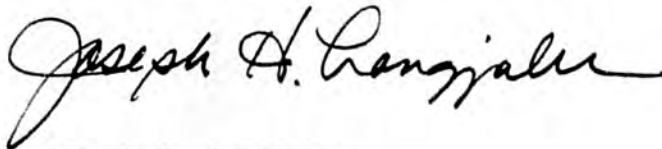
insurance and other allowable methods of meeting the financial responsibility requirements in fact are not realistic alternatives.

We support legislation that would give DEC the authority to grant us approval to operate without direct action coverage, as long as we met the other conditions of Alaska's financial responsibility requirements. This, in effect, is what the State Legislatures of California, Washington, Florida and Virginia each decided to do in the course of strengthening their pollution laws in the wake of the EXXON VALDEZ spill; all of them now accept entry into a P&I Club as proof of financial responsibility without requiring the clubs to submit to direct action.

Foss Maritime Company recognizes the need for providing evidence of financial responsibility so that government entities and other legitimate claimants can be compensated for their damages in the event of a spill. But it seems clear to us -- as it did to the Legislatures of those four states -- that between the pollution coverage offered by the P&I Clubs and the readily accessible \$1 billion federal OPA trust fund, there are more than ample funds available to deal with any incident involving non-crude operators, and direct action is not necessary.

If it appears that we are advocating for the insurance industry's position, please be assured that is not our intention. We are simply caught in the middle by being forced to meet a state requirement that insurers refuse to provide. All signs indicate the industry is not going to relent, so unless the Alaska Legislature grants us some form of relief, we will be in the decidedly distasteful position beginning June 1 of choosing to either operate out of compliance or not operate at all. As a responsible company that has been transporting products to and within Alaska for the past sixty years, neither of those choices is in any way attractive to us. We therefore urge the Oil and Gas Committees to act favorably on SB 405 and HB 501.

Respectfully submitted,

A handwritten signature in cursive script, reading "Joseph H. Langjahr". The signature is written in dark ink and is positioned above the printed name.

Joseph H. Langjahr

Samson Tug & Barge Company, Inc.

Phone (907) 747-8559 • Fax(907) 747-5370 • P.O. Box 559 • Sitka, Alaska 99835

Senator Sam Cotten
Alaska State Legislature
Capitol Building
Juneau, AK. 99801-1182

February 26, 1992

Dear Senator Cotten:

This correspondence contains commentary on two bills that have been introduced this year.

Senate Bill 405/House Bill 501: We urge your support of this bill and to encourage your colleagues to support it. As a small business transporting petroleum products in Southeast Alaska, we can provide evidence of financial responsibility with insurance only. Without a change in the statutes, we and many other small operations will be forced to cease transporting petroleum products. This would place a hardship on the people of Alaska and raise the price of oil. The state government would be paying higher prices for fuel and in a year when the budget is facing real scrutiny, additional cost are unwanted. Passage of these bills would allow continuing operations by all the barge companies involved in business in Alaska.

House Bill 232 (Sunken or Abandoned Vessels Bill): We have been advised this bill will be retroactive to cover all existing wrecks and a requirement to remove them within 30 days. Senator, this is unrealistic, impractical, impossible, unwarranted, and someones pipedream. A wooden fishing boat that sinks and rolls over in fifty feet of water will be reduced to only machinery in a years time. A steel vessel sinks in a narrow channel in a 140 feet of water, tidal current 5 + knots . The first problem is locating the vessel (all but impossible). Placing divers in water with this velocity to work is placing their lives in jeopardy. For what? Weather conditions in most of Alaska prohibits salvage attempts. Why regulate, what nature prohibits?

It is our understanding the bill relates to direct action against the underwriters and there is no limit to liability. Senator, we all know the type of problem created when direct action provisions against the underwriter are placed in regulation. That is why SB 405 was introduced. But even more important, Alaska whose main route of importing and exporting its goods is by the sea, will be dealt a devastating blow with passage of this bill.

If you were an insurance underwriter, would you write a policy on a fish processor or tender or lograft tug, if you knew direct action would be taken against you and the vessel that sinks in 200 feet of water must be removed in 30 days, irregardless of safety

of lives. Does no limit of liability mean the cost to put the shells back on the beach exactly the way they were before a vessel grounded?

Senator, you are a fisherman and you have been around boats and most likely you have insurance. You know more about the sea than many of your colleagues. Tell them how it is. No one wants to damage or destroy the environment of Alaska's coast, but a bill of this nature could very well destroy a portion of it's economy.

We appreciate your time and we hope you will consider our comments.

Respectfully,

ALBERT M. SNELLING
Safety Director

The American Waterways Operators



Pacific Regional Office

5615 West Marginal Way, SW.
Seattle, WA 98106

TEL: (206) 764-1321
FAX: (206) 764-1323

Gerald P. McMahon
Vice President - Pacific Region

February 20, 1992

Representative Richard Foster
Room 611, Court Building
P.O. Box V
Juneau, AK 99811

Dear Representative Foster:

The American Waterways Operators (AWO) is the national trade association representing the inland and coastal barge and towing industry. Several of our members are based in Alaska or operate in Alaskan waters involving the marine transportation of petroleum and petroleum products.

I write in support of House Bill 501 which will provide statutory relief from the existing State of Alaska "direct action" requirements of evidence of financial responsibility. This requirement has been a longstanding problem with our industry which makes it impossible to obtain insurance to meet this Alaskan requirement. This is a responsible bill which would establish a financial responsibility standard which protects claimants who have been harmed by a spill and recognizes the realities of the insurance marketplace, and does not bring a major and essential portion of Alaska's petroleum distribution network to a grinding halt.

We thank you for introducing HB 501 and urge your colleagues to support its passage as soon as possible.

Sincerely,

Gerald P. McMahon



FORTY NINER TRANSPORTATION, INC.

Reply to:

1600 A Street, Suite 308 • Anchorage, Alaska 99501 • (907) 279-5878 • Fax (907) 278-5700

P.O. Box 389 • Seward, Alaska 99664 • (907) 224-3190

February 27, 1992

Representative Richard Foster
Room 611, Court Bldg.
P. O. Box V
Juneau, Ak 998711

Ref: House Bill 501 - Statutory relief to
"Direct Action" Requirement Evidence
of Financial Responsibility

Dear Representative Foster:

Forty Niner Transportation, Inc. is an Alaskan owned and operated marine transporter of refined petroleum products.

I support House Bill 501 which will provide statutory relief from the existing State of Alaska "direct action" requirement of evidence of financial responsibility.

We have tried to meet the Alaskan insurance requirements with no success. This is a responsible bill which would establish a financial responsibility standard, protects claimants who have been harmed by a spill, recognizes the realities of the insurance marketplace and does not disrupt service to our customers who rely on us.

We urge you and your colleagues to support the passage of HB 501.

Sincerely,

FORTY NINER TRANSPORTATION, INC.

Louis Audette, Jr.
General Manager

The American Waterways Operators



Pacific Regional Office

5615 West Marginal Way, S.W.
Seattle, WA 98106

TEL: (206) 764-1321
FAX: (206) 764-1323

Gerald P. McMahon
Vice President - Pacific Region

February 20, 1992

Senator Lyman Hoffman
Capitol Building
P.O. Box V
Juneau, AK 99811

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Gerald P. McMahon



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P.O. Box 389 • Seward, Alaska 99664 • (907) 224-3190

February 27, 1992

Senator Lyman Hoffman
Capitol Bldg.
P. O. Box V
Juneau, Ak 99811

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We urge you and your colleagues to support the passage of HB 501.

Sincerely,

FORTY NINER TRANSPORTATION, INC.

Louis Audette, Jr.
General Manager



ANDERSON TUG & BARGE CO.

BOX 1315 • SEWARD, ALASKA 99664
(907) 224-5506

February 21, 1992

Senator Lyman Hoffman
Capitol Building
P.O. Box V
Juneau, AK 99811

Dear Sen. Hoffman,

I am writing to urge you and your colleagues to support the passage of House Bill 501 which will provide statutory relief from the existing State of Alaska "direct action" requirements of evidence of financial responsibility.

Our company will have great difficulty obtaining insurance (if at all!) to meet this Alaskan requirement. House Bill 501 will not bring those of us in the petroleum distribution network to a halt, but does protect claimants who have been harmed by a spill by establishing a financial responsibility standard.

Thank you.

Sincerely,

Sharon E. Anderson
Sec/Treasurer



Alaska State Legislature

465-41979

Please enter into the record my testimony to the Senate Oil & Gas
committee name

committee on SB 405 , dated 2-25-92
bill/subject

Testimony in support of SB 405

Kodiak Oil Sales Inc is a fuel distributor serving the Kodiak Area. We are a family owned business and have operated as a family business since 1950. My comments relate to the availability of insurance which meets the State of Alaska's requirements for non-crude oil terminals.

The State at times passes laws which have effects which were not the intent of the original legislation. I do not believe that it was the intent of the legislature to make it impossible to meet the financial responsibility requirements of the statute. But that is what has occurred by having the "direct access" clause as a requirement for insurance.

Kodiak Oil Sales like many non-crude operators depends on insurance to provide "proof of financial responsibility". We are able to get insurance that meets or exceeds the requirements with the exception of the "direct access" clause. At this time there is no insurance company in the world which will write a policy that contains this "direct access" clause.

Companies such as mine supply petroleum products to the people who live and work in Alaska. If the "direct access" clause is not removed from the statutes we will not be able to meet the financial responsibility requirements, and State of Alaska will have to tell us not to sell fuel anymore.

Page 1 of 2 pages

Signed:

John Ramagli
Testifier

Kodiak Oil Sales Inc
Representing (Optional)

Box 1487 - Kodiak AK

Address

401-32415

486-3205 Fax



Alaska State Legislature

Please enter into the record my testimony to the Senate Oil & Gas
committee name
committee on SB 405, dated 2-25-92
bill/subject

What this means in real terms is that there will be no place in most of Alaska for people to buy petroleum products. Can you imagine living in Alaska without heating oil, gasoline and diesel fuel. I can't.

I further ask that the Department of Environmental Conservation have the authority to grant "conditional approval" in the case of financial responsibility. There may be a time in the future when a problem such as this arises and it may not be convenient to ask the legislature to change the law. The DEC should have the authority to work with industry till the situation can be resolved.

Jim Ramaglia
Vice President
Kodiak Oil Sales Inc.

page 2 of 2 pages

Signed: Jim Ramaglia Jim Ramaglia
Testifier
Kodiak Oil Sales Inc
Representing (Optional)
Box 1487 Kodiak AK
Address
486-3245- 486-3205 Fax
Phone No.



Electric Service for 300,000 Alaskans

Alaska

Rural

Electric

Cooperative

Association, Inc.

703 W. Tudor Rd., #200
Anchorage, AK 99503
(907) 561-6103
FAX (907) 561-5547

February 24, 1992

Dear Senator Hoffman:

Thank you for the interest and concern you have shown for a problem common to many residents throughout the state who have to handle petroleum products in the course of business. SB 405, which you recently introduced, is certainly a step in the right direction. But I fear that, as drafted, it does not go far enough toward resolving the problem.

The people I represent on this issue are small electric utilities owned by the consumers or the communities they serve. They have found it absolutely impossible to purchase insurance policies which both transfer risk and satisfy AS 46.04.040(e). We have no reason to believe this situation is temporary.

From our perspective there are three basic problems in attempting to buy insurance to cover this risk:

- (1) The "direct access" language in AS 46.04.040(e) is something no insurance company will accept. The insurance industry's method of doing business is to pay for losses experienced by their insureds rather than providing a pot of money to be used at the discretion of some third party. If there is a dispute regarding a loss, an insurance company pays only after a court determines the responsibility for and the amount of the loss. This is inherent to the insurance industry, and they will not change just because the State of Alaska would like for them to do so.

The big companies can satisfy their proof of financial responsibility without insurance by simply posting their financial statement and qualifying as self-insurers. Most of our members don't qualify as self-insurers, and they are small enough that it would be prudent for them to transfer the risk if they could do so at a reasonable cost.

- (2) The "strictly liable, jointly and severally" language in AS 46.04.040(g) is another severe problem. It is unusual for an insurance company to be willing to write a policy under those conditions because they would be required to pay a loss without any finding of fault on the part of their insureds. This provision severely limits the number of insurance companies that will issue these policies, and that seriously increases the cost of such insurance.
- (3) The third basic problem is the sheer complexity of the drafting of the statutes involved. In diagramming the statutes in an effort to understand them, I came up with this:

Page 2, line 21 of SB 405 refers to "judgments under statutes listed in (i) of this section..."

"(i) of this section" refers to:

a loss compensable under

AS 46.03.760(e) which refers to
AS 46.03.740-750 and
AS 46.03.822

or

AS 46.03.822

and assessments under

AS 46.03.758 which also includes
liability under AS 46.03.760(a)
AS 46.03.759

AS 46.03.760(a) which also refers to
AS 46.08.070(c)

or

AS 46.04.030(g)

My point is that this is such complex and confusing legalese that insurance companies simply will not deal with it unless they expect to earn very large premiums on policies issued under the law.

With large businesses able to satisfy the financial responsibility requirements in some way other than through buying insurance, the small businesses like my members face the formidable task of trying to find insurance companies willing to write this coverage just for them.

What needs to happen is for non-crude handlers to be completely separated under the law from crude handlers. There should be a simple, concise statement of the requirements that apply to them which eliminates "direct access" and "strictly liable, jointly and severally." Then the commercial insurance industry could do its job of providing insurance at a reasonable cost for businesses like those I represent.

Members of ARECA will be pleased to assist you in this effort in any way we can.

Sincerely,



David Hutchens
Executive Director

Ray Gillespie
Gillespie & Associates
Lobbying & Governmental Affairs



10390 Mendenhall Loop Road
Juneau, Alaska 99801
Telephone: (907) 463-3375
Fax: (907) 463-5522

MEMORANDUM

TO: Senate and House Oil and Gas Committees

DATE: February 10, 1992

FROM:  Ray Gillespie, for Crowley Maritime, Delta Western and Petro Marine

RE: Marine Pollution Insurance Problems

This will outline three problems non-crude carriers and operators are experiencing in obtaining marine pollution insurance to satisfy the financial responsibility and "direct action" provisions of Alaska law.

Briefly, these problems are:

1. Confusion created by apparent inconsistencies between statute and regulations concerning insurer liability/exposure when issuing a policy meeting the specific requirements of financial responsibilities statutes.
2. P&I club and insurance coverage with "direct action" endorsement is virtually unavailable to most Alaska operators in the present commercial insurance or P&I club market.
3. Whether D.E.C. has statutory authority to grant conditional operating permits to operators who have met the financial responsibility requirement dollar amounts, but can not satisfy the "direct action" endorsement due to its unavailability.

I.

LIABILITY LIMIT/EXPOSURE OF INSURERS OR GUARANTORS.

Environmental Conservation Regulation, 18 AAC 75.230 (b), requires a policy of insurance certificate or binder to carry an endorsement which reads in part as follows:

"Any other provision of this policy notwithstanding: (1) this policy insures against any liability the insured may incur under Alaska Statute 46.04.040 (i), or any provision cited in it as a result of an unlawful discharge of oil within or affecting Alaska lands or waters within the territorial jurisdiction of the State of Alaska; however, the insurer's liability does not exceed the limits of coverage set out in Section _____ of this policy...." (emphasis added)

Alaska Statute 46.04.040 (i) reads as follows:

"Financial responsibility under this section extends to loss compensable under AS 46.03.760 (e) or 46.03.822 and an assessment under AS 46.03.758, 46.03.759, 46.03.760 (a) or 46.04.030 (g)."

This statute in combination with 18 AAC 75.230 (b) has led P&I clubs and insurance underwriters to conclude that their exposure under a policy may not be limited to the face amount of the policy even though it meets the other monetary requirements for financial responsibility (AS 46.04.030 (k)). In other words, because statutes generally supersede any inconsistent regulation, insurers have advised operators that the potential for unlimited liability and the uncertainty of a judicial interpretation of these statutes and regulations prevents insurance underwriters and P&I clubs from writing the insurance with the required endorsement.

II.

"DIRECT ACTION" PROBLEM

AS 46.04.040 (e) reads in part as follows:

"An action brought under AS 46.03.758, 46.03.759, 46.03.760 (a) or (e), 46.03.822, or AS 46.04.030 (g) may be brought in a state court directly against the insurer, the group, or any person providing evidence of financial responsibility. The applicant, and insurer, surety, guarantor, person furnishing an approved letter of credit, or other group or person providing proof of financial responsibility approved by the department shall appoint an agent or service of process in the state...." (emphasis added)

This provision requires that any insurer or P&I club submit directly to the Alaska jurisdiction and be subject directly to legal action against it in Alaska courts without first proceeding against the spilling operator. The State of Alaska or private party can, under this provision, proceed directly in Alaska courts against the insurer. Typically, P&I club coverage is an indemnity policy, which first requires a provable loss against the operator before the P&I club pays that loss. This is the so-called "direct action" provision which prevents many operators from securing coverage meeting the requirements of Alaska Statutes.

In the States of Washington and California recently enacted financial responsibility statutes do not require the "direct action" endorsement. In essence, California and Washington simply allow for P&I club and insurance coverage which meets the monetary financial responsibility requirements and requires no other showing of a "direct action" endorsement.

III.

UNCERTAINTY OF D.E.C. AUTHORITY TO ISSUE CONDITIONAL OPERATING
PERMITS WHERE DIRECT ACTION ENDORSEMENTS ARE NOT
AVAILABLE.

AS 46.04.040 (1) provides that under certain circumstances DEC may issue permits to an operator who has proof of financial

responsibility without the "direct action" endorsement. This provision has been interpreted as authority to issue conditional permits only upon proof of at least \$50 million in insurance or other financial responsibility which has the direct action endorsement. Since the maximum financial responsibility coverage for a non-crude operator (tank vessel and barges) is \$35 million under AS 46.04.040 (c) (2), the waiver or conditional permit provisions of subsection (1) is not available to them.

The D.E.C. has, however, been issuing conditional permits to non-crude operators which have complied with the monetary financial responsibility requirements, but are unable to get such coverage with the "direct action" endorsement. The "direct action" endorsement is unavailable in the market place to some, if not most, non-crude operators. Due to the commercial unavailability of financial responsibility with the required endorsement, the DEC is in the unpleasant predicament of denying operating permits to established responsible carriers who have been doing business in Alaska for years. Denial of such operating permits because of commercial unavailability of "direct action" endorsement is potentially devastating and would likely eliminate most non-crude refined product delivery to many Alaskan communities.

This provision should be revisited by the Legislature to reflect the realities of the insurance market and availability of coverage. As of last week, D.E.C. has suspended any Conditional Permits.

IV.

SUGGESTED SOLUTIONS

Legislation which:

1. Places explicit language in statute which limits the exposure of an insurer or P&I club to the face amount of the policy;
2. Eliminates the "direct action" requirement;
3. Provides a substitute mechanism to "direct action" which satisfies the State of Alaska and yet recognizes the realities of the available insurance or P&I club coverage;

4. Clarifies D.E.C. authority to grant conditional operating permits to non-crude operators who have otherwise complied with the monetary requirements for financial responsibility; or

5. Combination of the above.



City of Galena

Antoski Hall • P.O. Box 149 • Galena, Alaska 99741 • Telephone (907) 656-1301

January 16, 1992

Governor Walter Hickel
Third Floor, Capitol Bldg.
P.O. Box A
Juneau, AK 99811

92-076
C. J. James

Dear Governor Hickel:

I am writing you in regards to AS 46.04.040 which is having a drastic effect on communities with fuel storage facilities in this state, in particular Galena. Either this piece of legislation is so stringent in wording that Lloyds of London will not underwrite insurance policies in this regard, or they are gun shy because of past oil spills in the state. In any event, there is a red flag up! The City of Galena does not have sudden or accidental spill coverage at this time for it's bulk fuel facility.

Since no carrier in the state can get coverage the DEC has accepted self insurance as an option. This is an end run around the problem. All one needs for self insurance is to show that \$10/barrel is on hand in reserves, proved by submitting financial statements each quarter. In our case that is \$142K for a 600K gallon facility. This would probably clean up a small spill but nothing major.

I believe this issue needs to be addressed head on. The answer to the problem will have to come from the legislature and soon. I am not comfortable with the situation since my name is on the fuel spill contingency plan for Galena. There are a lot of fuel storage facilities in the state at risk because of this problem. I'd like to see something done about it.

Sincerely,

Chris Hladick
City Manager

RECEIVED
JAN 31 1992

GOVERNOR'S OFFICE

RECEIVED

JAN 31 1992

A.D.E.C.
COMMISSIONER'S OFFICE

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.

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 99811-3100
Phone: (907) 465-3991
Fax: (907) 463-3351

March 12, 1990

MEMORANDUM

TO: Senator Mike Szymanski

FROM: Glenn T. Gray
Legislative Analyst

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

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

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

Summary

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

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 IGPIC reinsurance. Thus insurance rates for all P&I club members will increase. The decision by the P&I companies to raise coverage to \$500 million was not a result of Alaska oil spill legislation (French 1990; Barker 1990). The Exxon Valdez accident did, however, raise the perceived risk of operating in Alaska and this may be reflected in insurance rates.⁹

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

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.

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

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

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

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

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

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

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

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.

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

ment, unless a contingency plan is approved or made

er 24, 1990.

into

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

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

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

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

contingency 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

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

er 24, 1990.

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

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. 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

acy 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 d 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]

GOVERNMENT CODE

§ 8670.37

(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,

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 is necessary to carry out as Added Stats 1990 ch 1248 §

§ 8670.40. Oil spill prevention

(a) The State Board of E sufficient to carry out th The amount of the annu products.

(b) * * * (1) The oil sp crude oil at the time th and upon every person o a marine terminal from the owner of the crude o received by means of a every operator of a pipeli oil originating from a pipeline operating across board by the terminal o of crude oil or petroleu preceding month. No fee products if the person w fee has been collected by to the crude oil or petro

(2) Every owner of crud except that payment to c owner from further liab

(c) The moneys collecte

(d) The board shall coll

(e) The fee described in

(1) To implement oil sp inspections and to imple

(2) To carry out studies

(3) To finance environm

(4) To reimburse the m implementation of this

7.8 (commencing with S

(5) To implement, inst contain, and clean up o

(6) To reimburse the bo Part 24 (commencing w

(f) The moneys deposite

* * *

Added Stats 1991 ch 10 §

§ 2 (AB 1409), effective Au

Former Sections:

Former § 8670.40, similar

1990, amended Stats 1991

operative July 1, 1991, by i

Editor's Notes—For severa

Cross References:

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Administration and collect

Due date for fees: Rev & T

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,

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 reasonable, the responsible party shall be reimbursed from 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 the requested activity did not have satisfactory results. If a responsible party complies with the requests of the 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 claims 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 are to the extent theretofore unsatisfied.

(10) Nothing contained herein shall be construed to limit the liability of vessels, terminal facilities, or the responsible party 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 this subsection. After reporting a discharge, a vessel shall remain in the jurisdiction of the department sufficient time to prove financial responsibility for the damages 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 discharge 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 numbering of subunits 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 numbering of subunits 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

operation or assistance on-scene coordination must be filed with the department to be reimbursed for carrying out the cleanup. The department may not file an objection on the premise that a satisfactory result was achieved with the request of the coordinators and the department provides a valid defense. The costs of cleanup shall be paid by the party from the fund awards against the fund, the future income of the fund for a specific purpose of the fund, the prorated basis, or basis shall be paid by the fund until the sum is paid to the claimants collected by the department of action pursuant to (8) shall be utilized for such prosecutions satisfied.

penalty, the pilot in charge of any vessel shall give immediate notification of the spill to the nearest Coast Guard third degree, pursuant to s. 5.083, or s. 775.084, or less of gasoline or other petroleum products. The department shall assess a fine or penalty for violation of the requirements of this chapter, a vessel or person who discharges a pollutant into the department's jurisdiction shall be liable for the damage. The pilot and master of the vessel shall be liable for the damage after notice of the spill is given to any of the third degree, pursuant to s. 775.082, s. 775.083, the department detain the vessel and require financial responsibility, require that the vessel maintain the terminal facility of that facility for the spill.

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

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

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

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

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

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

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

a. The location of a spill.

b. Habitat and living resource sensitivity.

c. Seasonal distribution of living resources.

d. Recreational use or aesthetic importance.

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

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

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

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

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

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

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

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

1. Developing restoration and enhancement techniques for natural resources.

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

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

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

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

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

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

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

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

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

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. 216.18(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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Title 58

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

administrator is hereby authorized and empowered to compromise and settle the amount sought for costs and damages from discharger or other responsible party and any penalty arising 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 full 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 against 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

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Emergency and Temporary Acts

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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. *Exon Corp. v. Hunt*, 4 N.J. Tax 294 (1982) affirmed 190 N.J. Super. 131, 462 A.2d 193, affirmed 97 N.J. 526, 481 A.2d 271, affirmed in part, reversed in part on other grounds 106 S.Ct. 1103, 475 U.S. 355, 89 L.Ed.2d 364, appeal after remand 109 N.J. 110, 534 A.2d 1.

3. Preemption

Use of New Jersey Spill Fund to compensate third parties for damage resulting from hazardous substance discharges, to pay personnel and equipment costs, to administer the fund, and to conduct research is beyond the scope of Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C.A. § 9614(c)], and is not preempted by section of the Act [42 U.S.C.A. § 9614(c)] prohibiting state funds that cover Superfund-eligible expenses. *Exon 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. *Exon 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.

for class by public advocate

Advocate may act to assert such claims as are in the opinion of the Public Advocate, may recovery of damages or cleanup costs provided by for 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

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.*

2. Payment prior to cleanup

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

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

Notes of Decisions

1. Construction and application

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

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

58:10-23.11t. Rules and regulations

Law Review Commentaries

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

Notes of Decisions

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3. Validity of regulations

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

Act (§ 58:10-23.11i et seq.), after erroneously treating plaintiffs' hand-delivered written comments as untimely, did not comply with Administrative Procedure Act (§ 52:14B-1 et seq.) and thus regulations were invalid, despite Department of Treasury's contention that it had "become familiar" with plaintiffs' position before proposing regulations. *Exon 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

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Volume 22

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§ 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.*

§ 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.

Inc. (1985) 127 Misc 2d 323, 485 NYS2d 705.

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

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

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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, 586 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

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Petition to rival claims

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## INSURANCE

— Employees, persons covered  
The legislator was a "full-time employee" meaning of state employees life insurance notwithstanding insurer's claim that leg- did not work a minimum 30 hours per and therefore did not qualify for coverage policy rider defining a "full-time employ- one working not less than 30 hours per Jetson v. CNA Ins. Companies, App. 1 38, 536 So.2d 569, writ denied 537 So.2d

— Business pursuits, property or in- terests covered

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

Parties to contract and relation between them

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

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

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

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

made on the insured;

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

urrier.

see Special Pamphlet.

## INSURANCE

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

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

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

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

### Comment—1989

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

### Historical and Statutory Notes

#### 1988 Legislation

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

Section 2 of Acts 1988, No. 934 provides:

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

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

#### 1989 Legislation

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

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

### Forms

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

### Law Review Commentaries

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

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

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

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

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

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

For Reenactment eff. Jan. 1, 1983, see Special Pamphlet.



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91 -- H 6019 SUBSTITUTE A

# Rhode Island

81-026

JT COMM. LEGISLATIVE SERVICES  
LAW REVISION OFFICE

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 1991

## A N A C T

### 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~~  
11 ~~valid certificate of financial responsibility issued by the U.S.~~  
12 ~~Coast Guard as evidence of financial responsibility in accordance~~  
13 ~~with the Federal Oil Pollution Act Sections 100~~  
14 ~~and 101~~  
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~~

committee  
amendment  
3/21/91  
AC

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

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 *or, for vessels less than 300 gross tons, other*  
 13 *coverage shall be fined not more than one hundred thou-*  
 14 *sand dollars (\$100,000) or twice the amount required to rectify any*  
 15 *environmental damage caused by said vessel, whichever is greater.*  
 16 *with the Federal Oil Pollution Act Sections 1004 and 1016*

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.

*committee*  
*amendment*  
*2/21/91*  
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*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*

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Laws through the 1991 Second Called  
Session of the 72nd Legislature  
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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 D  
Title 2

§ 40.257.

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# CODE OF VIRGINIA

1950

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1991 Cumulative Supplement

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ANNOTATED

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*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

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

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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

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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 amount in the amount of \$500 per ton received by the Board shall be Petroleum Storage Tank Fund. discharged in violation of this great of such discharge from a le, any amount held in escrow damages imposed under this

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

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

D. Acceptance of proof of financial responsibility shall expire:

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

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

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

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

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

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

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

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

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

tions, 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  | Purpose.                                                                                  |
|-----------|-------------------------------------------------------------------------------------------|
| 88.44.005 | Definitions.                                                                              |
| 88.44.010 | Commission—Powers and duties.                                                             |
| 88.44.020 | Members—Meetings.                                                                         |
| 88.44.030 | Terms—Vacancies.                                                                          |
| 88.44.040 | 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**

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### 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.
- 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 19... **Florida Implements 1990 Spill Act.** DNR says the next draft of the regulations will be released in January.

#### 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 COFR 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.
- 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 18... **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 SB 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.

#### 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 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 Bonfadelli, 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. 1.                              | 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 185 on the refurbishment of existing vessels for spill response signed June 17; HB 196 on responder liability signed July 2. |
| Arizona (AZ)     | Dept. of Environmental Quality                                                                                                                                                              | Title 49 of the AZ Revised Statutes.                                                                                                                                                                                                          | Title 18 of the AZ Administrative Code.                                                      | None.                                                                                                                                                                                          |
| Arkansas (AR)    | Dept. of Pollution Control & Ecology                                                                                                                                                        | Section 82-1901, et seq., AR Statutes (Water & Air Pollution Control Act).                                                                                                                                                                    | Regs 7,8 of the Dept. of Pollution Control & Ecology.                                        | None.                                                                                                                                                                                          |
| California (CA)  | Dept. of Fish & Game                                                                                                                                                                        | The Lempert-Keene-Seastrand Oil Spill Prevention and Response Act (SB 2040) passed Sept 2, 1990. It amended, repealed, or added sections to California's Water Code, Public Resources Code, Harbors and Navigation Code, and Government Code. | Financial responsibility regulations released Aug 15 (see OSLR, Sept 1991).                  | SB 200 on VTS requirements signed Oct 13; AB 134 on the VTS in Los Angeles signed Oct 13; AB 1409 on collecting fees signed Aug 1; AB 100 on safety requirements at facilities signed Oct 13.  |
| Colorado (CO)    | The Oil & Gas Commission for production facility spills; the Public Utilities Commission for pipeline spills; and the Dept. of Health, Water Quality Control Commission for spills in water | Colorado Water Quality Control Act (25-6-201, 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 80.16, .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

January 1, 1992

### 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) |                                   |



PUERTO RICO



US VIRGIN ISLANDS

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

■ Indicates states that have passed responder immunity legislation.



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,

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

## Louisiana Enacts Spill Bill In One Week

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

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

About four months after the act passed, former Louisiana Governor Buddy Roemer took the first step toward implementing the act and appointed Bruce Hammatt as the new executive director of the state's Oil Spill Commission. Hammatt, whose staff works out of the governor's mansion, is responsible for promulgating regulations pursuant to the act. According to a spokesperson on 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 objectors to the regulations are still the small operators, said Ormes.

## Washington Forms New Marine Safety Office

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

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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,<sup>127</sup> and the possibility of actual imprisonment for more than six months is enough to trigger a defendant's right to a trial by jury.<sup>128</sup> 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,"<sup>129</sup> and the process of sentencing review on a case by case basis seems to require "only the exercise of judicial responsibility."<sup>130</sup>

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 unrecompensed.<sup>1</sup> 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 105-119 and accompanying text.



effortless recovery.<sup>2</sup>

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."<sup>3</sup> There are three basic types: hull and machinery insurance, cargo insurance, and protection and indemnity insurance.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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."<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> This type of club is still active in Great Britain.<sup>10</sup> However, in this country almost all marine insurance is now handled by corporations.<sup>11</sup>

The typical marine protection and indemnity (P & I) policy grew out of the early British mutual protection clubs.<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

7. *Id.*

8. MARITIME LAW & PRACTICE, at 291.

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

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

11. *Id.* at 55.

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

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

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

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

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

2. 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. Kiert, *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.<sup>17</sup> Regulation of the insurance industry in general, however, was controlled by the laws of the various states.<sup>18</sup> 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*.<sup>19</sup> In that case the Court allowed a state direct action statute to alter the effect of a marine insurance policy.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> As a result, state direct action statutes have been applied to marine insurance policies.<sup>24</sup>

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

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.<sup>27</sup> This rule was based on the lack of privity between the two parties.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> 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."<sup>33</sup>

The provisions and effect of statutes permitting a direct suit by a third party against an insurance company vary significantly from state to state.<sup>34</sup> 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.<sup>36</sup> The broadest and most notable of the latter is the Louisiana statute and its offspring in Puerto Rico.<sup>37</sup>

## 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.<sup>38</sup> 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."<sup>39</sup>

The Louisiana statute faced its first clash with traditional principles of maritime law in *Maryland Casualty Co. v. Cushing*.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> It further provides for a concursus of all claims against the vessel owner arising from a particular cause of action.<sup>43</sup>

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.<sup>44</sup> The district court dismissed the action on the ground that the statute was inapplicable to marine insur-

36. Houdlett, *supra* note 12, at 562.

37. Kierr, *supra* note 6, at 651.

38. *Id.*

39. LA. REV. STAT. ANN. § 22:655 (West 1978).

40. 347 U.S. 409.

41. 46 U.S.C.A. §§ 183, 186 (West 1958).

42. Courts have interpreted the statute to mean the value of the vessel and her freight after the accident. See, e.g., 347 U.S. at 414 n.4.

43. 46 U.S.C.A. §§ 183, 186.

44. 347 U.S. at 410-11.

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

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.<sup>47</sup> However, the Court soon "found itself . . . hopelessly divided" in its attempt to reconcile the federal Act with the Louisiana Statute.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup>

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.*<sup>52</sup> 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.<sup>53</sup> Second, the court held that the statute applied to protection and indemnity, as well

45. *Id.* at 411-12 (referring to the Limitation of Liability Act, 46 U.S.C.A. § 183).

46. *Id.* at 412.

47. *Id.*

48. *Koesler v. Harvey Applicators, Inc.*, 416 F. Supp. 872, 873 (E.D. La. 1976) (quoting G. GILMORE & C. BLACK, *supra* note 5, at 908).

49. 347 U.S. at 422.

50. *Id.* at 436.

51. *Id.* at 427.

52. 419 F.2d 230 (5th Cir. 1969), cert. denied, 397 U.S. 987 (1970).

53. *Id.* at 236 (citing *Coleman v. Jahncke Serv., Inc.*, 341 F.2d 956 (5th Cir. 1965)).



as liability policies.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup>

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

In *Continental Oil Co. v. London Steam-ship Owners Mutual Insurance Assoc.*, the fifth circuit held that Louisiana's direct action statute did not apply to a suit involving a collision between a vessel and a fixed production platform on the outer continental shelf off the coast of Louisiana.<sup>58</sup> The basis for the decision was that under the Outer Continental Shelf Lands Act,<sup>59</sup> 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.<sup>60</sup> This decision has been followed in later cases.<sup>61</sup> 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.<sup>62</sup>

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

54. *Id.* at 237.

55. *Id.* at 238.

56. *Koesler*, 416 F. Supp. at 873.

57. See also *American Sugar Co. v. Vainqueur Corp.*, 1970 A.M.C. 405 (E.D. La. 1970) (holding that the marine indemnity policy was written for the benefit of public protection; therefore, the right of direct action under Louisiana's statute should not have been denied to plaintiff).

58. 417 F.2d 1030, 1040 (5th Cir. 1969).

59. 43 U.S.C.A. § 1331 (West 1984).

60. 417 F.2d at 1037-40.

61. See *Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973).

62. 416 F. Supp. at 875-76.

tion statute for injuries suffered outside state territorial waters where the Outer Continental Shelf Lands Act was not a factor. In *Sassoni v. Savoie*, the court held that the Louisiana statute was applicable to a seaman's suit for injuries sustained on the high seas.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup>

*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.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> The statute was amended in 1957 to bring it directly in line with the Louisiana statute.<sup>70</sup> Therefore, under the Puerto Rico statute the defense of limitation of liability is unavailable to the insurer.<sup>71</sup> 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.<sup>72</sup>

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.<sup>73</sup> He brought suit against both the vessel owner and its P & I carrier.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup>

*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.<sup>77</sup>

69. *Id.* at § 2003(1) (1977).

70. *Torres v. Interstate Fire & Cas. Co.*, 275 F. Supp. 784, 788 (D.P.R. 1967).

71. *Id.* at 789.

72. Recall that the value of the vessel plus pending freight is the maximum amount for which the vessel owner-employer could be held liable after a successful limitation proceeding. 46 U.S.C.A. § 183.

73. 379 F. Supp. 634, 635 (D.P.R. 1974).

74. *Id.* at 635.

75. *Id.* at 637.

76. *Id.* at 637-38.

77. Houdlett, *supra* note 12, at 561.

A California statute, for example, provides that the insolvency or bankruptcy of the assured will not release the insurer from payment of damages. When judgment is secured against the assured an action may be brought against the insurer by the judgment creditor to recover on the judgment.<sup>78</sup> 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.<sup>79</sup>

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.<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup> The court found that the California direct action statute applied to the policy.<sup>83</sup> As a result, the indemnity policy was, in effect, converted into a liability policy upon which the seaman had a statutory right to sue.<sup>84</sup>

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,<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup>

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.<sup>89</sup> 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."<sup>90</sup> 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."<sup>91</sup> A year later the Florida court expanded the *Shingleton* holding to apply to forms of liability insurance other than automobile

policies.<sup>92</sup>

The *Shingleton* rule has since been modified by the Florida legislature.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> 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."<sup>96</sup>

Although federal courts had refused to permit joinder of an insurer on personal injury claims<sup>97</sup> and on claims arising out of torts on the high seas,<sup>98</sup> 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.<sup>99</sup> In making its decision, the court focused primarily on whether Florida's right of direct action conflicted with the general maritime law.<sup>100</sup> 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.<sup>101</sup>

92. *Beta Eta House Corp. v. Gregory*, 237 So. 2d 163, 165 (Fla. 1970) (expanding the rule to allow joinder of liability insurance carrier for fraternity house).

93. *Van Bidder v. Hartford Accident & Indem. Insurance Co.*, 439 So. 2d 880, 882 (Fla. 1983) (upholding the constitutionality of FLA. STAT. ANN. § 627.7262 (West 1984)).

94. 414 F. Supp. 131, 132 (N.D. Fla. 1975).

95. *Id.* at 133.

96. *Id.*

97. *Id.* at 132-33.

98. See *Bangladesh Agricultural Dev. Corp. v. Millbank Shipping, Inc.*, 1983 A.M.C. 2631, 2632 (M.D. Fla. 1983) and cases cited therein.

99. *Bangladesh Agricultural Dev. Corp.*, 1983 A.M.C. at 2632.

100. *Id.*

101. *Id.* at 2633.

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 802-03.

89. 223 So. 2d 713, 715 (Fla. 1969).

90. *Id.*

91. FLA. R. CIV. PRO. 1.210(a).

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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.<sup>102</sup> 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*.<sup>103</sup>

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.<sup>104</sup> The cases decided prior to the modification, however, demonstrated a general willingness on the part of the Florida judiciary to provide access to the marine insurance fund of an assured tortfeasor. Though the federal courts were less willing to apply the joinder rule to marine insurers, where the tortious act occurred within Florida waters it appears recovery was permissible. On balance, it seems likely that the policies behind the *Shingleton* decision will continue to persuade the courts to allow joinder of a marine insurer once the plaintiff has obtained a judgment against the assured. The argument for permitting such joinder on an action to recover on a judgment would be especially strong where the assured is insolvent, leaving the injured seaman with an empty judgment.

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

#### B. New York's Anti-Direct Action Statute<sup>105</sup>

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

102. 258 So.2d 485, 486 (Fla. App. 1972).

103. *Id.*

104. 439 So. 2d at 882.

105. New York's direct action statute has limited application, leading some commentators to refer to it as an anti-direct action statute. Houdlett, *supra* note 12, at 570.

jured party to sue an insurer directly if the assured is insolvent.<sup>106</sup> Unfortunately for injured seamen, however, Section 167(4) specifically excludes from the direct action provision "insurance against the perils of navigation"<sup>107</sup> and "marine protection and indemnity insurance."<sup>108</sup> 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.<sup>109</sup> The plaintiff then brought an action against the company's insurer.<sup>110</sup> 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 . . ."<sup>111</sup> 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.<sup>112</sup>

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.<sup>113</sup> 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.<sup>114</sup>

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 413. 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

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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.<sup>115</sup> 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.<sup>116</sup> The court ruled that the insurance policies involved were clearly ones of indemnity and that New York law was applicable.<sup>117</sup> 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."<sup>118</sup> The court entered judgment for the insurance company.<sup>119</sup>

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.<sup>120</sup> 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 . . ."<sup>121</sup> 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 & Indemn. 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,<sup>122</sup> 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.<sup>123</sup>

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.*<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup> The court explicitly recognized that under the circumstances the assured could never pay on the judgment.<sup>127</sup> Despite this fact, the court observed that New York policy in favor of direct actions is not strong.<sup>128</sup> Therefore, in reliance on rule 167(4), the court granted the insurer's motion for summary judgment.<sup>129</sup>

### 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.



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

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.<sup>132</sup> 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.<sup>133</sup> The company which had issued the policies claimed that payment of the judgment by the assureds was a condition precedent to recovery.<sup>134</sup> 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.<sup>135</sup> The court ruled that the statute invalidated the indemnity limitation in the policies of marine insurance, and allowed the seamen to recover.<sup>136</sup>

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.*<sup>137</sup> 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.<sup>138</sup>

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.<sup>139</sup> 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."<sup>140</sup> 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.<sup>141</sup>

Several years later, the Supreme Court of Hawaii had an opportunity to address the same issue.<sup>142</sup> 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.<sup>143</sup>

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.<sup>144</sup> 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.<sup>145</sup> On appeal, however, the decision was reversed.<sup>146</sup> 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.<sup>147</sup> 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.



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

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

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

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.

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

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

#### IV. CONCLUSION AND RECOMMENDATION

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

##### A. Judicially Sanctioned Recovery

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

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

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

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

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

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

157. *Id.* at 1052.

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

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

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

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

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

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

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

#### B. Legislative Action

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

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

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

158. Cf. *Tokio 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; *Koesler*, 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 *Koesler*, 416 F. Supp. at 876.

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

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

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

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

169. 46 U.S.C.A. § 688 (West 1975).

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

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

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

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

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

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

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

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

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

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

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

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. *Kierr*, *supra* note 6, at 656.

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

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

184. *Ahmed*, 1982 A.M.C. at 1231. See ARNOULD'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.

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 HALSBRURY'S LAWS OF ENGLAND ¶ 706 (4th ed. 1978).

174. *Id.*

175. ARNOULD'S LAW OF MARINE INSURANCE & AVERAGE [356, Vol. II (16th ed. 1981).

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



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

DEBORAH K. PERIMAN

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

### INTRODUCTION

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

### I. HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

By A.F. Bessemer Clark\*

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

### Chapter I

#### Liability

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

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

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

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

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

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

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

#### Damage

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

The heads of damage covered are six:

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

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

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

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

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

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

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

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

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

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

#### Limitation

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

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

2. S. 1003(a).

3. S. 1002.

4. Under s. 4201.

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

6. S. 1006.

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.



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12. S. 1018 (C).

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

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

15. Under s. 1013.

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

#### Interest

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

#### Financial responsibility

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

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

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

#### Chapters II-III

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

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

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

#### Chapter IV

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

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

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

16. S. 1005(b)(5).

17. S. 1016(h).

18. S. 3001.



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

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

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

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

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

19. S. 4201(a).

20. S. 4202.

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

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

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

#### Chapters V-IX

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

#### Conclusion

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

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

21. S. 4301.



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

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

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

## The new Luxembourg Shipping Register

By Luc Frieden\*

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

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

### 1. Registration requirements

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

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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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## 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

- 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, even 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 investor, mortgagee, or financing lessor is that maximum pollution liability insurance limits be maintained. What amount of insurance will be considered adequate in view of the risk of unlimited liability is a developing picture. It appears that \$700 million has become the norm (more than 50% of the tankers are said to have opted for \$200 million in excess pollution liability cover over the \$500 million standard 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 an 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.

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It's Best to Answer When the Coast  
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## THE OIL POLLUTION ACT OF 1990

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

### I. INTRODUCTION

On August 18, 1990, the United States adopted a new legal regime governing the discharge or threat of discharge of oil on the navigable waters, adjoining shorelines, and exclusive economic zone of the United States. This article examines the Oil Pollution Act of 1990 (Oil Pollution Act)<sup>1</sup> and its expected effects. Because the Oil Pollution Act relies upon and amends the previous statutory framework relating to oil pollution, a general understanding of water pollution law as it existed in the United States prior to passage of the Oil Pollution Act is necessary. United States law regarding water pollution is unusually confused, with overlapping statutes and common law remedies on both the federal and state levels. Now, the Oil Pollution Act is the principal federal legislation in this field; it establishes a comprehensive scheme for prevention, removal, liability, compensation, and penalties relating to oil pollution. However, the preexisting federal legislation, including the Federal Water Pollution Control Act (Clean Water Act),<sup>2</sup> remains in effect except for the imposition of liability, which is now governed by the Oil Pollution Act. Water pollution resulting solely from discharge of hazardous substances other than petroleum, natural gas, and related products is addressed by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund).<sup>3</sup> Although the United States has not adopted either of the major international conventions regarding liability for oil pollution,<sup>4</sup> and thus is not in accord with interna-

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

2. 33 U.S.C. §§ 1251-1387 (1988).

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

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

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

## II. PREEXISTING LAW

### A. Penalties for Oil Pollution

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

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

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

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

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

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

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

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

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

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

18 U.S.C. § 3571 (1988).

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

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

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

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

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

6. 33 U.S.C. § 1321(b)(3). The exceptions were (1) quantities less than those which, by regulation are deemed to be harmful, and (2) where, in certain cases, permitted by the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Protocol) I.M.C.O. Document TSPP/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(h)(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

## 1. Liability of Owner or Operator of Discharger

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

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

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

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

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

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

17. 33 U.S.C. § 1321(p)(3). The insurer in a direct action suit is entitled to invoke all rights and defenses available to the owner or operator and those available to the insurer if the claim has been brought by the owner or operator. See *United States v. West of England Ship Owner's Mut. Protection & Indem. Ass'n.*, 872 F.2d 1192, 1989 AMC 1497 (5th Cir. 1989) (*United States* sued both the barge owner and its P&I insurers to recover cleanup costs).

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

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

*Id.*

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

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

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

## 2. Third-Party Liability

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

19. *Id.*

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

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

22. 46 U.S.C. §§ 181-188 (1988).

23. *United States v. Dixie Carriers*, 736 F.2d 180, 183-85, 1985 AMC 815, 818-21 (5th Cir. 1984), *Stewart Transportation*, 596 F.2d at 619, 1979 AMC at 1201-02. As an example, assume that the owner or operator's limit under the Act was \$600,000, and he spent \$400,000 effecting cleanup operations which the government determined to be inadequate. If the government then spent an additional \$500,000 on further cleanup, the owner or operator was required to pay the full \$500,000 to the government, notwithstanding the fact that he had already spent \$400,000 in attempting to carry out his statutory duty. Clearly, this anomaly acted as a disincentive for owners and operators of discharging units to effect cleanup operations voluntarily. Because government efforts are generally more expensive than those undertaken by private industry, the anomaly increased pollution cleanup costs.

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

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

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

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

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

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

24. 33 U.S.C. § 1321(g).

25. *Id.*

26. *Id.*

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

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

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

30. 42 U.S.C. §§ 9601-9675 (1988).

31. 42 U.S.C. § 9601(14)(F).

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

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

### D. Activity-Based Federal Legislation

In addition to the general federal pollution statutes covered thus

33. *Id.*

34. 42 U.S.C. § 9607(a)(4)(C).

35. 42 U.S.C. § 9607(h).

36. *Id.*

37. 42 U.S.C. § 9607(m).

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

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

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

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

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

41. 42 U.S.C. § 9609.



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

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

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

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

42. 43 U.S.C. §§ 1811-1824 (1988).

43. 43 U.S.C. §§ 1651-1655 (1988).

44. 33 U.S.C. §§ 1501-1524 (1988).

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

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

47. 42 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—\$300 per gross ton, or \$250,000 whichever is greater, "except when the owner or operator . . . fails or refuses to provide all reasonable cooperation and assistance requested by the responsible Federal official in furtherance of cleanup activities . . ."

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

50. 43 U.S.C. § 1814(b).

51. 43 U.S.C. § 1815(c)(1).

### 2. Trans-Alaska Pipeline Authorization Act

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

### 3. Deepwater Port Act

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

52. 43 U.S.C. §§ 1651-1655 (1988).

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

54. 43 U.S.C. § 1653(c)(1), (2), (7). The defenses are act of war, negligence of the United States or other governments' 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 (Ct. Cl. 1981), cert. denied, 454 U.S. 964 (1981).

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

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

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

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



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

### III. STATE LEGISLATION

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

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

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

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

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

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

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

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

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

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

### IV. THE OIL POLLUTION ACT OF 1990

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

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

67. Oil Pollution Act § 1018(a),(b).

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

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

#### A. Damages Recoverable

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

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

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

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

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

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

72. 33 U.S.C. §§ 1251-1387 (1988).

73. 33 U.S.C. §§ 1471-1487 (1988).

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

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

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

#### 1. Natural Resources

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

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

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

76. Oil Pollution Act § 1002(b)(2).

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

78. Oil Pollution Act § 1006(d)(1).

79. Oil Pollution Act § 1006(e).

80. 42 U.S.C. § 9607(f).

81. Oil Pollution Act § 1006(e)(2).

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

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



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

## 2. New Claimants

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

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

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

85. See, e.g., *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1021, 1985 AMC 1521, 1524 (5th Cir. 1985) (*en banc*, cert. denied, 477 U.S. 903, 1986 AMC 2704 (1986)); *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 30, 1985 AMC 2600 (1st Cir. 1985). *Contra* *Kinsman Transit Co. v. City of Buffalo*, 388 F.2d 821, 1968 AMC 293 (2d Cir. 1968) (forseeable damages are recoverable whether or not there is physical damage to a claimant's proprietary interest). Other theories of recovery, such as breach of the Refuse Act, nuisance tort theories, or even state law claims are unavailable as a means of circumventing the bar to recovery of those whose loss is purely economic. *Testbank*, 752 F.2d at 1031, 1985 AMC at 1540.

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

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

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

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

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

## 3. Defenses to Liability

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

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

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

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

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

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

*Id.*

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

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

*Id.*



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

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

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

### B. Limits of Liability

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

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

92. Oil Pollution Act § 1003(a).

93. Oil Pollution Act § 1003(c).

94. Oil Pollution Act § 1003(b).

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

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

96. 33 U.S.C. § 1321(f).

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

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

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

The Oil Pollution Act appears to remove the anomaly which

98. Oil Pollution Act § 1004(b)(1).

99. Oil Pollution Act § 1004(b)(2).

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

101. Oil Pollution Act § 1004(c)(3).

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

103. Oil Pollution Act § 1004(c)(1).

104. Oil Pollution Act § 1004(c)(2).

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

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

### C. Increased Penalties

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

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

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

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

106. Oil Pollution Act § 1012(c).

107. Oil Pollution Act § 1018(a).

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

109. Oil Pollution Act § 1005(b)(5).

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

111. 33 U.S.C. § 1321(b)(6)(P).

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

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

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

### D. Direct Action Against Insurers

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

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

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

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

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

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

117. The requirements apply to:

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

Oil Pollution Act § 1016(a).

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

#### E. Jurisdiction and Venue

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

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

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

Oil Pollution Act § 1016(c).

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

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

121. Oil Pollution Act § 1016(b)(2).

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

123. Oil Pollution Act § 1017.

124. Oil Pollution Act § 1017(b).

125. *Id.*

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

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

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

##### 1. The Fund

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

126. *Id.*

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

128. 28 U.S.C. § 1404.

129. Oil Pollution Act § 1017(c).

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

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

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

133. Oil Pollution Act § 1012(f).



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

## 2. Double Hulls

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

## 3. Prevention, Removal, and Other Provisions

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

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

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

135. Oil Pollution Act § 1014(b).

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

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

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

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

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

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

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

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

142. Oil Pollution Act § 4118.

143. Oil Pollution Act §§ 5001-5007.

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

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

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

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

148. *Id.*

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

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

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

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

(A) is a vessel of the United States;

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

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

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

#### 1. The International Conventions

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

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

46 U.S.C. § 2101(39).

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

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

154. Oil Pollution Act § 3001.

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

*Id.*

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

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

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

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

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

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

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

158. *Id.* at col. 3.

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

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



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

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

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

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

161. *Id.* at col. 4.

162. *Id.* at col. 5.

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

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

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

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

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

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

### 3. The Escape of Cargo Owners

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

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

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

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

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



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

#### V. CONCLUSION

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

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

C. Andrew Waters\*

### INTRODUCTION

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

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

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

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

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

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

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

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

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

172. Oil Pollution Act § 1102.

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

### CONCLUSION

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

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

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

## The Oil Pollution Act of 1990: An Analysis

THOMAS J. WAGNER\*

### INTRODUCTION

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

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

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

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

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

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

Part I will 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),<sup>5</sup> declared a national policy prohibiting discharges of oil and imposing a regime of civil penalties and strict liability for federal clean-up costs. The FWPCA did not deal with damages of private interests, economic losses, or expenditures by local governments. Later, as source-specific pollution hazards were identified, Congress passed special measures to deal with these hazards. These included the Trans-Alaska Pipeline Authorization Act of 1973 (TAPA),<sup>6</sup> the Deepwater Ports Act of 1974 (DPA)<sup>7</sup> and the

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

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

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

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

<sup>5</sup> 43 U.S.C. § 1801 *et seq.*

<sup>6</sup> 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, *Env't. L. Rep.* 10338, 10349-50 (Aug. 1989) ("Straube").

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

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

<sup>9</sup> International Fund for Compensation of Oil Pollution Damage, December 18, 1971, reprinted in 6 *Benedict* 6-100 ("Fund Convention").

<sup>10</sup> CLC, *supra* note 11, Articles I, III. An excellent description of the development and coverage of the CLC and the Fund Convention appears in Jacobsen & Yellen, *Oil Pollution:*

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

<sup>11</sup> 33 U.S.C. § 1251 *et seq.*

<sup>12</sup> 43 U.S.C. § 1651 *et seq.*

<sup>13</sup> 33 U.S.C. § 1501 *et seq.*



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

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

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

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

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

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

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

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

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

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

## II

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

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

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

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

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

#### A. Liability, Defenses and Limitations

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

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

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

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

<sup>20</sup>Id., § 1001(32).

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

<sup>22</sup>Id., § 1002(b)(2).

<sup>23</sup>Id., § 1006(d)(1).

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

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

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

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

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

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

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

<sup>25</sup>Id., § 1003(a)(3). The "third party" defense is very restrictive. The responsible party must also establish its own due care and precautions as to foreseeable third-party acts and consequences.

<sup>26</sup>Id., § 1003(b).

<sup>27</sup>Id., § 1003(c).

<sup>28</sup>Id., § 1002(b).

<sup>29</sup>Id., § 1004(a). In general, these limitation amounts do not apply to interest on recoverable removal costs or damages under § 1005(b)(5).

<sup>30</sup>OPA, § 1004(c)(1).

<sup>31</sup>Id., § 1004(c)(2); see note 8, *supra*.



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

### B. Removal Responsibilities

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

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

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

<sup>33</sup>OPA, § 1004(c)(3).

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

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

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

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

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

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

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

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

### C. Prevention and Oil Spill Penalties

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

<sup>39</sup>*Id.*, § 1012(a).

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

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

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

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

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



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

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

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

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

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

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

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

#### D. Relationship with Other Laws

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

<sup>45</sup>OPA, §§ 4101-03.

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

<sup>47</sup>*Id.*, § 4106.

<sup>48</sup>33 U.S.C. § 1223.

<sup>49</sup>33 U.S.C. § 1203.

<sup>50</sup>OPA, § 4109.

<sup>51</sup>*Id.*, § 4110.

<sup>52</sup>*Id.*, § 4115.

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

<sup>54</sup>OPA, § 4302.

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

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

<sup>57</sup>OPA, § 1018(b).

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

<sup>59</sup>OPA, § 1018(c).

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

#### E. Claims Procedure

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

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

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

<sup>60</sup>Id., § 3001.

<sup>61</sup>Id., § 1014.

<sup>62</sup>Id., § 1013.

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

<sup>64</sup>Id., § 1015(a).

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

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

### III AN ANALYSIS OF THE ACT

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

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

<sup>65</sup>Id., § 1015(b).

<sup>66</sup>Id., § 1017(b)(c).

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

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

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

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



—contingency planning for realistic worst case scenarios, and better coordination of response activities with streamlining of decision-making;<sup>71</sup>

—implementation of the 1984 Protocols to the CLC and the Fund Convention to provide greater means to address tanker spills.<sup>72</sup>

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

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

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

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

#### B. Prevention and Oil Spill Penalties

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

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

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

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

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

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

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

#### C. Removal Responsibilities

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

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

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

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

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

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

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



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

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

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

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

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

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

#### D. Relationship with Other Laws

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

<sup>80</sup>Id., § 4202.

<sup>81</sup>Id., §§ 4201(a) and 4202(a); FWPCA, § 311(c)(3)(d) and (j) (U.S.C. § 1321(c)(3)(d) and (j)). See also *Water Pollution*, Vol. 19, No. 50, *Env't. Rep.* at 2697.

<sup>82</sup>See *James*, supra note 4, at 6, 7.

<sup>83</sup>The potential for duplication and confusion abounds as state laws and regulations proliferate. The joint House and Senate Conference Report does confirm that the Act preserves federal preemption of those areas within federal regulatory authority. *Conference Report on*

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

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

<sup>82</sup>OPA, § 1012(a).

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

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

<sup>85</sup>OPA, § 1001(a).

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

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

#### E. Claims Process

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

<sup>90</sup>H. R. 1465 § 1018, p. 122; see *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). Nonetheless, many states have rushed to enact their own oil spill legislation, see, e.g., Md. H. B. No. 392 (Apr. 24, 1990), or to propose their own regulations. See Cal. S. B. 2040 (Sept. 22, 1990); Fla. H. B. 517 (June 22, 1990); Fla. S. B. 1068 (June 11, 1990).

<sup>91</sup>See note 17, *supra*.

<sup>92</sup>Implementation of the Fund Convention, which requires contributions from worldwide oil receiving interests, would have effected a sharing of removal costs and pollution damages among the international community, up to the international limits.

<sup>93</sup>*Jacobsen & Yellen*, *supra* note 13, at 487, 488; *Temple, Barker & Sloane*, *supra* note 17, at VII-4.

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

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

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

#### CONCLUSION

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

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

## V. CONCLUSION

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

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

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

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

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

284. *Id.* at 656-57.

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

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

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

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

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

B.(1) The injured person or his or her survivors or heirs . . . , at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and, such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, . . . .

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

3. *Id.* § 22:611 (emphasis added).

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

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



## THE DIRECT ACTION STATUTE

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

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

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 175.

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).

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

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

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

16. *Id.* at 471.

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

18. *Id.*

19. *Id.* § 22:655 (B)(2).

20. *Id.* § 22:655 (B)(1).

21. *Id.*

22. *Id.* § 22:655 (C).

23. *Id.* § 22:655 (D).

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

### ANALYSIS OF CASES INTERPRETING THE OCEAN MARINE EXCLUSION

The first court to address the applicability of Louisiana's direct action statute to ocean marine insurance was the United States District Court for the Eastern District of Louisiana in *Maryland Casualty Co. v. Cushing*.<sup>29</sup> In *Cushing*, the ocean marine exclusion issue arose after the JANE SMITH, a towboat, collided with a concrete pier and capsized in the Atchafalaya River.<sup>30</sup> Five seamen drowned in the collision. The owner and charterer of the JANE SMITH successfully petitioned the court to limit their liability under the provisions of the federal Limited Liability Act.<sup>31</sup> The Limited Liability Act allows the owner of a vessel, and its charterer, to limit their liability to the value of the owner's interest in the vessel and her freight when loss, damage, or injury occurs without the owner's privity or knowledge.<sup>32</sup> When a petition to

'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.

25. 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).

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

27. *Id.* at 682-83 (citing 46 U.S.C. § 183).

28. The Limitation of Liability Act provides in part:

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

46 U.S.C. § 183 (1988).

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

46 U.S.C. § 186 (1988).

limit liability has been granted, suit against the vessel owner or charterer is precluded in any other action.<sup>33</sup> Nevertheless, in *Cushing*, the representatives of the drowned seamen sued the insurers of the vessel owner and charterer in a second action pursuant to the direct action statute.

The district court announced two principal reasons for dismissing the plaintiffs' direct action against the insurers.<sup>34</sup> First, the court noted that the insurance policies in question were protection and indemnity policies which protected the owner and charterer of the vessel against liability for personal injury and accidental death occurring on the vessel.<sup>35</sup> To determine whether the direct action statute applied to protection and indemnity insurance, the district court noted that the Louisiana Insurance Code defines and classifies the various types of insurance covered by the Code.<sup>36</sup> The court further observed that the Code draws a distinction between liability insurance<sup>37</sup> and marine and transportation (inland marine) insurance.<sup>38</sup> The court pointed out that the direct action statute is

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

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

Supp. Fed. R. Civ. P. F(3).

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

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

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

33. Section 6, subsection 4 provides:

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

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

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

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



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

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

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

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

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

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 683-84.

40. *Id.*

41. *Id.* at 684.

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

[t]o give effect to the direct action statute . . . by allowing these plaintiffs to proceed directly against the shipowner's insurers would not only work material prejudice to the characteristic features of the general maritime law but would also contravene the essential purpose expressed by an Act of Congress [in the Limitation of Liability Act] in a field already covered by that Act.<sup>44</sup>

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

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

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

44. *Id.* at 684.

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

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

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

15 U.S.C. § 1011-1012 (1988).



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

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

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

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

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

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.

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

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

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

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

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

58. *Id.* at 957.

59. *Id.*

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

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

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

60. *Id.*

61. *Id.* at 960.

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

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

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

64. *Id.*

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

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

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

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

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

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

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

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

67. 419 F.2d at 232.

68. *Id.*

69. *Id.*

70. *Id.* at 236.

71. 341 F.2d 956.

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

73. *Id.* at 236.

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

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

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

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

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.*, 356 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.

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

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

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

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

84. 46 U.S.C. § 688 (1988).

85. 538 So. 2d at 989.

86. *Id.*

87. *Id.*

88. *Id.*

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

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

91. 538 So. 2d at 989.

92. *Id.* at 990.

93. *Id.*



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

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

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

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

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

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

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

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

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

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

98. *Id.* at 992.

99. *Id.* at 992-93.

100. *Id.* at 992.

101. *Id.* (emphasis added).

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

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

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

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

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

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

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

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

110. *Id.* at 289.

111. *Id.* at 284.

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

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

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

112. *Id.* at 286-87.

113. *Id.*

114. *Id.* at 287.

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

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

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

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

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

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

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

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

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

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

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

120. *Id.*

121. *Id.* at 291.

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

123. 892 F.2d 386, 391, *aff'd in part*, and *rev'd in part on rehearing*, 897 F.2d 1268 (1990) (holding that not only is protection and indemnity insurance covering personal injury ocean marine insurance, but protection and indemnity insurance against liability for damage to the property of third persons is also ocean marine insurance).

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

### CONCLUSION

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

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.

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

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

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

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

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

136. See *supra* note 78.

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

138. See *supra* note 109.

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

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

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

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



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

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

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

Cheryl L. Wilson

## CASENOTES

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

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

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

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

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

2. *Id.* at 320.

3. 46 U.S.C. app. § 688 (1988).

4. *Miles*, 111 S. Ct. at 320.

5. *Id.*

6. *Id.*

7. *Id.*

# Isle shippers: Oil flow may not go

It's 'a potentially crippling problem'

By Gene Alshire  
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

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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.