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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,

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

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

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

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 Financial security shall not be canceled or withdrawn by the vessel owner or operator while the vessel is transporting pollutants as cargo within state waters.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

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

1. Pays the civil penalty; or

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

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

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

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

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

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

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

(a) The director shall establish the amount of damage award and shall certify the amount of the award and the name of the claimant to the Treasurer, who shall pay the award from the fund, subject to the provisions of [1]subsection (9). If the claimant agrees with the established amount of damage, the settlement shall be binding upon both parties as to all issues and cannot be further attacked, collaterally or by separate action, in the future. If the total amount of such awards exceeds the amount available to any claimant or claimants from the fund, such claimant or claimants shall have the right to a pro rata share of all funds available in the fund until the total amount of awards is paid to the claimant or claimants.

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

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

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

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

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

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

(a) An act of war.

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

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

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

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

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

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

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

(9) In the event the total awards for a specific oc rence exceed the current balance of the fund, the im diate award shall be paid on a prorated basis, an 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 clai or claimants. However, amounts collected by the from the prosecution of causes of action pursuan paragraph (5)(d) and [2]subsection (8) shall be utiliz satisfy the claims as to which such prosecutions to the extent theretofore unsatisfied.

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

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

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

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

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

376.121 Liability for damages to natural resourc

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

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

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

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

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

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

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

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

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

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

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

a. The location of a spill.

b. Habitat and living resource sensitivity.

c. Seasonal distribution of living resources.

d. Recreational use or aesthetic importance.

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

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

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

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

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

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

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

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

1. Developing restoration and enhancement techniques for natural resources.

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

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

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

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

5. Developing an adequate wildlife rescue and rehabilitation program.

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

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

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

History.—s. 19, ch. 90-54.

376.13 Emergency proclamation; Governor's powers.—

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

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

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

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

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

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

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

376.14 Terminal facilities and vessels; financial responsibility.—

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

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

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

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

376.15 Derelict vessels; removal from public waters.—

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

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

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

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

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

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

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

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

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

ES
STATUTES
ANNOTATED

NEW JERSEY STATUTES ANNOTATED

Title 58

WATERS AND WATER SUPPLY

Title 59

CLAIMS AGAINST PUBLIC ENTITIES

Appendix A

EMERGENCY AND TEMPORARY ACTS

ST. PAUL, MINN.
WEST PUBLISHING CO.

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

L.1976, c. 141, § 18.

1 58:10-23.11g.

Historical Note

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

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

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

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

L.1976, c. 141, § 19.

Historical Note

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

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

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

L.1976, c. 141, § 20.

Historical Note

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

58:10-23.11t Rules and regulations

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

NEW JERSEY STATUTES ANNOTATED

Official Classification

Title 58

Waters and Water Supply

Title 59

Claims Against Public Entities

Appendix A

Emergency and Temporary Acts

1991

Cumulative Annual Pocket Part

[For Use In 1991–1992]

Replacing 1990 Pocket Part in back of volume

INCLUDING LAWS

through the

1990 First Annual Session

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

3. Preemption

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

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

...for class by public advocate

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

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1. Persons entitled to indemnity

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

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

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

2. Payment prior to cleanup

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

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

Notes of Decisions

1. Construction and application

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

58:10–23.11t. Rules and regulations

Law Review Commentaries

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

Notes of Decisions

Validity of regulations 3

3. Validity of regulations

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

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

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

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

c.

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Cumulative Supplement
Issued December 1991

Volume 22

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

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

By the Editorial Staff of the Publisher

For use during 1991-1992

Lawyers Cooperative Publishing
Aqueduct Building, Rochester, New York 14694

IT-68

§ 190. Claims against insurers

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

HISTORY:

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

RESEARCH REFERENCES AND PRACTICE AIDS:

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

CASE NOTES

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

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

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

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

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

§ 190-a. Application of article

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

HISTORY:

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

RESEARCH REFERENCES AND PRACTICE AIDS:

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

Law Reviews:

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

WEST'S
LOUISIANA STATUTES ANNOTATED

REVISED STATUTES

Official Classification

Sections 22:611 to 22:730

Volume 15A

1992

Cumulative Annual Pocket Part

Replacing 1991 pocket part in back of volume

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

Includes laws through the 1991 Third Extraordinary Session

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

77. —— Theft, terms in policy

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

91. Construction against insurer—In general

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

108. —— Employees, persons covered

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

118. —— Business pursuits, property or interests covered

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

125. Parties to contract and relation between them

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

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

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

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

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

(b) The insured is insolvent;

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

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

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

—— Employees, persons covered

:e legislator was a "full-time employee" ı 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- ı 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 interests covered

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Parties to contract and relation between them

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

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

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

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see Special Pamphlet.

(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, 1993, see Special Pamphlet

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Rhode Island

JT COMM. LEGISLATIVE SERVICES
LAW REVISION OFFICE

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 1991

AN ACT

RELATING TO WATERS AND NAVIGATION - CONTAMINANTS

Introduced By: Representative Christopher Boyle

Date Introduced: February 13, 1991

Referred To: Joint Committee on Environment and Energy

It is enacted by the General Assembly as follows:

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

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

committee amendment 3/21/91

* or, for vessels less than 300 gross tons, other evidence of financial responsibility in accordance with the Federal Oil Pollution Act Sections 100 101

Coast Guard, as ~~file certification of a performance bond or other~~ evidence of financial responsibility applicable to ~~or liability insurance with the director of the department of environmental management in the amount of twelve hundred ($1200) dollars per gross ton of weight of the vessel and its cargo to insure~~ payment of any judgment entered on behalf of the state of Rhode Island and Providence Plantations or any

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

person aggrieved pursuant to the provisions of chapter 12.3 of title 46. ~~In the event the vessel causes damage to the environment, the bond shall be forfeited or payment on the insurance policy made to the full extent of the costs incurred by the state and/or other persons to rectify and clean up the damage to the environment and natural resources of the state and to the extent of any award made pursuant to the provisions of chapter 12.3 of title 46 or any other law for the compensation of persons sustaining injury to the person, damage to their property and/or economic injury resulting therefrom.~~ Any seagoing tank vessel ~~as defined in section 46-9-2~~ entering waters or waterways of this state without such valid certificate of financial responsibility or, for vessels less than 300 gross tons, other evidence of financial responsibility in accordance with the Federal Oil Pollution Act Sections 1004 and 1016 coverage shall be fined not more than one hundred thousand dollars ($100,000) or twice the amount required to rectify any environmental damage caused by said vessel, whichever is greater.

committee amendment 2/21/91 AS

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

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

SECTION 2. This act shall take effect upon passage.

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RS439/SUB A
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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

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

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

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

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

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

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

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

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

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

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

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

§ 40.255. Actions

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

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

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

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

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

§ 40.256. Individual Cause of Action

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

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

CODE OF VIRGINIA

1950

1991 Cumulative Supplement

ANNOTATED

Prepared under the Supervision of

The Virginia Code Commission

BY

The Editorial Staff of the Publishers

Under the Direction of

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

VOLUME 9

1987 REPLACEMENT

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

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

THE MICHIE COMPANY
Law Publishers
CHARLOTTESVILLE, VIRGINIA

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

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

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

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

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

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

1. Approval was obtained by fraud or misrepresentation;

2. The plan cannot be implemented as approved; or

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

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

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

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

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

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

D. Acceptance of proof of financial responsibility shall expire:

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

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

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

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

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

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

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

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

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

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

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

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

Washington

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chapter 88.44
OIL SPILL FIRST RESPONSE

Sections

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

ATTACHMENT C

"1991's Oil Spill Legislative and Regulatory Scene"

U.S. Law Report - January 1992

U.S. LAW REPORT

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

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

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

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

Agencies Complete Five-Year Research and Development Plan

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

Activity in the States

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

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

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

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

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

Alaska Adopts Country's Toughest Regulations

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

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

California Appoints New Oil Spill Administrator

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

State Oil Spill Legislation and Regulations: 1991

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

State Oil Spill Legislation and Regulations: 1991, continued

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

State Oil Spill Legislation and Regulations: 1991, continued

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

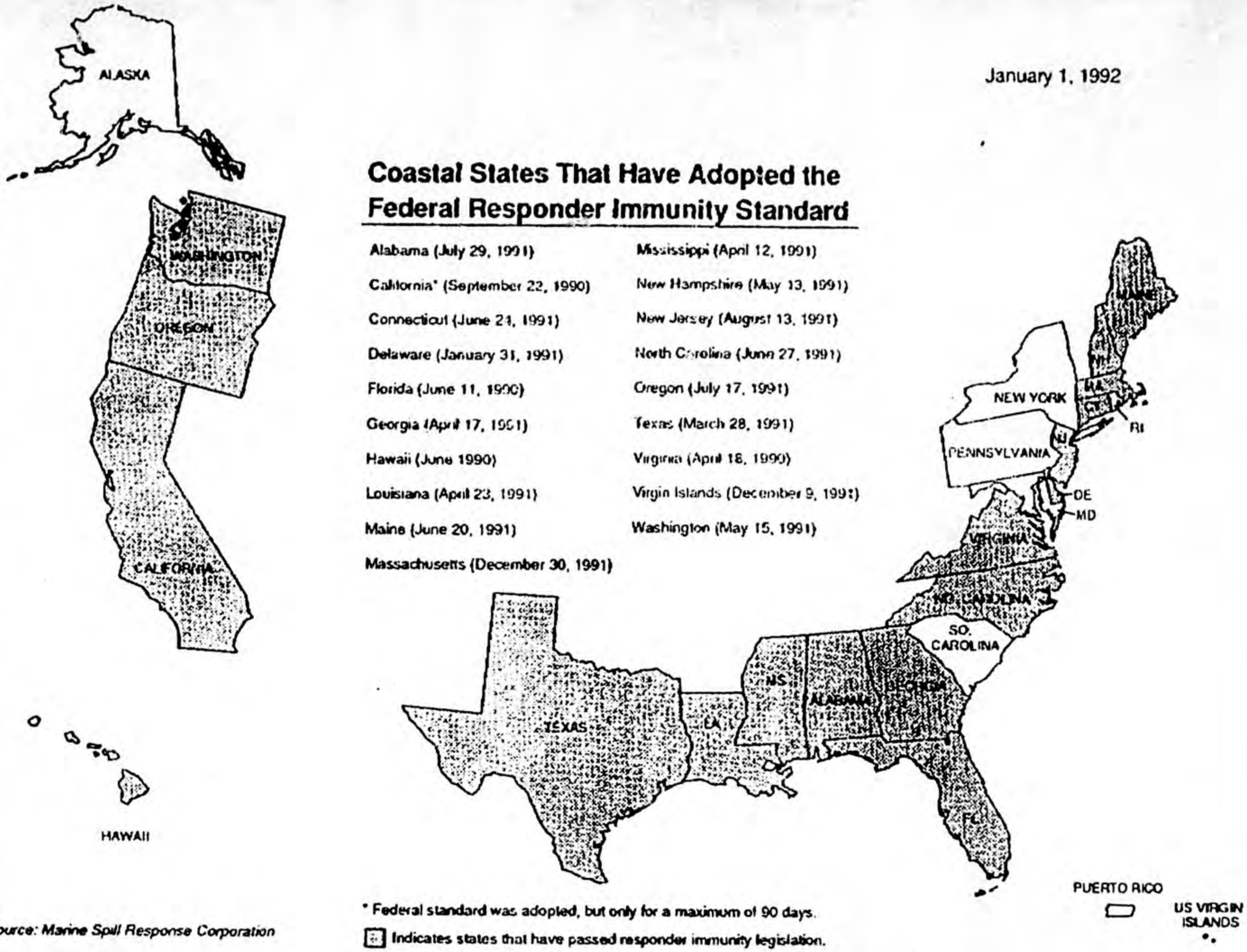
State Oil Spill Legislation and Regulations: 1991, continued

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

January 1, 1992

Coastal States That Have Adopted the Federal Responder Immunity Standard

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



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

☐ Indicates states that have passed responder immunity legislation.

Source: *Marine Spill Response Corporation*

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

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

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

Connecticut Passes Small Percentage of Spill Bills

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

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

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

Florida Implements 1990 Spill Act

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

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

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

Louisiana Enacts Spill Bill in One Week

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

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

Maine's Commission Judges Effectiveness of Laws

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

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

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

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

Maryland Regulations Address Vessels and Aboveground Tanks

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

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

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

New Jersey Adopts Aggressive Regulations

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

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

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

Oregon Is Only State to Pass Compact Bill

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

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

Texas Puts General Land Office in Charge

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

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

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

Virginia Meets January Deadline for Spill Regulations

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

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

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

Washington Forms New Marine Safety Office

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

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

Hotline

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

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

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

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

COMMENTS

WILLAMETTE LAW REVIEW
21:2 Spring 1985

DIRECT ACTIONS AGAINST MARINE INSURERS: A CALL FOR UNIFORM LEGISLATION

INTRODUCTION

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

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

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

effortless recovery.[2]

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

I. Background

A. Overview of Marine Protection and Indemnity Insurance

1. History and Definition

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

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

These insurance underwriters normally assumed only a part of

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

3. British Marine Insurance Act, 1906 § 1.

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

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

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

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

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

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

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

7. *Id.*

8. Maritime Law & Practice, at 291.

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

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

11. *Id.* at 55.

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

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

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

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

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

2. *Choice of Law*

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

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

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

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

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

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

20. *Id.*

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

22. *Id.* at 316.

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

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

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

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

B. *Development of Direct Action Statutes*

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Marine P & I Insurance and Direct Action Statutes

A. Louisiana

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *Puerto Rico*

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

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

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

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

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

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

C. *California*

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

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

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

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

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

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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 Constitutuion 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 entitiled to maintain an action thereon. *Id.* at 232, 273 P.2d at 816.
85. Examples of these are the Louisiana and Puerto Rico statutes.

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

III. Direct Actions In The Absence Of Statute

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

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

A. Joinder in Florida

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

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

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

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

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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).
92. Beta Eta House Corp. v. Gregory, 237 So. 2d 163, 165 (Fla. 1970) (expanding the rule to allow joinder of liability insurance carrier for fraternity house).
93. Van Bidder v. Hartford Accident & Indem. Insurance Co., 439 So. 2d 880, 882 (Fla. 1983) (upholding the constitutionality of Fla. Stat. Ann. § 627.7262 (West 1984)).
94. 414 F. Supp. 131, 132 (N.D. Fla. 1975).
95. *Id.* at 133.
96. *Id.*
97. *Id.* at 132-33.
98. *See* Bangladesh Agricultural Dev. Corp. v. Millbank Shipping, Inc., 1983 A.M.C. 2631, 2632 (M.D. Fla. 1983) and cases cited therein.
99. *Bangladesh Agricultural Dev. Corp.*, 1983 A.M.C. at 2632.
100. *Id.*
101. *Id.* at 2633.

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

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

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

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

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

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

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

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

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

106. N.Y. INS. LAW § 167(1)(a), 167(1)(b) (McKinney Supp. 1984).
107. *Id.* at § 112(2)(c)(1).
108. *Id.* at § 46(21).
109. 1969 A.M.C. 2334, 2335 (N.Y. 1969).
110. *Id.* at 2335.
111. *Id.*
112. *Id.* at 2336.
113. Cowan v. Continental Ins. Co., 86 A.D.2d 646, 647, 446 N.Y.S.2d 412, 413 (N.Y. App. Div. 1982).
114. *Id.* at 647, 446 N.Y.S.2d at 41[illegible]. The court further found, however, that Connecticut had the most significant contacts with the litigation and that therefore Connecticut law should be applied. Connecticut had a direct action statute authorizing direct recovery against an insurer by

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

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

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

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

C. Other Jurisdictions

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

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

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

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

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

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

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

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

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

121. *Id.*

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

123. 663 F.2d at 371.

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

125. *Id.* at 1048.

126. *Id.* at 1049.

127. *Id.* at 1048.

128. *Id.* at 1049.

129. *Id.* at 1052.

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

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

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

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

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

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

133. *Id.*

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

135. *Id.*

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

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

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

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

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

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

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

140. *Id.* at 919.

141. *Id.*

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

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

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

145. *Id.* at 65.

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

147. *Id.* at 459.

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

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

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

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 [illegible]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.' "[152]

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

IV. Conclusion and Recommendation

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

A. Judicially Sanctioned Recovery

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

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.

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

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

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

Another difficult problem certain to follow from a judicially created right of action is determination of the scope of the right, *e.g.*, whether both the tortious act and the injury must occur within the jurisdiction or whether it is sufficient that the tortious act occured there. Conflicting precedents regarding such issues in states with statutorily created causes of action have led to strained decision-making in those jurisdictions.[164] This type of difficulty would, it seems, be compounded by a judicially created right of action formed on a case by case basis.

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

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

B. *Legislative Action*

Although the potential for conflict with traditional maritime principles suggests that judicial creation of a right of direct action would be unwise, it does not form a similar bar to legislative action. Congress, in providing a right of action, could delineate the scope and appropriate application of the right, as well as determine its relationship to Limitation of Liability proceedings. A Congressional resolution of this issue is desirable in view of the extensive reliance by marine industries upon indemnity insurance[168] 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[169] a seaman could not bring a negligence action against his employer. The defense of the fellow servant rule inevitably quashed such an attempt.[170] The purpose and effect of the Jones Act was to extend the seaman's right to

158. *Cf.* 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).

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

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

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

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

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

> if the American marine insurance industry is to assume the international posture to which it is entitled by its economic base, laws regulating the most substantial features of marine insurance policies must be harmonized not only within the United States, but also with England and major foreign underwriting nations. Otherwise, the American marine insurance industry is subject to disfavor for rules that remain inconsistent with other markets and whose uncertainties increase the likelihood of lawsuits when questions arise.[177]

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

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

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

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171. *Williams*, 45 Wash. 2d at 215-16, 273 P.2d at 807.
172. *Maryland Casualty*, 347 U.S. at 438 (Black, J., dissenting).
173. 25 HALSBURY'S LAWS OF ENGNALD ¶ 706 (4th ed. 1978).
174. *Id.*
175. ARNOULD'S LAW OF MARINE INSURANCE & AVERAGE 1356, Vol. II (16th ed. 1981).
176. *See, e.g.*, Wilburn Boat Co., 348 U.S. at 325 (Reed, J., dissenting).
177. Staring, *supra* note 17, at 27.
178. *Olokele*, 53 Hawaii at 71-72, 487 P.2d at 770-71.
179. *See Ahmed*, 1982 A.M.C. at 1231.
180. *Maryland Casualty*, 347 U.S. at 419.
181. 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.

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. PERLMAN

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

INTRODUCTION

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

I. HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

Unscrupulous—indeed, at time, 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.

83 See, e.g., (U.K.) Civil Jurisdiction and Judgments Act 1982, Sched. 1.
84 *Supra*, fn. 14, at p. 30.

The U.S. Oil Pollution Act of 1990

*By A.F. Bessemer Clark**

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

Chapter I

Liability

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

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

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

* Managing Director, The West of England Ship Owners Insurance Services Ltd.
1. [1984] 2 Lloyd's Rep. 304, (U.S.D.C., N.D.Ill., E.Div.).

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

Damage

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

The heads of damage covered are six:

(1) The first is damage 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,[6] as well as a very wide definition: basically all flora and fauna, as well as air and water, and covering all resources on land or sea (up to and including the exclusive economic zone). Claims under this head can be brought by the Federal Government, by state governments or Indian tribes (where these control the resources); and also, in some instances, by foreign governments. The measure of damage is defined generally as including:

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

The intention is that regulations shall be produced within two years by the authorities explaining how these general statements will be translated into practice. The aim, according to the Conference Committee report, is that the definitions in the Act should be consistent with the Federal U.S. Court of Appeals' judgment in *State of Ohio v. Interior*,[7] which rejects the Interior Department's regulations for determining "use values" by reference to the market value of the damaged resource and instead requires the Department to take account of "all reliably calculated use values", including "non consumptive values" such as those of "option and existence". These latter values require the assessor to place a price on the loss to each individual citizen of damaged flora or fauna, by reference to his deprived right to future enjoyment of the injured resource.

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

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

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

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

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

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

Limitation

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

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

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)[9] of s. 311 of the Federal Water Pollution Control Act or the Intervention on the High Seas Act, which deals with Presidential powers to order removal.

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

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

> affect, or be construed or interpreted as pre-empting the authority of any State . . . from imposing any additional liability or requirements with respect to:-
> (A) the discharge of oil or other pollution by oil within such State; or
> (B) any removal activities in connection with such a discharge . . .

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

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

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*.

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

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

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

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

The Oil Spill Liability Trust Fund

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

The Fund is also to receive (and has been receiving since 1 January 1990) an annual levy of 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.[15] Section 1006 allows a responsible party to claim against the Fund for such removal costs and damage which he has paid either when he has a complete defence under s. 1003 or to the extent that such sums exceed his limits under s. 1004;
(v) payment of Federal administrative, operational, and personnel costs and expenses in connection with the Act.

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

14. The guarantor is the person who provides evidence of financial responsibility for a responsible party's liabilities under this Act. This is discussed in greater detail *infra*.
15. Under s. 1013.

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

Interest

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

Financial responsibility

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

Clubs in the International Group have already stated that it is not their intention to depart from their present expressed policy of only issuing certificates for oil pollution under international legislation, such as the Civil Liability Convention and the Federal Pollution Control Act. It must, therefore, be regarded as doubtful if they will provide certificates under this new Act and it remains to be seen how the system will evolve with other financial instruments. Meanwhile, the Act[17] 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.

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

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[18] reads as follows:

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

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

Chapter IV

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

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

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

17. S. 1016(h).
18. S. 3001.

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

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

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

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

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

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 spilt or $25,000 per day and, if the spill is due to gross negligence or wilful misconduct, $3,000 per barrel spilt with a minimum of $100,000.

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

Chapters V–IX

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

Conclusion

This then in broad outline is the legislation. It is an Act which is going to have profound effects on all tanker owners who decide to trade their tankers to the United States. It is bound to increase costs, not merely insurance premiums, which must rise to meet the additional exposure, but also in the provision of contingency plans. But, beyond that, in raising so clearly the spectre of unlimited exposure for shipowners, 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[1] takes into account the existence and opportunities offered by the Luxembourg banking and insurance sector and fully implements the core of the EEC Treaty,[2] including the right of establishment and the free movement of persons, services and capital.

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

1. Registration requirements

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

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1. Loi ayant pour object 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 rovisions apply to spills of oil of any kind or in any form with certain ery limited exceptions. It imposes strict liability, jointly and severlly, upon each responsible party, a term which is defined as an owner, perator or charterer by demise.

he Act expands the breadth of an owner's strict liability exposure, creases the monetary limits on liability, and makes it easier to npose 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.

hen 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

ace unlimited liability when one of those officers, whether inadver-
ently 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,
his provision may allow courts to "stretch" the facts to meet a showing
of gross negligence so as to impose unlimited liability. These provi-
ions, combined with the broadening of the scope of recoverable
amages, present tanker owners with a greater likelihood of incurring
iability beyond the Federal statutory limits and, in the event of a
najor spill in an environmentally sensitive area, in excess of the $500-
700 million in pollution liability insurance most currently carry.
lthough historically only two spills have resulted in liabilities exceed-
ng $100 million, the new law is likely to make historic reference
omewhat irrelevant.

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

Defenses. The Act provides responsible parties with very narrow
omplete defenses.

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

- 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.

owever, even if the responsible party is able to prove a defense, it
onetheless is obligated to make payment to claimants. It then be-
mes subrogated to their rights against such third party.

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

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

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

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

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

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

Recoverable damages will be:

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

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

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

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

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

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

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

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

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

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

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

Manning. For foreign flag tank vessels, the manning, training, qualification and watchkeeping standards of the country of a vessel's registry must be equivalent to U.S. law or international law acceptable to the U.S. If, after a period of evaluation, the Coast Guard determines the flag-country standards are not up to par, the Coast Guard shall refuse entry to vessels registered in that country unless the Coast Guard determines that the particular vessel is safe or entry is necessary for safety of the vessel or her crew. This provision will no doubt cause a re-evaluation of the use of certain flags of convenience which may not measure up to U.S. standards.

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

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

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

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

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

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

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

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

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

NON-TANKER OWNERS

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

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

OPERATORS

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

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

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

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

CHARTERERS

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

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

LENDERS/LESSORS/INVESTORS

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

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

An important concern for an 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.

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

STATE LAWS

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

INTERNATIONAL AGREEMENTS

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

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

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

CONCLUSION

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

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

A 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.

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)[1] 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),[2] 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).[3] Although the United States has not adopted either of the major international conventions regarding liability for oil pollution,[4] 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.[5]

II. Preexisting Law

A. Penalties for Oil Pollution

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

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

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(b)(4), *see generally* Discharge of Oil, 40 C.F.R. pt. 110 (1989). For hazardous substances other than oil, quantities which must be reported are specified in 40 C.F.R. § 117.3 (1989) and 40 C.F.R. pt. 302 (1989).

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

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

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

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

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

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

> (c) Fines for organizations.—Except as provided in subsection (e) of this section, an organization that has been found guilty of an offense may be fined not more than the greatest of—
>
> (1) the amount specified in the law setting forth the offense;
>
> (2) the applicable amount under subsection (d) of this section;
>
> (3) for a felony, not more than $500,000;
>
> (4) for a misdemeanor resulting in death, not more than $500,000;
>
> (5) for a Class A misdemeanor that does not result in death, not more than $200,000;
>
> (6) for a Class B or C misdemeanor that does not result in death, not more than $10,000; and
>
> (7) for an infraction, not more than $10,000.
>
> (d) Alternative fine based on gain or loss.—If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.
>
> (e) Special rule for lower fine specified in substantive provision.—If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense.

18 U.S.C. § 3571 (1988).

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

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

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

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

The Clean Water Act provided very limited defenses,[18] but its liability limits could be broken only where the government could show that the discharge "was the result of willful negligence or willful misconduct within the privity or knowledge of the owner."[19] In such a case, the responsible party was liable for the full removal costs.[20]

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

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

2. Third-Party Liability

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

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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—$125 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.

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

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

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

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

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

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

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

24. 33 U.S.C. § 1321(g).
25. *Id.*
26. *Id.*
27. United States v. Dixie Carriers, Inc., 627 F.2d 736, 742, 1982 AMC 409, 417 (5th Cir. 1980).
28. United States v. M/V Big Sam, 681 F.2d 432, 1983 AMC 2730 (5th Cir.), *reh'g. en banc denied*, 693 F.2d 451 (5th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).
29. United States v. M/V Big Sam, 693 F.2d 451, 456 (5th Cir. 1982) (Gee, J., dissenting from denial of rehearing en banc).
30. 42 U.S.C. §§ 9601-9675 (1988).
31. 42 U.S.C. § 9601(14)(F).
32. 42 U.S.C. § 9607(a). This section begins: "Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section . . . . "

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

D. *Activity-Based Federal Legislation*

In addition to the general federal pollution statutes covered thus

33. *Id.*
34. 42 U.S.C. § 9607(a)(4)(C).
35. 42 U.S.C. § 9607(h).
36. *Id.*
37. 42 U.S.C. § 9607(m).
38. 42 U.S.C. § 9607(b). The defenses are that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by: (1) act of God, (2) act of war, or (3) act or omission of a third party when the defendant can establish that he exercised due care and that he took precautions against foreseeable acts or omissions of any such third party.
39. 42 U.S.C. § 9607(c). This section limits liability as follows:
(1) Vessel carrying hazardous substance as cargo or residue—$300 per gross ton or $5,000,000, whichever is greater.
(2) Other vessels—$300 per gross ton or $500,000, whichever is greater.
(3) Incineration vessels or facilities—total of all response costs *plus* $50,000,000 limit for damages
Limitation can be broken where the release or threat thereof resulted from willful misconduct or willful negligence within the privity or knowledge of such owner or operator, or where the primary cause of a release was the result of breach of certain standards or regulations. § 9607(c)(2).
40. 42 U.S.C. § 9608(c). The insurer may invoke all defenses available to the owner or operator, and the defense that the incident was caused by the willful misconduct of the owner or operator. The insurer may not invoke other defenses that could be used in proceedings brought by the owner or operator against the insurer. Section 9608(d) limits the insurer's liability, which is, of course, limited to the amount of the policy.
41. 42 U.S.C. § 9609.

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

1. Outer Continental Shelf Lands Act Amendments of 1978

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

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

42. 43 U.S.C. §§ 1811-1824 (1988).

43. 43 U.S.C. §§ 1651-1655 (1988).

44. 33 U.S.C. §§ 1501-1524 (1988).

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

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

47. 43 U.S.C. § 1814(a).

48. 43 U.S.C. § 1814(c).

49. 43 U.S.C. § 1814(b). The liability limits were as follows:
Vessel—$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)[52] applies *inter alia* to vessels loaded with oil transported through the Trans-Alaska Pipeline destined for ports or terminal facilities under United States jurisdiction.[53] Like the other acts addressing water pollution, TAPAA imposed strict liability upon the owner and operator of any vessel subject to the Act, jointly and severally, with limited defenses.[54] TAPAA preempted inconsistent provisions in the Clean Water Act[55] and provided a maximum limit of exposure in all cases.[56] However, from the language of the statute, it appears that the extent of liability imposed by the Clean Water Act was in addition to the limit of exposure imposed by TAPAA.[57] Also, vessel interests could be pursued for amounts above the statutory scheme. Recently, the United States District Court for the District of Alaska held that TAPAA completely repeals the Limitation Act, not only with respect to the vessel owners' liability under TAPAA, but for claims in excess of the TAPAA limit asserted under applicable state law or general maritime law.[58] TAPAA does not allow a direct action remedy against insurers.

3. Deepwater Port Act

The Deepwater Port Act,[59] applies to oil handling facilities off the

52. 43 U.S.C. §§ 1651-1655 (1988).

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

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

55. Alyeska Pipeline Service Co. v. United States, 649 F.2d 831 (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[60] and was structured similarly to the other activity-based pollution acts.[61]

III. STATE LEGISLATION

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

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

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

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

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

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

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

66. *See, e.g.*, ALA. CODE §§ 22-22-1 to -14 (1990); ALASKA STAT. §§ 46.04, 46.08 (1987); CAL. FISH & GAME CODE §§ 2014, 5655, 12015 (Deering 1989 & Supp. 1990); CAL. GOV'T CODE §§ 8574.1-.5 (Deering 1982 & Supp. 1990); CAL. HARB. & NAV. CODE §§ 133, 135, 151-153, 293, 294 (Deering 1978 & Supp. 1990); CAL. PUB. RES. CODE §§ 30232, 30261, 30707 (Deering 1978 & Supp. 1990); CAL. WATER CODE §§ 13440-13443 (Deering 1977 & Supp. 1990); CONN. GEN. STAT. §§ 22a-448 to -459 (1989); DEL. CODE ANN. tit. 7, §§ 6201-6216 (Supp. 1988); FLA. STAT. ANN. chs. 206, 376, 377 (West 1988 & Supp. 1990); GA. CODE ANN. §§ 12-5-20 to -53 (1988 & Supp. 1990); ME. REV. STAT. ANN. tit. 38 §§ 541-560 (1989 & Supp. 1989); MD. ENV. CODE ANN. §§ 4-401 to -502 (1987 & Supp. 1990); MASS. ANN. LAWS ch. 21E, §§ 1-18 (Law. Co-op. 1988 & Supp. 1990); MASS. ANN. LAWS ch. 130, §§ 23, 24; ch. 131, § 42 (Law. Co-op. 1989 & Supp. 1990); N.H. REV. STAT. ANN. §§ 146-A:1-:14 (1964 & Supp. 1989); N.J. STAT. ANN. §§ 58:10-23.11 to .11(Z), 58:10A-1 to -20 (West 1982 & Supp. 1990); N.Y. ENVTL. CONSERV. LAW §§ 17-1743, 71-1941, (McKinney 1984 & Supp. 1990); N.Y. NAV. LAW §§ 170-197 (McKinney 1989 & Supp. 1990); N.C. GEN. STAT. §§ 143-215.75 to .94 (1987 & Supp. 1989); OR. REV. STAT. ch. 465, §§ 468.780-.833 (1989); S.C. CODE ANN. §§ 48-43-510 to -620 (Law. Co-op. 1987); TEX. WATER CODE ANN. §§ 26.261-.268 (Vernon 1988 & Supp. 1990); VA. CODE ANN. §§ 62.1-44.34:14 to :23 (Supp. 1990); WASH. REV. CODE ANN. §§ 88.40.020, 90.48.142, 335-336, 338, 390, 400 (1962 & Supp. 1990). The five states surrounding the Great Lakes also have pollution statutes. *See, e.g.*, ILL. ANN. STAT. ch. 85, para. 1701-1706 (Smith-Hurd 1987); IND. CODE ANN. §§ 13-1-3-1 to -4-4 (1987 & Supp. 1990); MICH. STAT. ANN. §§ 13.32(1)-.32(11) (Callaghan 1987 & Supp. 1990); MINN. STAT. ANN. ch. 115 (West 1987 & Supp. 1990); OHIO REV. CODE ANN. ch. 6111 (Baldwin 1982 & Supp. 1989). Many of these states can be expected to change their laws in response to the Oil Pollution Act.

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

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

IV. THE OIL POLLUTION ACT OF 1990

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

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[69] of the United States in the event of a discharge of oil.

A. *Damages Recoverable*

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

In addition to removal costs, the responsible party shall be liable for damages for injury to natural resources,[75] injury to real or per-

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

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

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

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

72. 33 U.S.C. §§ 1251-1387 (1988).

73. 33 U.S.C. §§ 1471-1487 (1988).

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

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

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

1. Natural Resources

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

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

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

76. Oil Pollution Act § 1002(b)(2).

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

78. Oil Pollution Act § 1006(d)(1).

79. Oil Pollution Act § 1006(e).

80. 42 U.S.C. § 9607(f).

81. Oil Pollution Act § 1006(e)(2).

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

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

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

2. New Claimants

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

1. Shipping and/or other shipping type interests unable to traverse the area [of the spill]. This includes claims with respect to vessels actually in the area at the time or rerouted around the area at the time.
2. Marina and boat rental operators.
3. Wholesale and retail seafood enterprises not actually engaged in fishing, shrimping, crabbing or oystering in the mandated area.
4. Seafood restaurants.
5. Tackle and bait shops.
6. Fishermen, oystermen, shrimpers and crabbers who engaged in these activities for recreational purposes only.[88]

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

3. Defenses to Liability

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

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

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

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

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

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

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

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

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

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

Id.

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

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

Id.

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

d. Any combination of paragraphs a, b, or c.[92]

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

B. Limits of Liability

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

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

92. Oil Pollution Act § 1003(a).

93. Oil Pollution Act § 1003(c).

94. Oil Pollution Act § 1003(b).

95. The new limits contained in section 1004 of the Oil Pollution Act are as follows:
(1) Tank vessel over 3,000 tons—$1,200 per gross ton or $10,000,000, whichever is greater.
(2) Tank vessel of 3,000 gross tons or less—$1,200 per gross ton or $2,000,000, whichever is greater.
(3) Other vessels—$600 per gross ton or $500,000, whichever is greater.
(4) Offshore facility—all removal costs *plus* $75,000,000.
(5) Onshore facility—$350,000,000. (The liability limits of certain onshore units may be reduced to a figure of not less than $8,000,000.)
(6) Deepwater Ports—$350,000,000. (The liability limits of deepwater ports may be reduced, after studies have been undertaken by the government, to an amount not less than $50,000,000.)

96. 33 U.S.C. § 1321(f).

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

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

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

The Oil Pollution Act appears to remove the anomaly which

98. Oil Pollution Act § 1004(b)(1).

99. Oil Pollution Act § 1004(b)(2).

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

101. Oil Pollution Act § 1004(c)(3).

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

103. Oil Pollution Act § 1004(c)(1).

104. Oil Pollution Act § 1004(c)(2).