An Explosion of Litigation: BP and Deepwater Horizon

By **John Clay**

As anyone who follows the news is well aware, BP Plc's Macondo oil well began spewing oil from the bottom of the Gulf of Mexico continuously from the night of the April 20, 2010, blowout—when an offshore drilling rig was destroyed and a well pipe ruptured—through June, with indications only in July that the newer containment effort may succeed in stemming the flow of oil into the Gulf.[1] As indications of growing ecological damage began to accrue, BP chief executive officer Anthony Hayward was heavily criticized for offering an assurance during the early days of the spill that the spill was comparatively small: "The Gulf of Mexico is a very big ocean. The amount of volume of oil and dispersant we are putting into it is tiny in relation to the total water volume."[2] While Hayward's words semed unjustifiably naive during May and June, more recent reports indicate that there in fact may be as little as 26 percent of oil released to date that remains present in the water or onshore in a form that can cause problems.[3] If the ecological repercussions of the spill are indeed lessening or have halted, however, there is no end as yet to the growing number of lawsuits being filed to recover for damages arising from primary and secondary consequences of the spill.

Allegations of Fault after the Blowout

Although multiple companies may have been involved in various aspects of the well's drilling and completion operations—including more remote subcontractors who may have designed or manufactured equipment and materials used in connection with the well—the press accounts of the accident and its aftermath have tended to focus on certain principal players.

BP[4] of course, is the majority owner and operator of the Macondo oil well. BP's co-working interest owners, Anadarko Petroleum Corp. and Mitsui Oil Exploration, respectively own a 25 percent and 10 percent working interest in the well, but it appears that their liability (if any) would derive purely from sharing a working interest, while BP faces direct allegations of gross negligence for its operational decisions and its supervision of the drilling rig and the subcontractors.[5]

Save the Walruses

Since the accident, BP has been faulted for not having an adequate plan to address a catastrophic oil spill. Critics have claimed that BP's plan was inadequately pasted together from other compliance efforts, citing as evidence the plan's discussion of the need to protect walruses, sea otters, and sea lions from the results of a spill—animals that may be found along the Alaskan coastline but are not indigenous to the Gulf of Mexico.[6] BP's plan—which the Minerals Management Service approved in July 2009—also provides a defunct Internet hyperlink to a marine spill containment service that now links to an unrelated Japanese language website.[7] On a more substantive level, BP has been faulted for acknowledging the risk of a spill in the plan without providing adequate solutions for the containment and removal of a significant dispersion of oil.[8]

Transocean, Ltd., which owned and operated the Deepwater Horizon drilling rig and employed its crew, was responsible for drilling and plugging the well. It has been faulted for how it operated and equipped the drilling rig and, in particular, for the operations conducted to complete the oil well in the days leading to the fateful explosion.[9] Transocean has also been faulted for its decision to equip the Deepwater Horizon with only one blowout preventer—a device designed by Cameron Industries to shear and seal the well pipe in the event of a blowout—while Cameron has been accused of negligence (and faces claims of strict liability) for the blowout protector's design and manufacturing.[10]

Further, both BP and subcontractor Halliburton Company have been criticized for the cementing process used to seal the well's casing, which might have allowed the gas to accumulate in the well.[11] Halliburton also has been accused of negligently designing the well casing, although a congressional report now alleges that BP is at fault for overriding Halliburton's recommendations and choosing a well casing design that did not meet Halliburton's preferred specifications.[12]

These are just some of the allegations—pointing in myriad directions—that make the Macondo oil spill sound like an exaggerated hypothetical presented in a first-year law school exam on civil torts. As commentators (and the parties) heatedly debate who is really at fault, however, the Gulf of Mexico and adjoining coastline began to suffer immediate economic consequences from the cessation of offshore drilling and a ban on fishing in certain areas, a crisis that was swiftly followed by a series of lawsuits that continues to grow on a daily basis.

A Storm of Litigation Forming in the Gulf

In a memorable scene from the movie *The Perfect Storm*, a weather commentator expressed a sense of awe (mixed with dreadful foreboding) as he described the "perfect" combination of oceanic weather conditions that were forming the storm of the century: "You could be a meteorologist all your life . . . and never see something like this. It would be a disaster of epic proportions. It would be . . . the perfect storm."

That observation could just as well describe the formation of "perfect" conditions for litigation in the Gulf Coast region following the Macondo oil spill. The BP/Deepwater Horizon disaster may

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lead to years of litigation, both for immediate damage from the spill (if contamination should continue) and for growing economic consequences that continue to flow from the disruption of offshore drilling operations in the Gulf. When this article was first prepared, there were already nearly 200 lawsuits on file that arose from or are related to the accident on Transocean's rig and the resulting spill.[13] That number has continued to grow as more recent reports of the spill indicate a potential cessation to ongoing contamination.

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Claims for Property Damage and Economic Loss

Many of the initial complaints against BP, Transocean, Halliburton, and Cameron were asserted by residents and small business owners along the Gulf Coast for alleged property damage and economic loss arising from the oil spill.[14] The typical claims asserted for such loss include negligence, various strict liability theories, claims arising under state regulatory statutes, such as the Louisiana Oil Spill Prevention and Response Act,[15] and claims for recovery under the Oil Pollution Act of 1990 (OPA).[16]

Claims by Injured Workers

Some of the families of the 11 Transocean workers who were killed in the Macondo oil well blowout have filed wrongful death actions.[17] On May 13, 2010, Transocean filed an admiralty complaint in the United States District Court for the Southern District of Texas, seeking to enjoin and consolidate all lawsuits filed against it while limiting any liability for the spill under the Limitation of Liability Act of 1851 to $26,764,083, the sum of the *Deepwater Horizon*'s unpaid rental bills.[18] In response, the court issued an injunctive order on June 14, 2010, that directed Transocean to file a stipulation with security for $26,764,083.

While the court's order specifically exempts from its scope most OPA claims (apart from actions by a "responsible party" under the OPA) and a number of federal environmental claims, the order enjoins personal injury and wrongful death claimants from pursuing relief in other venues. As a result, claimants asserting causes of action against Transocean for personal injury or wrongful death must now file their complaints against Transocean in the Southern District of Texas before the federal district court that issued the order, with a truncated limitations deadline of November 15, 2010.

Following an outcry of criticism regarding Transocean's tactic, Congress has begun to discuss the potential repeal or amendment of the Limited Liability Act and its comparatively small liability cap.[19] At this point, it remains to be seen whether Transocean will succeed in limiting its liability for personal injury and wrongful death claims to the $26,764,083 cap. In the meantime, as the oil spill containment and cleanup efforts continue, the growth in the number of potential claimants affected by the court's order will continue as well.

Derivative and Class Action Shareholder Complaints

Although the initial lawsuits arising from the oil spill typically involved claimants who sustained loss directly or indirectly from the effects of oil contamination, some of the more recent complaints involve securities litigation. On May 7, 2010, for example, a BP Plc shareholder filed a derivative complaint on BP Plc's behalf against certain of its officers and directors for breach of fiduciary duty and waste of corporate assets.[20] Among the allegations, the complaint asserts that the BP defendants failed to implement systemic company-wide safety measures after the 2002 Prudhoe Bay oilfield explosion and the 2005 BP refinery explosion in Texas City, Texas. The complaint also seeks contribution and indemnity from the BP-related defendants Transocean, Cameron, and Halliburton—and from their respective insurers—for claims asserted against BP, with a constructive trust created in BP's benefit for any proceeds that Transocean, Cameron, or Halliburton may receive on claims submitted to their insurers.

In a more recent direct shareholder class action, two BP investors filed a class action complaint on June 8, 2010, against certain BP entities, officers, and directors.[21] The class complaint was filed on behalf of investors who purchased BP shares between February 27, 2008, and May 12, 2010, for claims arising under sections 10(b) and 20(a) of the Securities Exchange Act of 1934. Among the allegations in the complaint, which provides one of the most factually detailed recitations of BP's public statements on safety in the recent spate of lawsuits now on file, the shareholders allege that BP and its officers and directors are responsible for a series of materially false statements made to the public regarding BP's safety compliance efforts, particularly assurances the company made about subsequent compliance measures following several industrial accidents for which BP was investigated, fined, or both.

The Oilfield Pollution Act

Many of the initial claims sought recovery under the OPA. The OPA contains some unique features that will shape much of the oil spill litigation that is being filed. Congress enacted the OPA in the wake of the 1989 Exxon Valdez accident and several other notable oil spills, creating a strict liability cause of action

against the owner or operator of a vessel, offshore facility, or onshore facility (the responsible party) for cleanup costs and damages arising from the discharge of oil from that vessel or facility into navigable waters or the adjoining shoreline.[22]

In particular, section 2702(b)(2)(C) of the OPA provides for recovery of damages "for subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources." More broadly, section 2702(b)(2)(E) authorizes the recovery of 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."

While some commentators might cite the OPA's $75 million damages cap for a responsible party as a disadvantage for potential claimants, section 2704(c)(1) of the OPA removes this cap for a responsible party that proximately caused the resulting harm through gross negligence, willful misconduct, or the violation of an applicable federal regulation. Moreover, section 2718 of the OPA expressly provides that the act does not preempt state law regulations or liability for the actual or threatened discharge of oil. In other words, a party can assert a claim under the OPA without waiving the right to recover for state law causes of action.

What may be a more important factor in considering whether to assert a claim under the OPA is section 2717's provision for exclusive jurisdiction in federal court (apart from a limited category of claims for "removal costs or damages" in state court). As explained below, whether an exclusive federal venue is desirable or a drawback may turn on one's attitude toward the consolidation of federal lawsuits into one district court venue for multidistrict litigation (MDL).

Location, Location, Location

Like Transocean, BP also has sought to consolidate litigation in the Southern District of Texas. On May 7, 2010, BP filed a motion requesting the creation of an MDL forum for all of the federal oil spill litigation, with the Southern District of Texas as the proposed forum.[23] Some plaintiffs' counsel have voiced objections, perhaps based in part on a perceived contrast in tone in the responses of some officials in Texas and their counterparts in Louisiana to the oil spill and BP in particular:

- Texas Governor Rick Perry: "From time to time there are going to be things that occur that are acts of God that cannot be prevented."[24]
- Texas Representative Joe Barton (addressing BP Plc's chief executive): "I think it is a tragedy of the first proportion that a private corporation can be subjected to what I would characterize as a shakedown, in this case, a $20 billion shakedown. . . . So I apologize."[25]
- Louisiana Governor Bobbie Jindal: "[T]he losses for many have already been significant and we will absolutely ensure that BP is held responsible for every loss associated with this spill."[26]
- Louisiana Representative Joseph Cao (addressing BP America's chief executive): "During the samurai days, we'd just give you a knife and ask you to commit hari-kari. . . . My constituents are still debating on what they want me to ask you to do."[27]

Although these comments reflect dramatically different perspectives, they were made by members of the same political party from contiguous Gulf Coast states that each depend on the exploration and development of offshore oil. The difference in perspective, if any, may stem more from the fact that Louisiana has suffered early damage from oil contamination while Texas has not yet suffered comparable pollution.

This perspective could change if Texas begins to experience a greater degree of damage to its ecology and economy with the passage of time (for example, if the path of a hurricane or tropical storm over the summer or fall should drive a significant amount of oil from the Gulf toward the Texas coastline), or if a sustained slowdown

Civil Liability under the RICO Act

In what is perhaps the most creative complaint filed to date in connection with the oil spill, a condominium owner filed a civil class action complaint on June 12, 2010, against various BP entities and BP's chief executive, Anthony Hayward, under the Racketeer Influenced and Corrupt Organizations (RICO) Act.[1] The complaint names the BP entities and Hayward as RICO defendants and, in a novel twist, alleges that the Minerals Management Service (MMS), a federal regulatory agency, is the requisite racketeering "enterprise" within the meaning of section 1961(4) of the RICO Act.[2] Among the allegations, the complaint asserts that the RICO defendants committed wire and mail fraud in procuring permits for offshore drilling and exploration, aided by and acting in collusion with certain unnamed persons within the MMS who ignored adverse findings related to BP. Asserted on behalf of condominium owners in the Florida panhandle, the complaint seeks treble damages under the RICO Act and its Florida state law equivalent.

Endnotes

1. *See* Rinke v. BP, P.L.C., Case No. 3:10-cv-00206-RV-EMT (N.D. Fla.).
2. *See* 18 U.S.C. § 1961(4).

in offshore operations due to the spill should result in significant economic repercussions for Texas-based businesses. In the meantime, the Judicial Panel for Multidistrict Litigation held a hearing on the motion in July for which a ruling will soon be issued.[28]

Drilling Rigs and Force Majeure Clauses

As a collateral effect of the oil spill (and the related offshore drilling moratorium), a growing number of companies have attempted to invoke force majeure clauses to avoid contractual obligations for offshore operations in the Gulf of Mexico. On June 1, 2010, for example, Cobalt International Energy, Inc., declared force majeure in connection with an offshore drilling rig owned by Diamond Offshore Drilling, Inc.[29] Anadarko Petroleum Corp. subsequently attempted to invoke a force majeure clause in connection with offshore rigs operated by Transocean, Transocean rival Noble Corp., and Diamond Offshore Drilling, Inc. Anadarko has been joined by companies such as Apache Corp., Chevron Corporation, and Statoil A/S, each of which has invoked force majeure clauses in an attempt to avoid contractual responsibilities for offshore operations in the Gulf of Mexico.[30]

Although it is hard to predict the full extent of litigation that will arise from the Macondo oil spill, these early contractual disputes indicate that a new spate of lawsuits may arise from the secondary and tertiary economic consequences that are beginning to affect all offshore drilling operations in the Gulf of Mexico.

Internal Dissension among the Macondo Oil Well's Co-Owners

Further complicating matters, BP's co-working interest owners, Anadarko Petroleum Corp. and Mitsui Oil Exploration, face a growing chorus of third-party demands to contribute to the oil spill fund that BP is setting up. Demanding that the deep pockets be emptied, U.S. Representative Edward Markey of Massachusetts announced on June 18, 2010, that Anadarko and Mitsui are jointly responsible with BP for the oil spill and should "contribut[e] to any fund that is constructed for any part of the reconstruction."[31]

Bowing to the growing political pressure, Anadarko's chief executive officer Jim Hackett publicly blamed BP for the first time for the oil spill, asserting that "BP's behavior and actions likely represent gross negligence or willful misconduct and thus affect the obligations of the parties under the operating agreement."[32] These loaded words were widely understood by commentators as an invocation of language in the parties' joint operating agreement that would shift responsibility for the oil spill back to BP.

In response, BP issued a press release denying Anadarko's characterization of its conduct and stating, "Other parties besides BP may be responsible for costs and liabilities arising from the oil spill, and we expect those parties to live up to their obligations."[33] BP's press release also noted that each of the co-working interest owners of the Macondo oil well agreed in the joint operating agreement to share the costs of operations, including cleanup costs for a spill, and agreed in documents filed with the federal government that they would assume joint and several liability for any oil spill and the resulting cleanup costs or damages in accordance with the OPA.

To provide a perspective on Anadarko's position, the company's market cap is estimated to be $20 billion, with cash reserves of $3.5 billion and a credit line of $1.3 billion.[34] Given that BP has already agreed to pay $20 billion before the costs of the oil spill are fully known, it is unlikely that Anadarko would remain solvent while bearing a pro rata portion of a cleanup fund. Although co-owner Mitsui had not publicly disavowed an obligation as a co-owner to contribute to the oil spill fund (at least as of the time this article was written), it is likely that Mitsui would contest joint liability for the same reasons and seek full indemnity from BP.

Pursuant to the parties' joint operating agreement, any dispute over the internal apportionment of liability for a fund for oil spill cleanup costs and damages will be resolved through a private arbitration.[35] Regardless of how the parties internally apportion responsibility, however, the demands from third parties for contribution to the fund will not go away. On June 24, 2010, Louisiana's state treasurer, John Neely Kennedy, reiterated Congressman Markey's demand and stated that Anadarko and Mitsui should contribute to an oil spill escrow fund.[36]

Kennedy's position is understandable given the concern he earlier voiced that BP's accessible liquid assets will be insufficient to cover the costs of an oil spill fund.[37] Some commentators warn that BP might file for bankruptcy even if its current assets are sufficient to meet current estimates of liability, based on the company's perception (whether accurate or not) that it would otherwise face an ever-expanding scope of liability with no end to the growth in litigation.[38] Other analysts argue that BP's assets and cash revenue from its ongoing interests are more than sufficient to cover the burgeoning costs and liabilities arising from the oil spill, making bankruptcy an unpalatable alternative,[39] an opinion that seems more credible now that the release of new oil may soon be at an end.

The management and investors of Anadarko and Mitsui, who may seek contribution and indemnity from BP through arbitration, doubtlessly hope the latter assessment is correct.

Who Needs a Lawyer When You're Dealing with Friends?

While live webcam coverage has offered a continuous video feed of the ruptured

well pipe since the early days of the spill, news reports during late May and June began to broadcast increasingly disturbing images of oil-drenched wildlife and beaches that resembled asphalt pavement because of the thick layers of black tar washing ashore. Just as public outrage over the spill seemed to reach a peak in mid-June, BP announced that it would set aside a $20 billion fund for damages and costs associated with the spill.[40]

Since then, Kenneth Feinberg, the fund's administrator, has been charged with the task of addressing and settling claims filed against the fund by individuals and businesses, while BP will address demands from the federal, state, and local governments.[41] Feinberg has since asserted that individual claimants will be paid more quickly by making a direct claim for payment from the fund than they would by resorting to litigation in court.[42] In recent statements, Feinberg has suggested that claimants can avoid legal fees entirely by asserting direct claims for payment without relying on counsel, and another partner administering the fund has warned that it will not pay for attorney fees or punitive damages.

According to the fund's administrator, claimants who accept an offer of payment must agree to waive the right to sue BP, although they can still sue other entities in connection with the spill.[43] Whether the fund's existence will serve to stem the flood of litigation by individuals and small businesses may depend on how fairly the claims process is administered. If claimants are quickly paid a reasonable amount without owing a contingent fee to counsel, Feinberg's assessment could be correct. If claimants are offered unrealistically low settlements without the advice of counsel, it could serve to fuel a sense of distrust regarding the fund administration process that would increase the incentive to resort to court litigation. Regardless, the fund's handling of individual and small business claims should not affect the voluminous complex commercial litigation arising from the collateral consequences of the oil spill. ■

John Clay is an associate with Ajamie LLP, a litigation boutique based in Houston, Texas. He may be reached at jclay@ajamie.com.

Editor's Note: Since the submission of this article, the author's law firm joined two other firms in filing a class action complaint under the Employee Retirement Income Security Act against BP Corporation North America, its pension plan, and certain of its officers and directors, Humphries v. BP Corp. North America, *No. 1:10-cv-04264 (N.D. Ill., filed July 9, 2010).*

Endnotes

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15. La. Rev. Stat. § 30:2454.

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