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Stretching the Boom? Limiting Liability for Offshore Drilling Disasters

Richard Faulk
OIL SPILL

Transocean wants to limit oil leak liability to $26.8 million

Transocean Ltd., the owner of the drilling rig that exploded and sank April 22 in the Gulf of Mexico, leading to a massive ongoing spill, is asking a federal court in Houston to limit its liability in related lawsuits to $26.8 million.

CONTINUED ON PAGE 7

GUEST COLUMN

Stretching the boom?

Limiting liability for offshore disasters

Richard Faulk of Gardere Wynne Sewell discusses two federal statutes that are being used in lawsuits over the ongoing oil spill in the Gulf of Mexico and whether the owner of the rig may limit its liability since one of the laws was designed to promote settlements and avoid litigation.

CONTINUED ON PAGE 3
TABLE OF CONTENTS

Oil Spill: In re Triton Asset Leasing
Transocean wants to limit oil leak liability to $26.8 million (S.D. Tex.) ............................................................... 1

Guest Column: By Richard O. Faulk, Esq.
Stretching the boom? Limiting liability for offshore disasters ........................................................................ 3

Oil Spill (MDL): In re Oil Spill by the Oil Rig Deepwater Horizon
Consolidate BP oil spills suits, lawyer tells panel (J.P.M.L.) ............................................................................ 8

Oil Spill: Lavigne v. British Petrol. PLC
Vacation home owners are latest to sue BP over Gulf spill (S.D. Ala.) ............................................................ 9

Biosolids: City of L.A. v. Kern County
Calif. county asks high court not to take biosolids case (U.S.) ............................................................. 10

Endangered Species Act: Hui Ho’omalu i Ka ‘Āina v. Princeville Hotel
Hawaii resort faces suit over destruction of rare seabirds (D. Haw.) .......................................................... 11

MTBE: State v. N. Atl. Ref.
Canadian refinery must defend MTBE suit in N.H. (N.H.) ....................................................................... 12

Enforcement: People v. Wal-Mart Stores Inc.
Wal-Mart to pay $27 million for waste violations (Cal. Super. Ct.) ............................................................ 13

Legislation
While oil spills, senators push to raise damages cap ...................................................................................... 14

California Class-Action Study
Calif. study shows increase in class-action suits ................................................................................................. 15

News in Brief .................................................................................................................................................... 16

Case and Document Index .................................................................................................................................. 17

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Offshore drilling is a tremendously complicated and potentially lucrative process. Unfortunately, it is also dangerous. Harvesters of fossil fuels face massive risks, not only to their lives and properties, but also to our environment and the livelihoods of all those who depend upon it.

On balance, our “modern” sense of justice might insist that those who realize wealth should bear the risks that their exploration and production poses to others. But when a product, like petroleum, is inextricably woven into our national fabric, legislators sometimes reach surprising compromises.

So, it seems, the owner of the Deepwater Horizon oil rig will argue in a Texas court as it seeks to limit its liability for one of the 21st century’s greatest environmental catastrophes. Transocean Ltd. has filed a lawsuit relying on the Shipowner’s Limitation of Liability Act of 1851, an antiquated federal law that it hopes may limit its potential liability for personal injuries and deaths associated with the disaster.

Laypersons may have reacted with alarm, anger and disbelief at Transocean’s suit, but from a lawyer’s perspective, the initiative deserves some study. Such studies even suggest solutions under other laws, such as the Oil Pollution Act, that may dispel the thick “fog of litigation” that threatens to engulf the Deepwater Horizon incident.

THE LIMITATION ACT
The Shipowner’s Limitation of Liability Act was enacted to ensure that U.S. ship owners were not adversely affected competitively by European initiatives that limited liability for their vessels. The law generally confines liability for damages, including personal injury and death, to the value of a vessel owner’s interest in the vessel at the voyage’s completion. It has been applied in many situations, perhaps most notably by the U.S. Supreme Court to limit the liabilities associated with the sinking of the Titanic.

Presently, unless the owner’s acts or omissions were a causal factor in the loss, the Limitation Act limits risks to no more than $420 for each ton of the vessel. If, however, the damaged vessel is practically useless or a total loss, the value can be minimal or even zero.

Lest anyone doubt that the Deepwater Horizon was a “vessel” within the meaning of the statute, semi-submersible rigs are fully mobile. Although they can be towed and anchored, they can also be maneuvered by using their own propulsion equipment.

Consistent with the Limitation Act, Transocean’s recent filing expressly and broadly denies any responsibility for the incident. The sweeping scope of the company’s denial is probably required because the type of participatory culpability necessary to avoid the limits has not been precisely defined. Although the Limitation Act has been criticized harshly, it has remained largely intact since its enactment, perhaps because of its location at the fringes of esoteric maritime law.

Despite its persistent vitality in most contexts, the act has not fared well regarding pollution damages associated with oil spills. In the Exxon Valdez incident, for example, the 9th U.S. Circuit Court of Appeals quickly held that the law was implicitly repealed by the Trans-Alaska Pipeline Authorization Act. Similarly, the federal Oil Pollution Act expressly preempts the Limitation Act as it applies to pollution liability in certain situations, perhaps most notably by the Trans-Alaska Pipeline Authorization Act. Similarly, the federal Oil Pollution Act expressly preempts the Limitation Act as it applies to pollution liability in certain situations, perhaps most notably by the trans-Alaska Pipeline Authorization Act. This is only a partial preemption, however. Claims for injuries, deaths and commercial losses unrelated to oil pollution resulting from an incident remain subject to the Limitation Act. In a catastrophic situation, such as the Deepwater Horizon disaster, a vast number of claims can still be collected, limited and processed under the Limitation Act.

The Oil Pollution Act may dispel the thick “fog of litigation” that threatens to engulf the Deepwater Horizon incident.

THE OIL POLLUTION ACT
The OPA itself limits the liability of persons responsible for oil spills, and it does so in a format similar to the Limitation Act—except that the limits are higher. Originally, the limits of liability under the OPA for tank vessels was $1,200 per gross ton or if larger than 3,000 gross tons, $75 million. Other vessels were liable for $600 per ton or less, the outside figure was $2 million. Other vessels were liable for $600 per ton or $500,000, whichever was greater. For vessels of 3,000 gross tons or less, the outside figure was $2 million. Other vessels were liable for $600 per ton or $500,000, whichever was greater. Offshore facilities and deepwater ports are liable for removal costs plus $350 million, and offshore facilities are liable for removal costs plus $75 million.

The OPA sets forth a number of circumstances under which the liability limits do not apply. They include cases of gross negligence,
willful misconduct, or violations of federal operating and safety standards under the OPA. Limits will also fail if incidents are not reported.14

Even greater opportunities to expand liability beyond the “caps,” however, were reserved to the states. Before the OPA was enacted, the federal Constitution’s “supremacy clause” displaced state laws when their requirements conflicted with the Limitation Act. As a result, ship owners sued under state law could seek liability limitations under the Limitation Act — even if state law provided for a larger or different form of recovery.

The OPA ended that era, however, by explicitly precluding persons responsible for oil spills from using the Limitation Act to restrict their pollution liabilities. Moreover, the OPA further allows states “to impose additional liability or additional requirements or to impose, or to determine the amount of, any fine or penalty (whether civil or criminal in nature) for any violation of law.”15 Accordingly, states may enact more severe and expansive laws regarding oil spills without the threat of federal preemption.

Many states, including jurisdictions on the Gulf Coast, have passed their own oil spill laws. For example, Louisiana’s Oil Spill Prevention and Response Act is designed to complement federal response efforts and also adopts certain liability limits.16 Significantly, however, Louisiana environmental authorities maintain that the liability imposed under the state law “may be levied in addition to further liabilities imposed by OPA or any other appropriate regulatory auspices.”17

Although space does not permit an exhaustive study of the liability limits — or lack thereof — under all relevant state laws, it suffices to note that responsible parties face risks associated with a veritable kaleidoscope of federal and state laws. Any attempt to limit those risks is unlikely to be uniformly successful unless the full range and domicile of the interested and injured parties and jurisdictions are considered and accommodated.

LIMITATION OF LIABILITY ACTIONS

The liability limits of these various laws can obviously be asserted as affirmative defenses against lawsuits filed by injured parties or political entities. But it can be argued that the Limitation Act and perhaps other laws provide vessel owners with other interesting opportunities.

The Limitation Act permits vessel owners to file an action within six months of receiving written notice of a claim — no prior lawsuit is required. The owner must file a “petition for limitation” in federal district court and must transfer its remaining interest in the vessel to a trustee appointed by the court. Alternatively, the owner may deposit cash or provide a bond equal to the value of its interest. If the value of a vessel that is “seagoing” proves inadequate to compensate all claimants, the deposited fund is increased to a sufficient amount, to the $420-per-ton limit set by the Limitation Act.18

The procedural rules governing Limitation Act proceedings give owners wide latitude to select their forums. Owners who act quickly can file limitation actions before any suits are filed against them elsewhere. If no other actions have been filed at the time the limitation action is commenced, the limitation claim must be commenced where the vessel is located, but if the vessel is not within any district (for example, lost at sea) and no suit has been commenced, the limitation action may be filed in any district.19

The right to sue first in a forum solely within their discretion gives owners a significant advantage. Although transfers for “convenience of parties and witnesses” are possible,20 courts may consider the owner’s choice of forum as a controlling factor. Indeed, regarding the Deepwater Horizon limitation action, Transocean said “[o]ne of the primary goals of this filing is to consolidate in a single court many of the lawsuits that have been filed ... to initiate an orderly process for these lawsuits and claims before a single, impartial federal judge.”21

Unlike the Limitation Act, the OPA does not explicitly permit responsible parties to file limitation-of-liability actions — but neither does it expressly forbid them. Certainly, the procedural rules that govern limitation-of-liability actions already exist under Supplemental Rule F of the Federal Rules of Civil Procedure.22

Since the procedural vehicle is therefore available, the only remaining issue is whether Congress intended to preclude limitation-of-liability actions under the OPA. This question is neither abstract nor particularly esoteric. It has been addressed in two appellate cases, which each concluded that such a remedy is not available under the OPA.23 The cases refused to allow limitation actions under the OPA per Rule F for a number of reasons, predominantly because OPA claims do not involve a “limited fund” against which the claimants can proceed24 and also because the rule’s venue and abbreviated claims deadlines conflicted with OPA.25

Given the OPA’s provisions that save all non-conflicting admiralty and maritime laws and remedies, it seems that the courts’ concerns might have been satisfied with a more flexible construction of Rule F, instead of prohibiting its use entirely. Indeed, it seems inevitable that the availability of this remedy will be tested again, either in the Deepwater Horizon litigation or in some future oil spill situation.

There are reasons to anticipate this attempt. Most importantly, the 5th U.S. Circuit Court of Appeals, one of the courts likely to review federal cases from the Deepwater Horizon controversy, has not ruled on the issue. Moreover, there are arguments that favor allowing limitation-of-liability actions under Rule F to redress OPA claims.

Congressional intent regarding the OPA is not obscure. The statute was enacted to adequately compensate the victims of oil spills by minimizing the need for litigation, to provide expeditious and effective cleanup, and to prevent future oil spills. Prior law, such as the Limitation Act, precluded effective recoveries because the amounts allowed were inadequate to cover the removal costs and victim compensation in oil spill scenarios.

The OPA greatly expanded the types of damages and allowable claims, but also left

The Limitation Act was enacted to ensure that U.S. ship owners were not adversely affected competitively by European initiatives that limited liability for their vessels.
open the potential for unlimited liability for both state and federal governments.

As an apparent compromise with parties potentially facing catastrophic liability, the OPA allows certain parties to limit or avoid liability altogether. To fill the funding gap created by this compromise, and to ensure that the objectives of its legislation could still be realized, Congress increased the liability limits far beyond those set by the Limitation Act and then established the Oil Spill Liability Trust Fund, supported by industry collectively, to fill any remaining gaps.

Given these ends — especially those ensuring adequate compensation and avoiding consumptive litigation — Congress may not have intended to foreclose the use of limitation-of-liability actions under the OPA. Congress was careful to provide that the OPA does not affect existing admiralty or maritime jurisdiction unless otherwise expressly provided under its terms.26

By its terms, Supplemental Rule F is not “selective” regarding the statutes that may employ its procedures. Instead, it plainly applies to any statute that allows limitation of liability by a vessel owner. Equally important, since limitation proceedings provide for “consensus” of claims, an action under the OPA potentially could join all parties and liability issues into a single proceeding.27 In this manner, the difficult liability concerns might be addressed in a relatively familiar admiralty context.

CONCLUSION

Prussian military analyst Carl von Clausewitz used the term “fog of war” to describe the level of ambiguity in situational awareness experienced by participants in military operations. The phrase captures the uncertainty regarding one’s own capability, the adversary’s capability and the adversary’s intent during a military operation.

Seasoned litigators know that there is also a “fog of litigation” phenomenon, especially in mass disaster litigation, that results from ambiguities and uncertainties and the urgency to respond to a devastating situation. In such matters, advocates and judges commonly seek clarity from traditional principles and wisdom from prior experience. Otherwise, already complex situations can quickly spin out of control.

Limitation of liability has been a hallmark of maritime controversies for almost two centuries. Although some of the original rationales for liability limits in the Limitation Act may have faded, the risks of catastrophic losses remain serious, especially when one considers the compounding problems created by incidents combining personal injuries, deaths, commercial losses and massive environmental impacts. The extent and magnitude of existing and potential litigation arising from the Deepwater Horizon incident will surely parallel the scope and severity of the disaster. Since the OPA’s claims procedure was specifically designed to “promote settlement and avoid litigation,”28 it seems incongruous to abjure pre-existing procedures that can be used to reach the same goals.

NOTES

1 Carl von Clausewitz, On War, Book 2, Chapter 2, Paragraph 24 (1889)


3 The principal provisions of the act provide:

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

(b) Seagoing vessels; losses not covered in full. In the case of any seagoing vessel, if the amount of the owner’s liability as limited under subsection (a) is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $420 per ton of such vessel’s tonnage, such portion shall be increased to an amount equal to $420 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.


5 In a limitation proceeding, the owner need not demonstrate the absence of its contributory role as a part of its burden of proof. Instead, the persons asserting claims bear the burden of showing that the owner’s fault of “unseaworthiness” was a causal factor in the accident. See Hercules Carriers v. Claimant State of Fla., 768 F.2d 1558, 1564 (11th Cir. 1985).

6 46 U.S.C. App. § 183(b). The liability limits were progressively increased to their current levels in a series of amendments. See Morin, supra note 2, at 423.

7 See Place v. Norwich & N.Y. Transp. Co., 118 U.S. 468, 493 (1886) (noting that the value of a sunken vessel may be zero). According to Transocean’s recent pleading, since “the remains of the Deepwater Horizon now lay sunken” about a mile deep in the federal waters of the Gulf of Mexico, the value of the rig and its cargo comes to no more than $26,764,083.

8 According to Transocean, the accident and subsequent oil spill “were not caused or contributed to, done, occasioned and/or incurred by any fault, negligence, unseaworthiness, or lack of due care on the part of the petitioners, or anyone for whom petitioners are or at any material time were responsible.” See http://transoceanlawsuits.com/wp-content/uploads/2010/05/Transocation-Limitation-Wall-Street-Journal-05.13.10.pdf.

9 See, e.g., Wyandotte Transp. Co. v. United States, 389 U.S. 191, 205 (1967) (holding limitation is available only if damage occurred without owner’s privity or knowledge); Corell v. Phipps, 317 U.S. 406, 411 (1943) (stating that the facts determine whether privity and knowledge existed); Deslons v. La Compagnie Transatlantique, 210 U.S. 95, 122 (1908) (finding mere negligence does not necessarily establish privity or knowledge of the vessel owner).

10 The Limitation Act has been “attacked by many and defended by almost none.” Gilmore & Black, supra note 3, at § 10-4(a). They explain: “[T]he argument that the Limitation of Liability Act has served its time and should be repealed has become commonplace. ... [The Limitation Act,] passed in an era before the corporation had become the standard form of business organization and before present forms of insurance protection ... were available, shows increasing signs of economic obsolescence.”
Section 1018(c) of the OPA provides: “(c) ADDITIONAL REQUIREMENTS AND LIABILITIES—Nothing in this act, [or] the act of March 3, 1851 [the Limitation of Liability Act] shall in any way affect, or be construed to affect, the authority of the United States or any state or political subdivision thereof— (1) to impose additional liability or additional requirements; or (3) to impose, or to determine the amount of, any fine or penalty (whether civil or criminal in nature) for any violation of law, relating to the discharge, or substantial threat of a discharge, of oil.”


15 Id. at 13.


18 See generally, Morin, supra note 2, at 424-26. The adjustment of the fund or security is accomplished through the procedures set forth in Federal Rule of Civil Procedure, Supplemental Rule F(7).


20 Id.


22 Supplemental Rule F(9) sets forth procedures that expressly govern limitation actions — and they are not expressly linked to any particular statutory context.


26 See 33 U.S.C.A. § 2751(e): “Except as otherwise provided in this act, this act does not affect—(1) admiralty and maritime law; or (2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”
