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Crude Defenses? Liability Limits for Offshore Drilling Accidents and Oil Spills

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As oil continues to pour into the Gulf Coast following the explosion of the Deepwater Horizon oil rig, the rig owner has filed suit seeking to limit its liability. In this BNA Insight, attorney Richard O. Faulk discusses liability limits for offshore drilling under the Shipowners’ Limitation of Liability Act, the Oil Spill Act, and state oil spill laws. Given our continued reliance on petroleum, the author says, liability limits reflect a balance the courts must reach between the risk allocated to oil companies, “and the society that demands and depends upon it.” While federal multi-district litigation is useful, the author concludes, a solution will require clarification of the substantive law “by a limitations action within the MDL.”

Crude Defenses? Liability Limits for Offshore Drilling Accidents and Oil Spills

BY RICHARD O. FAULK

“"The rose has thorns only for those who would gather it."”

Chinese Proverb

If the proverb above is any indication, the ancient Chinese were pioneers in the field of risk-benefit analysis. They knew that those who reach for great value often encounter equally significant dangers. Given the recent explosion, fire and oil spill in the Gulf of Mexico, this Oriental wisdom seems especially apt today. Offshore drilling, a process which is essential to the success of our industrial economy and international civilized society, is potentially lucrative. Unfortunately, it is also dangerous. Harvesting fossil fuels entails seri-
ous risks, not only to the explorers' lives and properties, but also to the environment and the livelihoods of those who depend upon it.

But are the risks mentioned by this Chinese proverb really limited to producers? Should the "harvesters" bear the complete risk of harm? Like many sources of wisdom, closer consideration reveals deeper meaning. On balance, our "modern" sense of justice might insist that those who realize wealth should bear the risk that their exploration and production poses to others. But when the product is inextricably woven into our national fabric, legislators sometimes reach surprising compromises.

When the entire nation depends upon an indispensable commodity, when the very wheels of our economy and our daily lives are enabled by products that exist only because the harvesters incur vast expense and extraordinary risks, is it fair and just that the explorers alone bear complete responsibility? Faced with the nation's insatiable appetite for energy, some say that Congress should appropriately limit the producer's liability to encourage explorers to meet the public's voracious needs. Indeed, some say that Congress has already done so.

So, it seems, the owner of the Deepwater Horizon will argue in a Texas court as it seeks to limit its liability for one of the 21st century's greatest offshore catastrophes—by relying on the Shipowners' Limitation of Liability Act of 1851—an antiquated federal law that Transocean hopes may circumscribe its potentially gigantic liability for personal injuries and deaths associated with the disaster. Such traditional "concursus" actions require all persons having claims arising from a particular event to submit their claims in a single proceeding and then limit the shipowner's liability according to statutory "caps." Laypersons may have reacted with alarm, anger and disbelief at Transocean's suit—brought suits in various other courts then would be required to proceed and then limit the shipowner's liability according to statutory "caps." Laypersons may have reacted with alarm, anger and disbelief at Transocean's suit—but from a lawyer's perspective, the initiative deserves some study.

The Limitation Act

When Congress passed the Shipowners' Limitation of Liability Act of 1851,4 the concept of offshore oil drilling was, if anything, a matter of science fiction, rather than practical utility. It was not until 1891 that platform drilling was first used for oil production in fresh water. The Limitation Act generally confines liability for damages, including personal injury and death, to the vessel owner's interest in the vessel at the voyage's completion.5 The Act has been applied in

4 See generally, Tyler Priest, The Offshore Imperative: Shell Oil's Search for Petroleum in Postwar America (2007), at 84-87. See also Noosh Certification: "What is Semi-Submersible," available at http://www.nccsdc.org/flushing.php?
5 See Priest, supra note 4, at 98-99.
6 See Priest, supra note 4, at 85-87.
9 The principal provisions of the Limitation Act provide:
many situations, perhaps most notably by the United States 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 Act limits risks to no more than $420 for each ton of the vessel. If, however, the damaged vessel is a practically useless or a total loss, the value can be minimal or even zero. Consistently, with the Act, Transocean’s recent filing expressly and broadly denies any responsibility for the incident. The sweeping scope of Transocean’s denial is probably necessary, because the type of participatory culpability necessary to avoid the liability of Transocean’s recent filing expressly and broadly denies any responsibility for the incident. 15 Although the Act has been criticized harshly, it has remained largely intact since its enactment, perhaps due to its location at the far fringes of relatively esoteric maritime law.

**Liability Limits for Oil Spills**

Despite its persistent vitality in most contexts, the Limitation Act has not fared well regarding pollution damages associated with oil spills. In the *Exxon Valdez* incident, for example, the 9th Circuit quickly held that the Act was implicitly repealed by the Trans-Alaska Pipeline Authorization Act. Similarly, the federal Oil Pollution Act (“OPA”) expressly preempts the Limitation Act insofar as pollution liability limits for oil spills are concerned. 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 Act. In a catastrophic situation, such as the Deepwater Horizon disaster, a vast number of non-oil spill claims can still be collected, limited and processed under the Limitation Act. Moreover, as we will see below, there are also arguments supporting concursus actions under the OPA—provided that the OPA’s limits and procedures of liability apply.

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 OPA tank vessels was $1,200 per gross ton or if larger than 3,000 gross tons, $10 million, whichever is 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. Onshore facilities and deep water 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 re-

![TOXICS LAW REPORTER ISSN 0887-7394 BNA 6-10-10](http://transoceanlawsuits.com/wp-content/uploads/2010/05/Transocean-Limitation-Wall-Street-Journal-05.13.10.pdf)


19 See GILMORE & BLACK, supra note 1.

ported. Even greater opportunities to expand liability beyond the “caps,” however, were reserved to the states.

**The Role of State Oil Spill Laws**

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 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’s limits 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.” Accordingly, states may enact more severe and expansive laws regarding oil spills without the threat of federal preemption.

Many states have taken advantage of the opportunity to pass their own oil spill laws, including jurisdictions on the Gulf coast. For example, Louisiana has enacted an “Oil Spill Prevention and Response Act” that is designed to complement federal response efforts, and which also adopts certain liability limits. Significantly, however, the Louisiana environmental authorities maintain that the liability imposed under its Act “may be levied in addition to further liabilities imposed by OPA or any other appropriate regulatory auspices.” Among the types of damages that can be recovered under the Louisiana Act from a party responsible for an oil spill are:

(a) Natural resources—damages for injury to, destruction of, or loss of natural resources as defined in this Section, include the reasonable and any direct, documented cost to assess, restore, rehabilitate, or replace injured natural resources, or to mitigate further injury, and their diminution in value after such restoration, rehabilitation, replacement, or mitigation, which shall be recoverable by the state of Louisiana.

(b) Immovable or corporeal movable property—damages for injury to, or economic loss resulting from destruction of, immovable or corporeal movable property, which shall be recoverable by a person who owns or leases that property.

(c) Revenues—damages equal to the net loss of taxes, royalties, rents, fees, or net profit share due to the injury, destruction, or loss of immovable or corporeal movable property, or natural resources, which shall be recoverable by the state of Louisiana.

(d) Public services—damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, recoverable by the state of Louisiana or any of its political subdivisions.

Although space does not permit an exhaustive study of the liability limits—or lack thereof—under the laws of the 50 states, it suffices to note that responsible parties face risks associated with a variety of federal and state laws. Depending on the nature of the state laws involved, the availability of limitation rules varies. In particular, whether the state “opts in” or “opts out” of the OPA’s limitations is an important factor. Attempts to limit those risks are unlikely to be uniformly successful unless the full range and domicile of the interested and injured parties and jurisdictions is considered and accommodated.

**Procedurally Invoking the Limits**

The liability limits of the Limitation Act, the OPA and the various state oil spill acts can obviously be asserted as affirmative defenses against lawsuits filed by injured parties or political entities—but the Limitation Act provides vessel owners with an especially interesting opportunity.

The 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. Value is generally calculated by determining the market value of the vessel (or its wreckage) at the end of the voyage during which the claim arose. Typically, the calculation must include the value of pending earned freight, if any, and the value of claims against persons reasonably believed liable for the loss. 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 Act.

Since choice of forum is often important, the procedural rules governing Limitation actions give owners broad discretion to select the district where the action will be filed. Owners who act quickly, such as Transocean did regarding the Deepwater Horizon incident, can often file their limitation actions before any suits are filed against them elsewhere. If no other action has 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 (i.e., lost at sea) and no suit has been commenced, then the limitation action may be filed in any district. 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, courts may consider the owner’s choice of forum as a controlling factor. Indeed, regarding the Deepwater Horizon limitation litigation,

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21 Id.
25 See generally, Morin, supra note 7, at 424-28. The adjustment of the fund or security is accomplished through the procedures set forth in FED. R. CIV. P., SUPP. R. F. (7).
26 FED. R. CIV. P., SUPP. R. F. (9).
27 Id.
Transocean stated that “[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.”

Unlike the Limitation Act, the OPA does not explicitly permit responsible parties to file limitation of liability actions—but neither does it forbid them. Indeed, the procedural rules that govern limitation of liability actions already exist under Supplemental Rule F of the Federal Rules of Civil Procedure. The Supplemental Rules formerly comprised separate Admiralty rules before they were consolidated with the civil rules in 1966, and the United States Supreme Court has recognized that they were intended to facilitate limitation of liability proceedings in maritime cases.

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 OPA. The cases refused to allow limitation actions under OPA per Rule F for a number of reasons. In the first case, Metlife Capital Corp. v. M/V Emily, the Commonwealth of Puerto Rico sued under the OPA and other maritime claims when a grounded barge caused an oil spill. The charterer, operator and owner of the tug responsible for the barge then filed a proceeding under the Limitation Act and Supplemental Rule F. The district court enjoined the limitation proceedings but allowed the OPA action to proceed. On appeal to the First Circuit, the appellate court held that the OPA was broadly preemptive and precluded all actions under the Limitations Act regarding oil spills—both substantively and procedurally. The court also held that Rule F did not apply to OPA actions, citing conflicts with the OPA’s claims procedures and concerns over protecting the government’s subrogation rights. In the second case, Bouchard Transp. Co. v. Updegraff, the Eleventh Circuit held that claims under Florida state law were not governed by Rule F or the Limitation Act because of the OPA’s preemption provisions. The court explained that unlike under Limitation Act claims, Florida and OPA claims do not involve a “limited fund” or other procedural restrictions.

Despite these holdings, it seems likely that the availability of the limitation remedy will be tested again, either in the Deepwater Horizon litigation, or in some future oil spill situation. 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. For example, both cases fail to effectuate the Congress’ plain intent in the OPA to preserve all pre-existing admiralty and maritime principles and remedies unless the OPA expressly provides otherwise. The text of the OPA expressly precludes application of the Limitations Act limits when they conflict with federal or state oil pollution laws. It does not, however, say that the Limitations Act procedures and the ability to seek concursus are precluded, nor does it expressly preempt limitation actions under Rule F. Statutory construction can be a complicated exercise—but when a statute takes the trouble to explicitly preempt only portions of a prior statute—and then with equal clarity preserves the entire remainder of pre-existing law, it is difficult to understand how the new law impliedly preempts anything.

The First and Eleventh Circuits found various conflicts and inconsistencies between the Limitations Act, Rule F and the OPA, but rather than fully exploring reconciliations and solutions that might facilitate the survival of pre-existing principles, both courts elected to void them entirely. For example, the concept of a “limited fund” is important to concursus proceedings, but the presence of clearly limited assets should not necessarily be dispositive. Equally important is the ability to collect all claims before a single tribunal so that justice can be administered efficiently within the context of limited liabilities. This is especially important where,

30 See Long and Gonzalez, supra note 1.
31 FED. R. CIV. P., SUPP. R. F.(1)-(9) sets forth procedures that expressly govern limitation actions—and those procedures are not expressly linked to any particular statutory context.
34 147 F.3d 1344 (11th Cir. 1998), cert. denied, 525 U.S. 1140 (1999).
35 See William M. Duncan, The Oil Pollution Act of 1990’s Effect on the Shipowner’s Limitation of Liability Act, U.S.F. Mar. L.J. 303, 319 (1993) (“If Congress’ intent in enacting OPA had been to completely repeal the Limitation Act, it would not have painstakingly repealed it only with respect to certain types of actions.”). Repeal by implication requires an “irreconcilable” conflict and even then, the implied repeal only occurs “to the extent of the conflict.” See Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976).
36 See Force and Gulfoff, supra note 2, at 365 (“[T]he court should have examined the matter as the court did after enactment of the Act of 1851. The earlier court, recognizing that Congress had failed to establish procedures for implementation of the right to limit, created the procedures for making
as in the Deepwater Horizon incident, a highly diverse group of claimants will inevitably seek to impose equally diverse federal and state laws on a collection of defendants with varying alleged responsibilities for the event.

Although the Bouchard court notes that there “is no need to bring all of the claimants into a single proceeding to make a pro rata distribution because every claim will be paid in full” by the Oil Spill Liability Trust Fund, this reasoning neglects one of the principal objectives of limitation proceedings. It is surely important that the claimants receive fair compensation—but it is equally critical that, to the extent provided, the defendant’s liability be limited. Those limits must be imposed consistently and without unnecessarily complex litigation—even if a statute, such as the OPA, ultimately provides full payment to claimants. To the extent that the OPA dispenses with “pro rata” distributions, that change can be accommodated without completely obviating Congress’ preservative intent. Although the remedy that is ultimately devised may not strictly resemble traditional concursus, it should retain enough of its tools to be useful in OPA litigation.

To the extent, therefore, that the OPA modifies procedures in limitation actions—so be it. The remaining procedures, which Congress expressly intended to survive, should persist in an amended remedy that works dynamically to effect the OPA’s salutary intentions. If this jurisprudential perspective is applied, accommodating issues like the OPA’s claims procedure, which requires pre-suit notice by claimants, is not an insurmountable task. A creative policy of abating limitation actions and allowing OPA claims to proceed during the pendency of the action can be framed and managed by the court. Similarly, concerns over governmental subrogation rights may also be exaggerated—especially if the creative ability of the federal judiciary to reconciling prior law consistent with Congress’ saving intent is underestimated. Even the absence of procedural specifics in the early version of the Limitations Act did not deter the courts from developing administrative processes.

A complete understanding of Congress’ objectives reveals arguments that favor allowing limitation actions 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 compensa-

that right a reality. The upshot of Metlife and other similar decisions is that they have construed “limitation” “out of the Act.” (emphasis added).

30 147 F.2d at 1350.

31 See generally, Force and Guthoff, supra note 2.

32 Some cases took a more restrictive approach before the OPA was passed. See, e.g., Lake Tankers Corp. v. Henn, 354 U.S. 945 (1957); Pershing Auto Rentals, Inc. v. Gaffney, 259 F.2d 546 (6th Cir. 1957). Their reasoning is not controlling because courts must now consider how Congress’ intent under the OPA has modified the original purposes of the Limitations Act.

33 Faced with such a situation, the Supreme Court refused to recognize “the dilemma of inferring that the legislature has passed a law which is incapable of execution.” Norwich Co. v. Wright, 80 U.S. (13 Wall.) 104, 123 (1871).

Conclusion

Our international and national societies are largely fueled by petroleum, and despite the current fascination with “green” and “renewable” alternatives, petroleum will remain the primary source of energy worldwide for the foreseeable future. All nations are dependent upon it for economic growth, and virtually all of humanity—at least those able to afford its benefits—depend upon it to meet the daily necessities of life. As the world’s population increases, and as the complexity of our society demands ever greater supplies of energy, fossil fuels remain the central means of supplying power. As such, they are an indispensable component of our march toward sustainability—for without them, there is no alternative sufficient to sustain the transition.

43 See Force and Guthoff, supra note 2, at 365-66. (“The provision of OPA that states that it is not intended to affect admiralty jurisdiction along with OPA’s legislative history provide strong indication that Congress contemplated actions under OPA as coming within the admiralty jurisdiction.”)


45 See Force and Guthoff, supra note 2, at 346-47.
Explorers are willing to meet society’s demands—provided that citizens are willing to share, to some extent, the enormous risks associated with offshore activities. In times of crisis, statutory liability limitations may be viewed by some critics as unfair and unwise obstacles to the course of justice. On reflection, however, it seems clear that the limits reflect a judgment by the people’s representatives that balances the risk allocated to those who produce petroleum, and the society that demands and depends upon it. Like many statutes, it is a compromise—one which our Constitution wisely reserves to the most politically sensitive branch of government, the legislature.

At some point, whether in the present situation or in the future, courts will be asked to effectuate that compromise. They will be urged to ensure that the people’s collective wisdom be respected. In doing so, they will see that the compromise requires that litigation be kept to a minimum, that compensation be made adequately and expeditiously, that remediation proceed with dispatch, and that the loss is balanced appropriately between the explorers and the public who consume their products. To do so, they will need to consider not only federal laws, but also the array of state statutes and regulations that the OPA explicitly refused to preempt.

Under the circumstances of a multistate catastrophe, it seems impossible that the purposes of the Congressional compromise can be achieved through individual actions, or even class actions, filed by claimants in a multitude of state and federal courts. Even in the absence of a “limited fund” such as might be created under the Limitation Act, the collective intent of that Act, and OPA—which clearly stresses both expedited resolution and limited liability—is best served by consolidating all claims against all defendants before a single forum and processing them as fairly as possible.

Federal multi-district litigation, although useful, is not, standing alone, a complete solution unless the substantive law is clarified by a limitations action within the MDL. Such a combination will grant the MDL court greater authority than it would have as a mere “collector and coordinator” of cases. Operating with a concurrence approach, the MDL court might deal with all claims against all defendants allegedly responsible for the spill, not just those that may be initially filed or be properly removed in federal court. Eschewing concursus risks extraordinary delays and disparate decisions by an uncoordinated judiciary. Justice cannot predictably prevail under such circumstances.

The ancient Chinese proverb wisely recognizes that the thorns of risk do not discriminate between their handlers. All those who participate in realizing the benefits of exploration—including those who use the resulting products and depend on their safe handling to avoid harm—are subject to their dangers. When the risks are enormous, and when society’s demands are extraordinary, the situation is ripe for political compromise. The results of that compromise may not be popular at this time of crisis, but that does not lessen their importance as anchors of reason during difficult times. The Limitation Act and the OPA, as well as the procedures under Supplemental Rule F, form a foundation that enables the construction of a meritorious process that facilitates compensation and remediation while avoiding consumptive litigation. Leaving their safe harbor during this storm risks even greater uncertainties and complications.

See Jason A. Schoenfeld and Michael M. Butterworth, *Limitation of Liability: The Defense Perspective*, 28 Tul. Mar. L. J. 219 (2004) (“The Limitation of Liability Act remains vital and useful, particularly in significant maritime collision and pollution incidents. Without the Limitation Act, chaos would ensue. Any individual plaintiff’s recovery could be the uncertain result of a race to the courthouse, and the first case tried to judgment and collection. In the hands of a skillful federal judge, the Limitation Act remains the only sensible, economic, and fair means of litigating and resolving complex maritime cases.”); see also Force and Guthoff, supra note 2 at 416 (“The unwillingness of courts to apply or create a concursus procedure and their failure to adopt procedural alternatives to oil spill cases will not only be manifestly unfair to responsible parties and guarantors but also an incredible waste of judicial resources.”).