

“When Everything Goes Wrong:

An Interactive Discussion Regarding Major Marine Casualties”

A major marine casualty, such as the one described in the hypothetical submitted herewith, involves multiple issues, parties, interests, claims, and strategies. The parties involved will, of course, vary depending on the nature of the casualty. This presentation will focus on the casualty from the perspectives of the P&I carrier of the vessel that allides with the platform, the vessel’s defense counsel, its pollution response provider, the platform owner/claimant’s counsel, crew and the United States Government. The respective parties will have countervailing, competing and conflicting interests to be protected/pursued. This presentation will provide a discussion of those interests and potential strategies, steps, claims, issues and pitfalls that these parties and their counsel may encounter in responding to a casualty of this nature.

HYPOTHETICAL

“WHEN EVERYTHING GOES WRONG”

About 2230 on January 29th, the evening before the accident, the OSV *M/V RUH-ROH* was shifted between berths at its home port. Four crewmembers were on board—a captain and a mate (both credentialed masters) and two deckhands. During the berth shifting, the captain had the conn, or navigational control, of the vessel.

According to crew statements, shortly after shifting berths, a brief watch turnover was held. During this turnover, the captain mentioned that the starboard engine throttle had a small air leak but that he did not think it was a serious problem. After the turnover, the mate took the conn, and at 2324, the *M/V RUH-ROH* left port with company orders to proceed to Port Tardis. On arriving at Port Tardis, the vessel was to remain in the vicinity of the port overnight and then continue to sea at 0600 on January 30. However, the mate continued the transit and passed Port Tardis, entering the open waters of the Gulf of Mexico at 0236 on January 30. The captain told investigators he did not know that the transit continued, as he was off duty and asleep at this time.

Although it could not be confirmed by data or crew statements, investigators believe that the steering on board the *M/V RUH-ROH* was placed in autopilot mode about the time the vessel entered the open waters of the Gulf of Mexico.

The *M/V RUH-ROH* was powered by twin diesel engines, each driving a propeller. Shortly after entering the Gulf of Mexico, the mate believed that the starboard engine was not maintaining full speed. He directed the on-duty deckhand to use a line to tie off the starboard engine throttle in the machinery space so that it would remain in the full-ahead speed position. This engine room alteration effectively removed control of the starboard engine throttle from the wheelhouse. Two crewmembers told the Coast Guard that the vessel owner, *Mysteries, Inc.*, had tried to remedy the throttle problem a few days earlier but did not have the correct part. Investigators found no log book entry about the throttle problem, even though entries about faulty or unsafe equipment were required by *Mysteries’* safety management system.

According to automatic identification system (AIS) data, between 0242 and 0623, the *M/V RUH-ROH* followed a southwest course of about 233 degrees. The vessel speed was full

ahead, between 8.6 and 9.7 knots. The on-duty deckhand told investigators that, at 0615, the mate directed him to wake the other two crewmembers so that they could assume the watch. At 0623, according to AIS data, the vessel altered course to 260 degrees, or about west-southwest.

The captain told investigators he entered the wheelhouse at 0635 and found no one there. He said visibility was poor at the time—about 0.125 miles—due to heavy fog. He then spotted the mate, who was on the after deck, and walked aft to talk to him. The mate told the captain he was checking on an engine vibration he had detected; however, he did not inform the captain about the starboard engine throttle he had directed the deckhand to tie off in the engine room.

Shortly after the discussion about the engine vibration, the captain and the mate entered the wheelhouse, where, until 0700, they discussed log book entries, why the vessel did not stop at Port Tardis as originally directed, and operating in fog. They did not discuss whether to post a lookout in the fog. The captain told investigators he then walked to the port side of the wheelhouse to smoke, and when he turned back to face the mate, the mate had exited the wheelhouse without a formal watch turnover. The captain then assumed, control of the vessel and adjusted the radar and AIS.

According to AIS data, between 0653 and 0711, the vessel's course was 280 degrees, or about west-northwest, and its speed was 9.5 knots. Visibility remained poor, but no lookout was posted. Sometime between 0700 and 0711, the mate returned to the wheelhouse where he and the captain discussed vessel traffic in the vicinity. No mention was made about oil or gas production platforms along the route. The captain told investigators he reduced the vessel speed; however, AIS data showed that the vessel maintained its speed.

The captain told investigators he then looked up from the radar and saw a platform about 200 yards ahead. He said he tried to slow the vessel but stated the speed "was entirely too fast for [the] clutch." He said he tried to avoid the allision by turning the vessel while "throwing it into reverse," but his turn was initially unsuccessful because the vessel was in autopilot and he had trouble disengaging it. Within 15-30 seconds, he managed to take the vessel out of autopilot. He placed it in manual steering and altered course, but his actions were too late to avoid the platform. About 0712, the *M/V RUH-ROH* allided with the platform, "*MEDUSA*", which was unmanned at the time—at a speed of 9.3 knots, according to AIS data.

The allision ruptured a production line, releasing approximately 250,000 barrels of oil into the Gulf of Mexico before the line could be cut off. Prevailing winds began to move the spilled oil toward another platform and toward wetlands on shore.

The impact caused deckhand, Miles Standish, to fall down the engine room stairs. He immediately got up and resumed his duties; but later reported injuries to his back and neck.

Shortly after the allision, with the starboard engine still engaged in the full-ahead position, the two deckhands entered the engine room and removed the line tied to the starboard engine throttle. About 0714, 2 minutes after the allision, the *M/V RUH-ROH's* course and speed were east-northeast at 74.9 degrees and 1.3 knots, according to AIS data. About 0730, without reporting the allision to the authorities, the crew navigated the vessel west-northwest toward the port of Hideaway City, at 9 knots.

The platform sustained structural damage and its oil production line ruptured. The rupture caused a release of approximately 250,000 barrels of crude oil into the water, and a 20-day cessation of operations at the *MEDUSA* and neighboring platforms.

The *M/V RUH-ROH* sustained fractures and indentations to the bow area, broken welds to the port engine exhaust, and a damaged port engine forward main seal.

Crew statements were unclear as to whether the captain or the mate was the designated “captain” of the vessel. The person described as "captain" in this report was, according to a Mysteries, Inc. representative, the company-designated captain. However, the company-designated captain told investigators he did not believe he held the position of captain. Mysteries’ safety management system did not provide guidance as to how captains were designated and assigned.

In addition to the confusion about who was captain, no records indicate that the vessel's position was being plotted during the voyage, and no lookout was posted even though the vessel was transiting in restricted visibility. Also, wheelhouse control of the starboard engine's speed was intentionally defeated by its throttle being tied off in the engine room. Hence, *M/V RUH-ROH* proceeded at full speed in restricted visibility without the following: a proper lookout, a clearly identified person in charge, engines ready to maneuver, and regular monitoring of the vessel's progress.

Post-Allision General Issues and Chronology

Responding to the above casualty requires, skill, communication, and (often) speed. However, regardless of the perspective from which the response is approached, many issues must be considered and dealt with. The following identifies some of those issues, questions that arise and strategies to use in approaching them from the perspective of various interests including, the Government and Public Response Side, the Vessel Initial Response, the Platform Initial Response, the Pollution Remediation Response, and Other Claimants Response.

1. Initial Events Commencing Roughly Simultaneously

A. Government and Public Response Side:

From the Government and Public Response perspective, the first priority to be addressed is responding to the incident; meaning controlling and remediating the pollution event and any resulting danger to the public or public resources. The next priority, which often must be addressed simultaneously, is commencing the investigation into the cause of the incident, potential culpability, and whether that potential culpability is civil, criminal or both.

- Given that there’s a significant discharge of oil into navigable waters of the United States, the Federal Government, primarily the Coast Guard through authorities delegated to the CG in the Clean Water Act, 33 U.S.C. § 1321(c), as amended by OPA, plus other authorities, including the National Contingency Plan (see 33

U.S.C. § 1321(d)), would spool up and commence a pollution response. A Unified Command would be formed with stakeholders, including state(s) and local government(s), the “Responsible Part(ies),” as well as other interests such as federal and state Natural Resource Trustees, and possibly Native Tribes.

- What is the Natural Resource Trustee role in the Unified Command?
- It is common that the federal response, sometimes in coordination with state and local authorities, will branch off and split the pollution cleanup response from the investigation side, *i.e.*, investigation into the causes and potential legal fallout and liability. The pollution response side proceeds through the Unified Command and its stakeholders and is focused on cleanup, prevention of continuing damage, and other short and long term response.
- The “investigation” side can involve different federal agencies, including criminal and civil components of the Dept. of Justice, agency components (*e.g.*, Coast Guard Investigative Service, EPA, Dept. of Interior, NOAA, *etc.*), and state and local authorities.
- The pollution response side proceeds through the Unified Command and its stakeholders and is focused on cleanup, prevention of continuing damage, and other short and long term response.

The “response” side is important to long term damages in terms of magnitude and duration of injury.

What is the difference between short and long-term *i.e.*, the Emergency Phase? Are there benefits and drawbacks of remaining in an emergency phase during a longer-term response?

Early restoration or emergency restoration can be expedited in the initial “emergency” phase. Permitting and other issues handled within the Unified Command can result in significant cost savings and Natural Resource benefit of time. The Natural Resource Trustees view injury in terms of lost-years of productivity or other variables. RP objective should include shortening the lost-year metrics.

- The existence of the pre-litigation investigative side of the response has significant effects on the strategy, duties, and obligations of the Responsible Party(ies) under OPA '90 (33 U.S.C. §2701, *et seq.*), crew, attorneys, and insurers/Clubs.

- The investigation side can further split off into public investigations, such as Coast Guard Marine Casualty Investigations conducted pursuant to 46 U.S.C. § 6301 *et seq.*, and NTSB investigations. (*e.g.*, the Joint Investigation of the BP/Deepwater Horizon spill conducted by the Coast Guard and the agency then known as Minerals Management Service.)

4(a). Assume that the Coast Guard performs a Marine Casualty Investigation and issues a report determining that one or more individuals and/or interests caused the allision and oil spill. Wholly aside from hearsay issues that potentially may be overcome by the hearsay exception of FRE 803(8) (Government reports), are the investigation and report admissible in subsequent litigation.

4(b). Assume that the NTSB issues a report determining that one or more individuals and/or interests caused the allision and oil spill. Wholly aside from hearsay issues that potentially may be overcome by the hearsay exception of FRE 803(8) (Government reports), are the investigation and report admissible in subsequent litigation.

- If the Coast Guard and NTSB conduct investigations and issue findings, they can be very useful, and engender significant interest of private parties and their attorneys and insurers. However, no part of a Coast Guard Marine Casualty Investigation or report is subject to discovery or admissibility in civil proceedings pursuant to statutory exclusion. 46 U.S.C. § 6308 *et seq.*, and specifically 46 U.S.C. § 6308. Likewise, no part of an NTSB investigation or report is subject to discovery or admissibility in civil proceedings pursuant to statutory exclusion and case law, particularly as a result of the updated format of NTSB reports, which combine “factual” findings with probable cause conclusions in a single report. 49 U.S.C. § 1194, and *see, e.g., Credle v. Smith*, 42 F.Supp.3d 596 (D.N.J. 2013) (joint Coast Guard and NTSB investigation, report excluded).

B. Vessel and Platform Initial Response Side:

Vessel Interest:

The Vessel’s interests and the Platform’s *initial* priorities in this scenario will parallel the Government’s and Public Response side, that is controlling and remediating the pollution event and any resulting danger to the public or public resources, and investigating the facts to determine the cause of the incident, potential culpability, and whether that potential culpability is civil, criminal or both.

For obvious reasons, the Vessel interest will also be concerned with protecting their interests, doing whatever is possible to limit potential liability, identifying any other potentially culpable parties, and, if possible, retaining the cooperation of the crew.

However, the bridge crew may face serious consequences as a result of this incident including action against their licenses, personal liability and/or criminal culpability. Under the facts of this hypothetical, the bridge crew are likely to be adverse to the vessel interests. Conflicts issues may arise that will preclude the vessel interests from obtaining the crew's cooperation. Once the crew members become aware of their exposure to civil and/or criminal penalties, they are likely to retain counsel.

- The hypothetical provides bases of both civil and criminal culpability for the OSV interests (RUH-ROH), and civil (strict) liability against the platform interests (OPA, 33 U.S.C. § 2704(a)(3) and (c)(3)). It's assumed that both interests (vessel and platform) will have attorneys respond ASAP and commence providing counsel at the "investigation" stage, as well as on the "pollution response" side, though the lines of demarcation between response, investigation, and providing counsel may not be as well-defined and separate as on the "government" side.
- Taking the Vessel interests first, the immediate issues confronting counsel include the following questions:
 - A Fundamental question that drives many issues: Who is the client? Is it the owner? The insurer/club? The Master (who has rightly "heard" that ship drivers and marine pilots have been prosecuted as a result of oil spills and other marine disasters), and who may have requested counsel's assistance and believes counsel is "his" attorney? The Mate and other crew? All of the above? Some of the above?
 - Who is the RP? The MEDUSA lost their oil and both the RUH ROH and MEDUSA could have an interest in Response and NRDA. How many different ways could that work?
 - If counsel has (or thinks he has) more than one client (*e.g.*, owner and possibly an OPA Certificate of Financial Responsibility ("COFR") guarantor, the latter of whom is not merely an insurer/guarantor, but a possible direct action defendant under OPA, 33 U.S.C. § 2716(f)), is there a potential conflict of interest underlying representation of the two clients? Is there an actual conflict of interest? The same issues exist regarding the crew.
 - Should separate counsel be appointed for the Master?
 - Is counsel providing representation in merely a civil matter? Or also in a possible criminal action against Master and crew, and possibly owners? *See, e.g.*, 33 U.S.C. § 1319 (*e.g.*, negligent discharge [despite being a crime, negligence is judged under ordinary negligence, not heightened criminal standards], knowing discharge, knowing endangerment, failure to report),

possible obstruction charges, false statements culpability under 18 U.S.C. § 2, *etc.* Or is counsel providing representation in both a civil and criminal matter, particularly where, as here, the potential criminal culpability of obvious?

- If the answers to the previous questions includes the possibility of criminal liability, is counsel *qualified* to render advice?
- Even if counsel is qualified to provide advice to a potential criminal defendant such as the Master, would that advice (*e.g.*, recommending that he assert his Fifth amendment rights and refuse to talk to Coast Guard investigators) conflict with the long-term legal interests of the owner, which may have incentive to cooperate with, at the very least, the governments' "pollution response" side? Or NRDA, which could take years.

Answer (or something to consider as a possible ramification): See, *e.g.*, OPA, 33 U.S.C. § 2704(c)(2)(C): "Failure or refusal of responsible party. Subsection (a) [OPA liability limits] does not apply if the responsible party fails or refuses-- (C) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 1321 of this title [Clean Water Act, 33 U.S.C. § 1321] or the Intervention on the High Seas Act (33 U.S.C. 1471 *et seq.*)."

- If counsel fails to advise Master of his Fifth Amendment rights and he later is convicted based in part on his incriminating statements to the Coast Guard and/or other investigators, does counsel open herself/himself to a malpractice action by the Master?
- Regardless of whether Master is counsel's "client," under principles of *respondeat superior* the owner is responsible for his actions. If owner is hit with civil and/or criminal liability as a result of the failure to advise Master of his Fifth amendment rights (or the failure to advise him that he should seek independent advice as to his rights), does that expose counsel to malpractice?
- By becoming involved in spill response and cleanup planning, has counsel stepped outside the role as counsel and become a witness? (Counsel and firm were named as civil defendants by a private party involved in an oil spill; they ultimately were dismissed.) Can counsel and firm then represent any party?
- Can counsel be called to testify in deposition and at trial?
- Can counsel be forced to divulge what otherwise would be considered privileged or work-product information and documents? If so, how will client(s) react?

- Regardless of the foregoing conflict issues and possible resolutions, what should counsel (and client) do on the public-facing side? For example, participation in the response side through the Unified Command? Or the NRDQ? For how long? Media relations and statements (or “no comments”)? The public investigation side, *e.g.*, investigations and hearings in a CG Marine Casualty Investigation?

And obviously, what should counsel do in preparation of defenses in litigation, civil and/or criminal? Should counsel advise owner to retain separate civil and criminal counsel? Same counsel? Retention of consultants/experts as to liability and damages, including natural resource damage claims? Wholly aside from strategic considerations, is there an obligation under state or other law on the part of owners/insurers to pay for counsel representing corporate officers and/or crew and civil and/or criminal actions?

Under NRDA: Options include: 1) Trust the Trustees, 2) Independent investigation and litigation, and 3) cooperation / collaboration.

- What are counsel’s responsibilities to preserve evidence and, similarly, prevent spoliation? *Cf.*, Vol 23, No. 2, U.S.F. Maritime Law Journal at 239, “*The Modern ‘Electronic Bridge’ and Immediate Discovery and Litigation Considerations Following a Major Marine Casualty.*” In addition to spoliation issues in civil litigation, what are counsel’s personal obligations (in addition to providing advice and counsel) concerning shipboard evidence, keeping in mind possible obstruction and related issues on the criminal side? False Statement Act issues?
- What issues can arise from attempts to secrete witnesses? Though less common in cases with U.S. nationals/witnesses/crew than with foreign crew, there are examples of whisking crew off a vessel and making them unavailable at undisclosed locations for interviews, *subpoenae*, *etc.* But see, particularly with respect to foreign crew, the possibility of material witness warrants. See also Fed.R.Civ.P. 27 and depositions to preserve testimony (but see also impediments to doing so under the terms of the Rule).
- The Coast Guard investigators are making arrangements to interview the licensed mariner who was at the helm during the incident. The mariner does not have counsel available. As counsel for the OSV operator, should you attend the witness interviews to protect the mariner’s interests?
- The Coast Guard investigator requested a CG-2692 accident report form from the company upon arrival on scene. The company has the original

completed by the mariner who was on the bridge during the incident. The company representative told the CG he is going to hold the form until it can be properly reviewed by his counsel. Does he have the right to withhold that evidence on scene?

- The Coast Guard investigator arrives on scene and demands that the company representative clarify who was serving as the designated master of the vessel during the accident voyage. Does the company representative have a legal obligation to provide that information to federal investigators?
- Due to the severity of the incident and the environmental impacts, the Coast Guard convened a district formal investigation. Should counsel representing the OSV operator request to be designated as a Party in Interest (PII) to the investigation and commit to participating in the forthcoming formal proceedings?

- **Regarding the platform interests:**

As the owner of the platform from which the oil was discharged, the platform owner will be identified as the putative Responsible Party under OPA '90. See e.g., See, e.g., OPA, 33 U.S.C. § 2701 (32). OPA '90 requires the Responsible Party to pay the costs of the clean-up. OPA provides relief for an “innocent” Responsible Party, if it can show that the discharge was due to the sole fault of a third party. See, e.g., OPA, 33 U.S.C. § 2703(a)(3). However, as is noted below, the statute sets a high bar for establishing the sole fault of another party. Therefore, early and thorough investigation into the cause of the incident is vital to the platform owner in this hypothetical in order to develop facts that might support their “innocent” Responsible Party defense.

If the platform owner cannot meet the high burden of proving sole fault of a third party, it may nevertheless be able to obtain contribution for proportionate fault from a negligent third party. See, e.g., *In re Settoon Towing, LLC, as Owner and Operator of the M/V Hannan C. Settoon* 859 F.3d 340 (5th Cir. 2017). Therefore, establishing fault on the part of the alliding vessel is vital.

- Because there are no obvious criminal issues involved, at least within the hypothetical’s construct, the platform owner’s counsel’s job would be less complex than the vessel’s counsel, though prudence would suggest that an internal review to rule out criminal and civil concerns (other than OPA strict liability) would be wise.
- Areas to investigate: was the platform properly marked? Leaving aside the proximate cause issues stemming from the vessel’s actions, are there requirements that may have been violated by the platform, e.g., for radar reflectors, RAYCONs, etc.?

- The foregoing issues are critical because OPA’s “sole fault third-party defense” (“it was all the other guy’s fault”) under OPA, 33 U.S.C. § 2703(a)(3), sets a high bar, especially under section § 2703(a)(3)(A) and (B).

Questions:

- Similar to the OSV, what should counsel do in preparation of defenses in civil litigation? Retention of consultants/experts as to liability and damages, including natural resource damage claims? How would they participate in the UC with the RP of record? NRDA studies?
- Begin setting up the sole fault third-party defense? See below discussion concerning an RP’s defenses to liability, all of which set an extremely high bar. Setting up the contribution claim against the OSV interests (33 U.S.C. § 2709)?
- Advertisement of RP status and claims procedures (33 U.S.C. § 2714(b))? Subrogation claims (33 U.S.C. § 2715(a))?

2. Litigation Issues:

A. Criminal Side:

- The facts present the obvious possibility of criminal culpability for the direct “pollution related” acts concerning the OSV. For example, 33 U.S.C. § 1319 provides for criminal liability for acts causing the discharge of, *inter alia*, oil. The statute provides for criminal fines and imprisonment, and includes counts for negligence (judged by standards of “ordinary” negligence, not a heightened criminal standard), knowing violations, knowing endangerment, false statements (this is a different violation than under the False Statements Act, 18 U.S.C. § 1001), and the failure to report a discharge.

Questions:

- Does section 1319 of the Clean Water Act, 33 U.S.C. § 1319, apply to a “non-discharging vessel” such the OSV here?

Yes, because section 1319 ties a violation to, among other statutes, the Clean Water Act, 33 U.S.C. § 1321(b)(3), which prohibits discharges into navigable waters of the United States, adjoining shorelines, *etc.*, without reference to whether the discharge was caused by a vessel, such as the OSV, that was itself not carrying the discharged oil.

- Other potential landmines to consider include: obstruction (*e.g.*, see above regarding handling of evidence), False Statement Act violations, witness tampering, *etc.*

- Is there other potential non-pollution related criminal culpability dealing with acts involving the crew’s navigation, equipment maintenance (e.g., tying off the throttle)?

Answer: Yes, for example, 46 U.S.C. § 2302(b) (Negligent Operation of a Vessel): “A person operating a vessel in a grossly negligent manner that endangers the life, limb, or property of a person commits a class A misdemeanor.” As a further example, if there had been a death instead of personal injury, the Seaman’s Manslaughter Statute would be viable, 18 U.S.C. § 1115, which has an “ordinary” negligence standard vice the higher standard under the general manslaughter statute.

- Can conviction of a plea on a relevant criminal action serve as *res judicata* or collateral estoppel on relevant civil claims?

Answer: yes, because criminal liability establishes a higher bar (beyond reasonable doubt) than standard civil liability (preponderance of the evidence), and the strict liability standard under OPA

B. Civil Side:

- **The Platform:**

- Are platform interests “responsible parties” under OPA?

Yes. The platform interests, as “responsible part(ies)” under OPA section 2702(a), have strict liability under OPA. 33 U.S.C. § 2701(32)(C) defines RPs in the case of offshore facilities: “In the case of an offshore facility (other than a pipeline or a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 *et seq.*)), 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 applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee) ...”

- What’s the standard of liability? Strict liability.
- Are there “complete” defenses to liability?

Yes, 33 U.S.C. § 2703, but limited to incidents “solely” caused by act of god (N/A here), act of war (N/A), or sole fault of a third party, or a combination of the foregoing. The OSV’s actions obviously could give rise

to the defense, but note the constraints on the third-party defense under 33 U.S.C. § 2703(a)(3) and (a)(3)(A) and (B).

- Can the platform interests prejudice their complete defense by post-discharge actions?

Yes, and *extreme* care should be exercised due to 33 U.S.C. § 2703(a)(c).
Quoting:

(c) Exceptions

(1) Acts of responsible party

Subsection (a) [the complete defense] does not apply if the incident was proximately caused by--

(A) gross negligence or willful misconduct of, or

(B) the violation of an applicable Federal safety, construction, or operating regulation by the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party ... *[Ed. Note: see above concerning the question of whether the platform was properly marked and that any warning devices were working, as well as that all safety devices concerning emergency shutdown procedures and equipment were functioning on the discharging production line.]*

(2) Failure or refusal of responsible party

Subsection (a) does not apply if the responsible party fails or refuses--

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

(B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or *[Ed. Note: this is another reason why involvement in, and cooperation with, the Unified Command is critical.]*

(C) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 1321 of this title or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).

- What are the platform's limits of liability? "The total of all removal costs plus \$75,000,000." 33 U.S.C. § 2704(a)(3).
- Can the liability limits be broken, leading to unlimited liability?

Yes. How? Quoting 33 U.S.C. § 2704(c)(1), (2), and (3):

(c) Exceptions

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(B) the violation of an applicable Federal safety, construction, or operating regulation by the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party ...

(2) Failure or refusal of responsible party

Subsection (a) does not apply if the responsible party fails or refuses—

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

(B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or

(C) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 1321 of this title or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).

(3) OCS facility or vessel

Notwithstanding the limitations established under subsection (a) and the defenses of section 2703 of this title, all removal costs incurred by the United States Government or any State or local official or agency in connection with a discharge or substantial threat of a discharge of oil from any Outer Continental Shelf facility or a vessel carrying oil as cargo from such a facility shall be borne by the owner or operator of such facility or vessel.

- Assume that the platform interests argue that the OSV is a “sole fault third-party” and that the platform shouldn’t have any liability under OPA and therefore has no obligation to pay. Must the platform RPs *nevertheless* pay response costs and damages in the interim, *i.e.*, until the sole fault liability of the third-party has been established?

Yes. 33 U.S.C. § 2702(d)(1)(B).

Does the OSV have recourse for actions they deem excessive that are approved by the UC?

- But what if the OSV interests are wholly or partially judgment proof for the monies paid by the platform interests?

OPA puts that risk on the RP, not claimants.

- If the platform RPs establish a complete defense due to sole fault third-party liability of the OSV, can the platform RPs seek recovery from the Oil Spill Liability Trust Fund?

Yes and no. “Yes” as to damages *other* than “response costs.” As to response costs, “no.” See, 33 U.S.C. § 2702(c)(3) (quoted above).

- Can the platform RPs seek recovery against the OSV interests?

Yes. OPA preserves contribution and subrogation rights. 33 U.S.C. § 2709 and 33 U.S.C. § 2715(a).

- What are the platform RPs’ potential damages?

See OPA, 33 U.S.C. § 2702(b)(1) (removal costs) and (b)(2)(A)-(F).

- Can the platform RP file for limitation of liability under the Limitation of Liability Act of 1851 (“LLA”), or otherwise seek concursus under Supplemental Adm. Rule F?

No. OPA disallows the right to limit liability under the LLA and instead OPA provides its own statutory limits and ways to break those limits. *See, e.g., In re Metlife Capital Corp. (M/V Emily S) (“Metlife”),* 132 F.3d 818 (1st Cir.1997), *cert. denied*, 524 U.S. 952 (1998), and *Bouchard Transportation, Inc. v. Environmental Protection Agency, State of Florida, United States, et al. (“Bouchard”),* 147 F.3d 1344 (11th Cir. 1998), *cert. denied*, 525 U.S. 1140, and *cert. denied*, 525 U.S. 1171 (1999).

- Can the platform RP argue that its liability for damages is limited by *Robins Drydock & Repair Co. vs. Flint*, 275 U.S. 303 (1927)?

No.

- Can the platform RPs have exposure for civil penalties, including judicially assessed civil penalties under the Clean Water Act, 33 U.S.C. § 1321(b)(7)?

Yes.

- **The OSV:**

General Maritime Law:

- Is the OSV an OPA RP and, if not, what's the basis of liability for the pollution claims?

Because the OSV is not a "discharging vessel," its owner, operator(s), and demise charterer (if any) are not OPA RPs. See the definition of RP in 33 U.S.C. § 2701(32)(A), and 33 U.S.C. § 2702(a). However, it *can* be an OPA RP if it is proven to be a "sole fault third-party," in which case it steps into the shoes of RP status.

- However, pollution is a maritime tort under the general maritime law, so traditional GML defendants, including the OSV *in rem*, have liability. The broader issues, however, go to burden of proof and damages. While under these facts the negligence of the OSV (and then some) is a given, such that the advantage of strict liability under OPA realistically isn't needed for proof purposes, other considerations are significant. For example:
- Under GML, the OSV can file for limitation under the LLA and seek concursus under Rule F; at least with respect to the PI claim of the crewmember.
- Absent OPA and its broad expanse of damages under 33 U.S.C. § 2702(b)(2)(A)-(F), under GML the OSV's damages are more limited, including under *Robins Drydock & Repair Co. vs. Flint*, 275 U.S. 303 (1927) (subject to the *Robins Drydock* exception for fishermen pursuant to *State of Louisiana ex rel. vs. M/V Testbank*, 753 F.2d 1019 (5th Cir. 1985) and other cases).
- Would the OSV have incentive to file for limitation?

Yes. Why? Under the facts, it appears that the OSV's ability to carry its burden of proving lack of privity or knowledge is slim to none, but concursus of all claims in federal court is a major consideration and advantage. See also the venue provisions of Supplemental Admiralty Rule

- Punitive damages possible?

Under *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008), they're not foreclosed, but punitive damages (under the facts with this particular vessel owner) would be largely irrelevant in view of the compensatory damages and issues of being judgment proof.

- What kind of insurance does the OSV have? What are the limits? Insured through a Club, Lloyd's, or other? Pollution exclusions?

Other Insurance Considerations:

What kind of insurance does the OSV have?

What are the limits? Insured through a Club, Lloyd's, or other? Pollution exclusions?

The OSV could have insurance through an International Group ("IG") club or the domestic market. If IG, \$1bn limit.

If in Louisiana territorial waters or if the policy was "issued or delivered" in Louisiana, could the club/insurer be sued from the get go under the Louisiana Direct Action Statute?

Who provided the COFR?

OPA Liability:

- Under OPA, 33 U.S.C. § 2702(d), the OSV can be treated as an OPA RP if the RP (in this case the platform RPs) establishes sole fault third-party. As a practical matter, the OSV would be brought into the OPA litigation, either by the platform RP or claimants or all of the above.

- What are the limits of the OSV as an OPA RP?

If it is proved to be a sole fault third-party, then its liability and limits become the strict liability and limits applicable to the platform RPs (see above – all response costs, plus \$75 million in damages). 33 U.S.C. § 2702(d)(2)(B). In this case, however, the facts show multiple ways to break the foregoing OPA monetary limitations, *e.g.*, gross negligence and likely willful misconduct, failure to report the spill, *etc.*

- Moreover, a common way to break OPA limitation is to show violation of federal safety and operating regulations. Taking the later as an example, there are numerous COLREGS violations, *e.g.*, Rule 5 (Lookout), Rule 6 (Safe Speed), Rule 7 (Risk of Collision), Rule 8 (Action to Avoid Collision), Rule 19 (Conduct of Vessels in Restricted Visibility).