Pollution Forms and Coverage Issues

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Insurance in its basic form is the process on assessing risk and then charging a premium that will allow the payment of all claims and costs and return an acceptable profit to the capital provider. As the analysis of risk and its predictability increases capacity, favorable conditions, high limits and appropriate pricing are available. However where the degree of risk and predictability become uncertain then conditions, pricing, limits and availability of insurance become more restricted. There is concern in the insurance market over environmental issues as the legal basis for assessing the risk and associated costs are at times uncertain and since the enactment of the Water Quality Improvement Act of 1970 there has been limited litigation on some of the critical areas of modern pollution statutes.

This paper is intended to highlight some of these critical areas from an insurer's perspective and to comment on the general ramifications in the marine insurance market.

AMERICAN INSTITUTE POLLUTION EXCLUSION and BUY BACK CLAUSE (P&I)

In 1976 the Water Quality Insurance Syndicate expanded its 1972 Policy Form from a form providing coverage for removal (clean-up) only of spilled oil to a form providing coverage for certain third party damages and coverage for discharges of substances other than oil[1].The vast majority of the U.S. domestic marine insurance market were members of the Water Quality Insurance Syndicate(WQIS) and accordingly the market decided to produce an exclusion clause for pollution and a buy back covering the items that were not covered by the WQIS Clauses. This resulted in the American Institute Pollution Exclusion Clause (P&I) and Buy Back Endorsement A (July 4, 1976).

This clause excluded all pollution and allowed the Insured to buy back:

"1. For loss of life of, or bodily injury to, or illness of, any person; or,

2. For loss, damage or expense to any cargo or property carried on board the insured Vessel (s); or,

3. For loss, damage or expense to any cargo or property on board any other vessel or contained or stored ashore unless such sums are paid, or liability is imposed, as a result of contact of such cargo or property with oil, petroleum products, chemicals or other substances of any kind or nature whatsoever arising in consequence of their sudden and accidental discharge, emission, spillage or leakage upon or into the seas, waters, land or air; or,

[1] SECTION B(1&2), LIABILITY FOR POLLUTION DAMAGE, Water Quality Insurance Syndicate Clauses (June 1, 1976)

4. For contamination of any cargo or property resulting from the pumping of oil, petroleum products, chemicals or any other substances of any kind or nature whatsoever directly into any other vessel, or between tanks of the insured Vessel (s) or into storage tanks or receptacles ashore or elsewhere."

The purchase of this buy back combined with the WQIS Clauses was intended to provide as full market coverage as was available through the fixed premium market.

In the next 35 years the WQIS and later other fixed premium markets underwent significant adaption and change and coverage was greatly expanded[2]. However the P&I market did not react and revise the Buy Back Endorsement A. The main problem with this was the lack of continuity between the products and such a great misunderstanding of the buyback clause that some individuals considered it to be some form of reasonable pollution coverage and they purchased no other product.

For a number of years the American Institute of Marine Underwriters' Liability Committee had considered this issue and this culminated in new a new clause (BUY BACK A).[3] While very similar to the previous clause the exclusion portion was modernized and the buyback portion was amended to read:

"1. For loss of life of, or bodily injury to, or illness of, any person;

2. For loss, damage or expense to any cargo carried on board the insured Vessel(s);

3. For loss, damage or expense to any cargo on board any other vessel or while contained or stored ashore; and

4. For contamination of any cargo resulting from the pumping of oil, petroleum products, chemicals or any other substances of any kind or nature whatsoever directly into any other vessel, or between tanks of the insured Vessel(s) or into storage tanks or receptacles ashore or elsewhere."

The main changes were in clauses 3 and 4. In clause 3 in the 1975 clause "… for any loss, damage or expense to any cargo or property…" was now amended to remove the reference to "property" and in clause 4 a similar reference to property was removed.

The Oil Pollution Act of 1990 (OPA 90)[4] provides for liability for damages for damage to or economic losses resulting from injury to or destruction of real or personal property. However, this applies only when such liability results from a "discharge[5] from a vessel into or upon the navigable waters or adjoining shorelines or exclusive economic zone[6]. The pollution exclusion portion of the new BUY BACK A excludes a broader range of "…discharge, emission, dispersal…" into or upon "…land, the atmosphere…" At the same time the fixed premium pollution coverage generally cover damages to

[2] WQIS Policy Form 1992, WQIS Policy Form 1998, WQIS Policy Form 2007, WQIS Policy Form 2011, London US Vessel Pollution Form 1990, LSW 1220 London US Vessel Pollution Insurance Policy, Great American Oil Pollution Cleanup Coverage
[3] American Institute POLLUTION EXCLUSION CLAUSE (P&I) and BUY BACK ENDORSEMENT A (MAY 9,2011)
[4] 33 U.S.C.A. 2702 (B)
[5] 33 U.S.C.A. 2701(7)
[6] 33 U.S.C.A. 2702 (a)

property arising from discharges as define in the Oil Pollution Act or "removal" or "remedial action" as defined in the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)[7]. Accordingly the removal of the property reference in the new BUY BACK A created a potential gap in coverage which had not existed in the same manner as before the new clause.

Where an emission into the air occurs that never is into or upon navigable water and it impacts property on shore or property carried aboard another vessel, the conditions would not be met to have an OPA 90 claim and under the pre 2011 WQIS policy form there would have been no coverage.

WQIS amended its coverage under the WQIS 2011 policy form[8] to provide for physical damage to real or personal property stored ashore arising from a sudden and accidental discharge, spillage, release, leakage or emission of Oil[9] or Hazardous Substances[10]. Damage to cargo stored ashore being specifically excluded. The issue here is that other types of air-emissions (e.g. paint, soot) are now excluded under the P&I policy and they would not be insured under the pollution policy.

It is also important to note that the pollution exclusion contained in BUY BACK A is very extensive. It includes "…, including but not limited to oil, fuel, petroleum products, chemicals, toxic materials or substances, hazardous materials or substances, smoke, thermal irritants, vapors, soot, fumes, waste, waste materials, invasive organisms, acids, alkalis, irritants, contaminants or other similar substances." The WQIS Policy specifically excludes aquatic invasive species[11] and other described substances/materials may be only partially provided for under the WQIS Policy and other fixed premium policies.

Salvage, Firefighting, Removal of Wreck and Substantial Threat of Pollution

OPA 90 and CERCLA both present a liability scheme where the owners and operators of vessels are liable for a "substantial threat of a discharge[12] or "threatened release[13]". The actual spillage of oil or hazardous substances is not required.

When one then looks at policies such as the American Institute Hull Clauses (September 29, 2009) which includes provisions for such things preventing or mitigating damage to the vessel under the DELIBERATE DAMAGE (ENVIRONMENTAL HAZARD CLAUSE), cross liability and actions taken under the COLLISION LIABILITY CLAUSE and the defense and safeguard under the SUE AND LABOR Clause and the straight forward salvage of the vessel, it can readily be seen that these actions could blend in and be a co-consideration with the avoidance of a pollution event.

[7] 42 U.S.C.A 9601(22) & (23)
[8] Water Quality Insurance Syndicate Worldwide Vessel Pollution Policy Form 2011 Section G of Part I
[9] 33 U.S.C.A. 2701(23)
[10] 42 U.S.C.A 9601(14)
[11] Water Quality Insurance Syndicate Worldwide Vessel Pollution Policy Form 2011 Section A(14) of Part III
[12] 33 U.S.C.A,2702(a)
[13] 42 U.S.C.A 9607 (a) (4)

Protection and indemnity Policies such as the AIMU protection and Indemnity (P&I) Clauses (June 2, 1983) have the same considerations when the reviewing the provisions of removal of wreck which read "Cost or expense of, or incidental to, any attempted or actual removal or disposal of obstructions, wrecks or their cargoes under statutory power or otherwise pursuant to law, provided, however, that there shall be deducted from such claim for cost or expenses, the value of any salvage from the wreck inuring to the benefit of the Assured or anyone."

The question that arises in the midst of many marine casualties is which policy provides coverage for various elements involved in the response and the answer is sometime both.

There is very limited litigation on this topic. Only two cases are directly on point and they are *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188 (9th Cir.1986) and *Kearny Barge Co. v, Global Ins. Co.,* 943 F.Supp 441 (D.N.J. 1996).

In *Port of Portland* the court stated "There are no rules of law to apply to [the] facts to determine whether the activities were salvage or pollution control. The determination is a purely factual one founded "on the application of the fact-finding tribunal's experience with the mainsprings of human conduct[14]" Also in *Kearny* the court sad "The successful salvage rescued the "Hull" of the CYNTHIA M and its costs are properly charged to Global: as in *Port of Portland*, the pollution prevention resulting from the refloating of the CYNTHIA M was incidental to the salvage of the CYNTHIA M and salvage costs are not chargeable to the WQIS Policy"

In order to try to bring some more order to this conflict among underwriters the WQIS 2011 Policy SECTION A (4) of PART II excludes "Firefighting, salvage or removal of wreck or debris of any Vessel(s) or cargo carried aboard any such Vessel(s),however this exclusion shall not apply to indemnity provided under SECTION A(7) of PART I. This SECTION provides:

"(7) Salvage, Cleaning, Offloading and Miscellaneous Liability-

(a) Costs and expenses incurred by the Assured for firefighting, salvage or removal of wreck or debris of any Vessel(s) or cargo carried aboard any such Vessel(s), to the extent that such actions were undertaken for the purpose of stopping a Discharge or Release, or mitigating or preventing a substantial threat of a Discharge under OPA or a threatened Release under CERCLA, subject always to SECTION A (4) of Part III;

(b) Costs and expenses incurred by the Assured for removal of Oil and/or Hazardous Substances from decks and other surfaces of the Vessel(s) that are exposed to the weather, arising from an Occurrence; …"

It is important to note that the exclusion is absolute while the affirmative coverage is limited. Offloading if conducted for the purpose of facilitating salvage would not be covered while stopping the discharge would.

[14] *C.I.R. v. Duberstein*, 363 U.S. 278, 289, 80 S.Ct 1190, 1198, 4L.Ed.2nd 1218

Although there has been not litigation that I am aware of, the same conflicts arise during a removal of wreck operation. If there is no substantial threat the may be no coverage.

It also should be taken into consideration by underwriters that where the double insurance clauses cannot be resolved or there is double insurance, it generally becomes a matter for state courts and the various states have differing regimes. This reduces certainty.

To sum it up, a vessel owner/operator purchases his insurance coverage with an expectation that he will be insured when a loss occurs. Up until the evolution of the fixed premium market the costs for pollution, firefighting, salvage and removal of wreck were covered by the hull and/or P&I insurers. As things have evolved the hull and P&I market are no longer committed to providing the traditional coverage that was previously provided but are more and more looking to the fixed premium pollution market to contribute to or pay for these types of claims and those disputes arising from this change are generating increased litigation and expense for the insurers.

Recovery of Economic Losses

OPA 90 states that each responsible party for a vessel from which oil is discharged is liable for among other things "(b) Covered removal costs and damages

(2) Damages

(B) Real or personal property-Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.

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(E) Profits and earning capacity-Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resource, which shall be recoverable by any claimant. [15]

The earliest OPA decision analyzing 2702(b)(2)(E) was in *Petition of Cleveland Tankers, Inc*. In Cleveland, the Court founds that section 2702(b)(2)(E) required a showing of damage to the plaintiff's own property or resources. However, another early decision, *Ballard Shipping Co. v. Beach Shellfish,* reached the opposite conclusion: "Congress means to allow recovery of economic losses from injury to natural resources even though the claimant's own property was not damaged. (*dicta*)

On July 22, 1980, the M/V SEA DANIEL collided with the container ship TESTBANK near mile 41 of the Mississippi River Gulf Outlet. Some containers onboard the M/V TESTBANK were lost overboard, including a container packed containing PCP's. The United States Coast Guard and various state authorities closed a portion of the Gulf Outlet and surrounding waterways to navigation and fishing for nearly three weeks. Plaintiffs brought suit seeking recovery for various economic losses. The district

[15] 33 U.S.C.A. 2702(b)(2) (B) & (E)

court granted the defendant's motion for summary judgment dismissing all claims against it on the ground that the plaintiffs could not recover for indirect economic losses absent some physical damage to a proprietary interest. On appeal, the Fifth Circuit, relying on *Robins Dry Dock & Repair Co. v. Flint*, affirmed the trial court's decision and held that parties who suffer no physical damage to their person or property are not entitled to recover consequential economic losses under maritime law.[16]

However, OPA is unclear as to whether economic losses are recoverable absent associated physical damages. In non-OPA cases, the Robins Dry Dock rule has generally been applied, which does not allow recovery of economic damages absent physical damage to a proprietary interest. There has been an exception made for fishermen, and some federal statutes such as TAPAA and CERCLA also allow economic loss claims.

Re Taira Lynn Marine Ltd. NO 5, LLC involved an allision that caused the release of a gaseous mixture that resulted in economic loss claims. Without finding that OPA applied, the Fifth Circuit stated that "2702(b)(2)(E) allows a plaintiff to recover for economic losses resulting from damage to another's property. However, the Court held that even if OPA applied the claim for economic loss damages under 2702(b)(2)(E) failed because the plaintiffs did not demonstrate that there was any property damage.

In *Dunham-Price Group, LLC v. Citgo Petroleum Corp*. the owner of an undamaged concrete facility could pursue a claim under section 2702(b)(2)(E) arising from the facility's temporary closure as a result of an oil spill. The spill caused "the closure of approximately 22 miles of the Calcasieu River, including portions of the Intercostal Waterway, and damaged property along the river, though none belonging to the plaintiff. The Court found that the river was a natural resource under OPA, and that a trier of fact could decide whether the plaintiff's economic loss was caused by this property and resource damage.

In sum, Fifth Circuit precedent clearly demonstrates that individuals may pursue claims under section 2702(b)(2)(E) for economic damages caused by physical damage to another's property or resource. However, the precise relationship required between the loss and the physical damages remains an open issue.

A few courts have examined OPA's causation requirements but found that OPA did not expressly require a showing of proximate cause. (*CSX Transp. Inc. v. McBride*) [17]

In the "Deepwater Horizon" litigation the court hinted that OPA causation may lie somewhere between two common law standards for causation: traditional proximate cause and simple but for causation. The action for pure economic loss claims survived motion to dismiss.

Insurers have heretofore rated their insurance on a belief that in order to have a claim for economic loss that the claimant would have to have had their property touched by the oil. This gave a very clear line in the sand for the settlement of claims. At this point the possibility of a much broader interpretation by the courts is possible and this will have an effect on the market.

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[16] *State of Louisiana ex. Rel. Guste v. Testbank* 752 F2nd 1019, cert denied, 477 U.S. 903 (5th Cir. 1985)
[17] *McBride v. CSX Transportation Inc*., 598 F.3rd 388,389 (7th Cir. 2010)

An added comment is that it should be noted that many claims have been settled that might not have been obligated under law. The politics of this are obvious; however, this potentially increases the expectations of parties for payment of more speculative claims in the future.

Criminal Liability

Criminal sanctions have historically been used as a deterrent to combat deliberate dumping of oil and other intentional environmental misconduct. The use of strict liability and negligence statutes by the Department of Justice and other law enforcement agencies, and the lower level of culpability based on negligence and strict liability, has resulted in insurance coverage being developed for certain criminal liabilities.

Statutes that are now used to prosecute spills include the OPA 90, the Clean Water Act[18], the Refuse Act[19], and the Migratory Bird Treaty Act.[20]

Insuring against intentional criminal acts is against public policy; therefor, traditionally, pollution insurers have not provided coverage. However, the growing use of strict liability and negligence statutes by the Department of Justice and other law enforcement agencies, and the corresponding lower culpability levels necessary for criminal liability, have resulted in the development of insurance coverage for certain criminal liabilities.

WQIS's 2011 Worldwide Vessel Pollution Policy Form 2011 provides coverage for fines and penalties arising from violations of certain criminal statutes. U.S. Criminal Defense[21] is also provided.

New issues are now facing the responsible party and its insurer as a result of this increased use of criminal sanctions. When a spill occurs, the vessel operator and its crew need to be aware that they are the potential target of a criminal investigation. It may be necessary for them to assert their Fifth Amendment right against self-incrimination. However, the assertion of Fifth Amendment rights could hinder a cleanup response and could also be considered "lack of cooperation with responsible officials[22]," which could result in a breach of a vessel's liability limits under OPA.

Some of the inequities in the use of criminal sanctions against responsible parties may eventually be addressed by legislation. However, unless there is legislation that results in major changes, the use of criminal sanctions must be considered by a responsible party and its insurer when planning oil spill response strategies and responding to a spill.

[18] Federal Water Pollution Control Act 33 U.S.C. 1319 (c)(1)(A)
[19] Rivers and Harbors Appropriations Act 0f 1899, U.S.C. 401-418
[20] 16 U.S.C. Sections 703-712
[21] Water Quality Insurance Syndicate Worldwide Vessel Pollution Policy Form 2011 Section H of PART I
[22] 33 U.S.C.A. 2704(c)(2)(B)

The trend to use criminal sanctions has firmly entrenched itself in government at all levels, and it has been the spiller who has underestimated the government resolve. It seems at times that the government feels that it is better to punish any innocent spiller so as to instill fear if not caution in the regulated community.

At the same time that society is viewing spills as criminal issues with little or no proof of any negligence or intent, there are other implications for spill response where the event is possibly or actually the result of a terrorist act.

The Background of Criminal Liability

Criminal penalties for oil spills and other environmental violations have existed under U.S. law for over one hundred years. For most of the twentieth century, law enforcement agencies and the courts have exercised discretion by treating environmental violations as civil matters unless the violations were the result of obvious criminal intent. However, in the past several years, the number and severity of criminal sanctions against vessel owners, operators, crewmembers, and masters have increased dramatically. This increase is the result of several factors. Arguably, the most important of these is an increased awareness of environmental issues by the public and increased scrutiny of incidents by federal agencies such as the Environmental Protection Agency ("EPA"), the Federal Bureau of Investigation ("FBI"), and the United States Coast Guard. The Department of Justice has also been a major factor through the use of several laws to criminalize strict liability statutes that originally were not intended to be used in spill events. In this atmosphere, owners, operators, masters, and crew all face exposure to criminal liability.

Statutory Basis for Liability

OPA contains criminal provisions. For example, not reporting a spill is a crime under OPA[23]. OPA also strengthened the criminal liability provision of other environmental statutes, including the Deepwater Port Act (33 U.S.C. Section 1514(a)), Intervention on the High Seas Act (33 U.S.C. Section 1481(a)), The Port and Waterways Safety Act (33 U.S.C. Section 1232(b)), and the Act to Prevent Pollution from Ships (33 U.S.C. Section 1908(a)). For the most part, the OPA criminal provisions follow traditional concepts of criminal law, which require some showing of knowledge or intent, or at least a negligent act. This would include instances of deliberate dumping.

The problem arises in the use of strict liability criminal statutes (primarily the Refuse Act of 1899 (33 U.S.C. Section 407), and the Migratory Bird Treaty Act ("MBTA") (16 U.S.C. Section 707). Under the MBTA, it is unlawful to, at any time, and by any means, or in any manner, to pursue, hunt, take, capture, or kill any migratory bird. We add emphasis on the word kill, as you will note that the language of the MBTA does not require that it be a negligent or intentional act. With this interpretation, it would be possible that a person could be driving their car, have a bird fly out from the bushes, strike and kill the bird and then be found criminally guilty of "killing" the bird.

[23] Citation for penalty for failure to report

Congress's original intent in 1918 when they enacted the MBTA was to target hunters of migratory birds, and this was how the MBTA was used prior to the EXXON VALDEZ spill. As a result of the EXXON VALDEZ spill, the MBTA was first used to support a criminal prosecution against a shipowner in connection with a maritime oil spill.

The Refuse Act of 1899 is also now being used to target vessels that have had an oil spill. The Refuse Act makes it unlawful to discharge "refuse matter" from a ship into navigable waters. This is another example of a statute used in a way that the original drafters of the legislation surely had not intended.

Since the EXXON VALDEZ, prosecutors have increasingly been using these strict liability statutes, which do not require a showing of intent, as a basis for criminal prosecution in an oil spill incident and it can be anticipated that a criminal prosecution could follow a spill of a hazardous substance. In other words, the shipowner, operator, and crew can be criminally prosecuted for their involvement in an oil spill even though all precautions were taken to avoid the spill. Moreover, the strict liability standard for environmental crimes has been repeatedly upheld under the rationale that environmental crimes are in the nature of a public welfare offense.

A recent high profile spill where the MBTA was used to prosecute a shipowner was the 1997 spill from the NORTH CAPE near Point Judith, Rhode Island. In that case, a tug caught fire and the barge it was towing ran aground. The failure of the barge to have an anchor windlass on board, which is a device used for raising an anchor, not lowering it, and which was not required by federal regulation, played an important role in the case. The parties involved stipulated to a settlement with the government rather than risk more severe criminal sanctions.

Another basis to allege liability that has been used in connection with environmental crimes is the Responsible Corporate Officer Doctrine[24]. Under this doctrine, a corporate supervisor or officer in an organization may be criminally liable when that supervisor or officer has knowledge of an environmental violation committed by a subordinate. In essence, the responsible corporate officer doctrine serves as a means of imputing criminal knowledge to corporations in which environmental violations occur.

If ultimately convicted, vessel interests face huge fines and criminal records. For example, the owner and operator of the Barge SCANDIA and Tug NORTH CAPE, Eklof Marine Corporation, plead guilty to the negligent discharge of 830,000 gallons of diesel fuel near Pt. Judith, Rhode Island in 1996. The companies were fined 9.5 million dollars. Eklof's ex-president was fined $100,000 and received three years' probation. The tug captain was fined $10,000 and received two years' probation.

A criminal conviction can also carry some collateral consequences, including being blacklisted from obtaining government contracts and onerous terms of probation where the company has to submit to regular or unannounced examination of its records by court appointed agents. Conviction under state law can also trigger a loss of both state and federal contracts.

[24] United States v. *Dotterweich* 320 U.S. 277 (1943)

The underwriter generally has a prohibition against the admission of liability on the part of an insured party which if done, may breach coverage. The underwriters also generally have a requirement that the insured cooperate with them, but when facing criminal sanctions this may become quite difficult.

Planning for Criminal Liability Issues

When a spill occurs, the person in charge, who normally is the captain of the vessel, must notify the National Response Center (part of the U.S. Coast Guard) in accordance with OPA statutory requirements. Once this notification is made, what type of involvement can the shipowner, operator, and crew expect to have with the U.S. criminal justice system?

Many companies appoint their Qualified Individual ("QI") from the ranks of their most knowledgeable and experienced employees. In many cases these individuals are intimately involved in the operation of the vessel that has had the casualty. These individuals may, accordingly, come under the scrutiny of the various investigative agencies and they can then become so involved in the criminal investigation or the defense of it that they are unable to perform the basic duties of a QI. To at least ensure that financial decisions can be made on a timely basis without interference from a criminal investigation, a responsible party ("RP") should assign the QI role to someone that does not have duties that could expose them to the criminal investigation.

The insurance industry has traditionally dealt with non-criminal counsel and the issues of privilege involved in civil matters takes on a whole new meaning when put in the context of criminal prosecutions against an individual. Companies may have claims handling procedures that by their requirements could cause privilege to be waived.

As an initial matter, in a high visibility spill, it is highly likely that both federal and state officials will commence a criminal investigation immediately. On the federal level, this may involve the Coast Guard, investigators from the EPA and FBI, and the U.S. District Attorneys' office. At the local level, police, state police and an investigative unit from a state environmental enforcement agency will more than likely participate in any release. The investigation could also involve officials from more than one state if the spilled oil migrates into another state (a relatively frequent occurrence). Multiple states can mean multiple state officials and the possibility of conflicting laws or possibly different requirements under different state laws.

It is the responsibility of these law enforcement organizations to gather evidence to determine if a crime has been committed. While the Coast Guard plays a broader role, with many duties arising in relation to a spill, it is important to appreciate that the Coast Guard must also evaluate whether a criminal investigation is appropriate. By the sheer nature of the Coast Guard's mission, they enter many situations with more than one responsibility. The guidelines for the Coast Guard's criminal investigation are contained in the Commandant's Instruction for the Criminal Enforcement of Environmental Laws. The following must be kept in mind with respect to the Coast Guard's activities when there is a spill:

1. Once a casualty is reported, it is the Coast Guard's responsibility to investigate;

2. One of the purposes of the investigation is to determine whether there is evidence of a crime;

3. And where there is “reasonable cause” or a “serious marine accident” (including a serious threat to the environment), the individuals involved will be asked to submit to drug and alcohol testing.

The Coast Guard may issue subpoenas to require persons to appear and to produce documents such as [or including] vessel log books, cargo manifests, and crew records.

Additionally, the Coast Guard has an obligation to turn over to the U.S. Attorney any evidence of criminal conduct it discovers during its investigation of an incident.

The cost of providing a defense may become an issue. It may be necessary to appoint several attorneys to represent divergent vessel and crew interests.

At the early stage of an environmental casualty, the crew, corporate officers and the corporation should be represented by criminal counsel. This requires some advance planning. Criminal defense counsel should be identified in the geographic areas where the company’s vessels operate and then, if possible, put on retainer. At least a preliminary liaison should be established with defense counsel so that they can be sent to a spill scene as rapidly as possible. It may be necessary to retain individual criminal counsel for the company, officers, and crewmembers, since their interests may conflict during an investigation.

It is also advisable to conduct in-house training for crewmembers and corporate officers to educate personnel regarding their potential criminal liability, how to conduct themselves during a criminal investigation, and the numerous pitfalls that they may face. For example, individuals, including assigned defense counsel, have been threatened with obstruction of justice charges when suggesting to a crewmember that they should assert their Fifth Amendment rights. Basically, if you are not assigned defense counsel, you should not advise anyone else as to whether they should discuss an incident with investigators.

Another serious issue from an insurer’s perspective is the effect a criminal investigation has on ongoing response efforts. First, to efficiently respond to a spill, the spill response managers need access to the responsible party and its management for critical information to facilitate the spill cleanup. When there is a criminal investigation underway, the responsible party may be attending hearings or responding to questions from law enforcement agencies.

Even when individuals are not directly involved in the criminal investigation, they may be less than eager to discuss the spill, perhaps on the advice of criminal counsel. This lack of full cooperation could hamper the clean-up efforts. If a vessel is damaged and the responders need information, a question of how much product is left in a holed tank or other questions necessary for the mitigation of the event could be interpreted as incriminating by the responsible party's personnel. Additionally as mentioned elsewhere, a R.P.’s lack of cooperation with responsible officials could result in the loss of OPA’s limitation on liability and open up the vessel owner and operator to a liability they had not anticipated.

Specifics Regarding Insuring Against Criminal Liabilities

Another consideration for a vessel operator is whether it can get insurance for criminal liabilities. In general, insuring against criminal liability is against public policy and insurance policies that attempt to do so are void and unenforceable.

There are exceptions to this public policy that allow for coverage under various state and federal laws. These exceptions often turn on the degree of culpability for the alleged criminal conduct, in other words, whether to be convicted under a criminal statute you must have committed an intentional act or whether your negligence led to the conviction. For instance, Massachusetts has statutorily recognized the public policy against insuring against criminal liability. However, the state's statute is narrowly applied to cases involving a particular subjective intent to cause damage to the injured party. In Louisiana, one court has held that liability insurers must cover damages arising from criminalized "non-intentional" conduct, such as criminal negligence.

In other jurisdictions, the specific issue of insuring against criminal penalties has not been addressed, but it would appear that public policy could indirectly prohibit insuring against criminal liability resulting from intentional acts. Other jurisdictions might view insuring against criminal liability as analogous to insuring against civil punitive damages, which are not generally insurable. However, it is not against public policy to insure against strict liability and negligent violations of criminal law.

The specific provisions in an insurance policy may also preclude coverage. Many policies contain exclusions that either directly or indirectly prohibit insuring against criminal liabilities. A typical provision that might apply to criminal penalties would be where a policy does not provide coverage against the willful misconduct of an insured. With this type of exclusion, one would have to look at the degree of culpability of an insured to determine if there was coverage. For instance, if the insured were convicted of a violation of a strict liability statute, such as the MBTA, the policy exclusion would not preclude coverage.

Another insurance policy provision that would apply to criminal liability would be exclusions for fines and penalties. In this instance, there would be no coverage even if there were a violation of a strict liability statute.

In sum, a coverage determination is made by reviewing the policy provisions, including exclusions that would preclude coverage for some or all criminal violations, and whether state or federal jurisdictions would preclude coverage on public policy grounds notwithstanding policy provisions. As insurers, we recognize that there is an increasing demand for products that provide coverage for criminal liabilities. As a result, WQIS now offers a Defense, Fines, and Penalties Endorsement that covers certain liabilities and defense costs arising out of alleged violations of the MBTA, the Refuse Act, and criminal negligence under OPA.

Recovery against the Fund

Under OPA, a guarantor or insurer has certain defenses to claims arising out of a spill, including the criminal gross negligence or criminal willful misconduct of the insured. A successful criminal prosecution may allow an insurer to recover from the Fund because, as previously stated, public policy forbids insurance against criminal acts.

In *WQIS v. U.S.,* (The MORRIS J. BERMAN)[25], WQIS submitted a claim for reimbursement of the $10 million it spent on cleanup costs in the 1994 spill in Puerto Rico. We believed that we were entitled to reimbursement as a result of the willful misconduct of the assured in causing the spill, since the owner was convicted of knowingly sending an unseaworthy vessel to sea likely to endanger life. The timeline is instructive here: the spill occurred in 1994; however, we did not submit a claim to the fund until 1998. After four years without a determination on our claim by the Fund we filed suit, seeking a ruling that the criminal conviction must constitute willful misconduct under OPA. The NPFC argued that there was no willful misconduct of the Responsible Party. While disagreeing with our rationale, the Court found that a series of events that led to the casualty constituted willful misconduct and ruled in WQIS' favor in 2007.

Conversely, an insurer's potential to recover losses from the National Pollution Fund Center ("NPFC") may become jeopardized by a determination that the action of the insured was not willful misconduct or gross negligence yet it was still a criminal act. By the fact that the loss arose from the violation of a Federal safety, construction or operating regulation, the insurer, in effect, remains liable, but loses the benefit of any statutory limitation from the Fund.

The use of criminal sanctions in response to environmental incidents is also getting more and more scrutiny by government organizations. At least one organization, the National Transportation Safety Board, is concerned that the expanded use of criminal sanctions impedes their ability to conduct investigations and determine the root cause and remedies for marine incidents.

The Background of Insurance and Terrorism

The insurance industry has historically provided "war" coverage on hulls, cargos, aircraft and other properties, which are capable of moving, avoiding the war zone or fleeing the area of conflict. Until 1914, war coverage was written under the presumption that war had "rules". Concepts such as neutral prizes, contraband, blockade and rights of search applied. The First World War changed all of these concepts. A free of capture and seizure clause was developed, which effectively excluded war and in 1938 a separate war policy was developed. War was generally agreed to be acts of nations or agents of nations. Strikes, Riots and Civil Commotions (SRCC) were not considered to be acts of war and were also covered separately. SRCC is where terrorism generally fell, though there is little agreement or case law to clearly establish this one way or another. The concepts of rules of war have now evolved into the ultimate "the end justifies the means" philosophy.

In the event that an oil spill is potentially or actually the result of a terrorist act, there is a concern that government officials will treat the location primarily as a crime scene and take other

[25] *Water Quality Insurance Syndicate v. United States* 522 F.Supp.2nd 220 (2007)

actions that will transform and complicate a pollution event. The National Response Plan should help address this issue.

The Effects of Terrorism on Insurance

Preventing the pollution of our waterways when there is a vessel casualty is of course a primary focus of governmental agencies. Oil spills were complex events prior to September 11, 2001 and they continue to be complex events today. However, one key difference now exists. Before 9/11, the immediate focus of everyone's attention was the quantity of oil spilled. Today, the first question asked after a release is not how much oil has been spilled but rather what was the cause. More specifically, was the spill the result of an act of terrorism? An explosion on a gasoline barge at an oil and gas storage facility in Staten Island, New York illustrates the point. A leading national newspaper devoted the first five paragraphs of its lead story on the explosion to a discussion of whether or not there was a terrorist attack. FBI officials were interviewed for the story.

Was the cleanup of that spill hampered because of the terrorism investigation? We will probably never know, because the gasoline that escaped from the barge quickly evaporated and the cleanup was not conducted until the fire resulting from the explosion was extinguished. The next spill, however, might be a crude oil spill where every minute in response time counts. While the shipowner is trying to minimize the spill, the F.B.I. might have already taken control of the spill scene to conduct an investigation, possibly evacuating the crew and locking out the spill responders and their equipment. If this in fact occurs, the cost and complexity of the cleanup will increase dramatically, the environmental damage will be greater, and the possibility that the shipowner's actions are found to be insufficient could become a reality, resulting in criminal sanctions. What if it is determined that a spill occurs as a result of an act of terrorism? Will the same criminal liabilities apply? Will these liabilities apply even in those instances where the spiller failed in some way in their security efforts so that the spill in part could be attributed to that failure? If the event gets out of control, will the discharging vessel or facility be expected to pay for the additional costs?

Even if a spill scene is not in lockdown status, there could be a lack of access if spill response personnel do not have the appropriate identification. While a national standard for transportation worker security cards will be put in place at some point by the Transportation Security Agency, port facilities currently have individual requirements for proper identification. For spill response crews that may need access to multiple facilities even at a single spill, this could impede spill responders' ability to timely deal with an oil spill.

The threat of terrorism is real. But vessel owners, their insurers, and government entities must now work to integrate the response to the terrorism threat to our existing spill response infrastructure that has been developed under OPA, and not unnecessarily increase a shipowner's exposure to criminal liability. The National Response Plan recently released by the Department of Homeland Security should help coordinate government agency actions following an incident and possibly help mitigate this exposure with clearer guidelines for all that are responding to an event. http://www.fema.gov/national-response-frameworkinvestigations, and has conducted interagency symposiums to address the issue.

Terrorism as such is not excluded under the WQIS policy. Coverage applies because the defense that is allowed to the responsible party is for damages and removal costs where the discharge or substantial threat of a discharge is caused solely by "An act or omission of a third party…"[26] This raises the specter of whether there could be a terrorist event where the responsible party is found for some reason by some act of omission of commission to have some degree of fault.

Abandoned and Derelict Vessels

Abandoned and derelict vessels are an emerging issue for Federal, state and local officials impacting many U.S. harbors, bays, and shorelines. Sunken, stranded, and decrepit vessels can be an eyesore, hazard to navigation or present a significant environmental threat. Wrecks can physically destroy sensitive marine habitats,"… sink or move during coastal storms, disperse oil and toxic chemicals still on board, become a source of marine debris, and spread derelict nets and fishing gear that entangle and endanger marine life."[27]

The National Oceanic and Atmospheric Administration (NOAA) has for many years through its NOAA Marine Debris Program focused its activities on coral habitats where they performed surveys in Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, Puerto Rico, and the U.S. Virgin Islands.

Since 2005 the NOAA Marine Debris Program has expanded its efforts and has been mandated to take actions through a number of statutes including:

The Marine Debris Research, Prevention and Reduction Act[28] legally establishes the NOAA Marine Debris Program, including mapping, identification, and impact assessments, removal and prevention activities, research and development of alternatives to gear posing threats to the marine environment, and outreach activities.

The Coral Reef Conservation Act of 2000[29] States that NOAA must "provide assistance to States in removing abandoned fishing gear, marine debris, and abandoned vessels from coral reefs to conserve living marine resources"

The Marine Protection, Research, and Sanctuaries Act of 1972 (Ocean Dumping Act)[30] regulates ocean dumping and monitoring and takes into account the aesthetic properties of the National Marine Sanctuaries in regards to marine debris.

The Coastal Zone Management Act of 1972[31] provides for management of the nation's coastal resources, including the Great Lakes, and balances economic development with environmental conservation.

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[26] 33 U.S.C. 2703(a)(3)
[27] US Department of Commerce, NOAA website response.restoration.noaa.gov/
[28] 33 U.S.C. 19561 et. Seq.
[29] 16 U.S.C. 6401 et. Seq.
[30] 33 U.S.C. 1401 et. Seq.

The Marine Plastic Pollution Research Control Act [32] deals with outreach and education and pollution from ships. The Act to Prevent Pollution from Ships (APPS) was amended by the Marine Plastic Pollution Research and Control Act of 1987, which implemented the provisions of Annex V of the International Convention for the Prevention of Pollution from Ships (MARPOL) relating to garbage and plastics. Annex V of MARPOL and the regulations implementing it apply to all vessels, whether seagoing or not, regardless of flag, on the navigable waters of the U.S. and in the exclusive economic zone of the U.S. It applies to U.S. flag vessels wherever they are located.

In order to identify the location of these vessels NOAA is utilizing two protocols:

1."Rigorous Scientific Survey Protocols: A long-term monitoring and assessment study with standardized, statistically robust and holistic methodologies that focus on abundance and density. The four main objectives are:

Assess the quantity of debris at a location and expand to regional characterization according to associated land and ocean uses that influence debris density

Determine the types and density of debris present by material category (e.g. plastic, metal, etc.)

Examine spatial distribution and variability of debris

Investigate temporal trends in debris amounts"[33]

2. "Volunteer At-sea Visual Survey: The MDP has also worked with scientists and sailors to develop a volunteer at-sea visual survey for floating marine debris. This data collection form has been in use since 2009 and continues to be updated. Sailors with the TransPacific Yacht Race and Pacific Cup have been instrumental in helping implement, test, and improve this survey."[34]

This program has identified some 1,100 abandoned or derelict vessels so and the vessels are being prioritized based on the environmental and other threat levels.

Limited Federal and State funding to respond to derelict vessels has resulted in legislative efforts that are beginning to consider potential new mandatory insurance requirements for particular sizes and vintages of vessels.

Several States including Florida[35], Maine[36], Maryland[37], New Jersey[38], and Texas [39]have established derelict vessel response regimes. Washington State, partly as a result of some of the

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[31] 16 U.S.C. 1451-1464
[32] 33 U.S.C. 1901 et. Seq.
[33] US Department of Commerce, NOAA website response.restoration.noaa.gov/
[34] IBID
[35] Fla. Stat. 823.11(2), 376.15
[36] Me. Rev. Stat. tit. 12 1866(4)
[37] Md. Code Ann.Nat. Res. 8-725.1(a)
[38] N.J. Stat. ANN. 12:7C-1
[39] Tex. Parks & Wild. Code 31.037(a)

incidents noted below, has the most developed derelict vessel program with a dedicated budget funded by vessel licensing fees. Also, Washington's 2001 Legislature authorized the use of money in the state toxics account for a grant program for local governments to clean up and disposal of hazardous substances on abandoned and derelict vessels .Even with its developed status the Washington State program generates a very small fraction of the funds that would be required to address its current backlog of over 200 vessels identified as derelict and in need of removal.

Recent Response Costs Spur Penalties & Increased Legislative Efforts

DAVY CROCKETT

In January, 2013 the owner of the DAVY CROCKETT, a World War II Liberty Ship, was issued a fine by the Washington State Department of Ecology ("DOE") in the amount of $405,000.00 for environmental violations and negligence arising from the owner's attempt to perform an in-water scrapping of the vessel along the banks of the Columbia River. Washington State DOE also issued a bill to the vessel owner for State response costs in the amount of $680,000. The unsuccessful scrapping of the DAVY CROCKETT began in October 2010, and resulted in a ten month multi-agency response led by the USCG at a cost of over $22 Million to the National Pollution Fund Center's Oil Spill Liability Trust Fund. Authorities determined that the 430 foot vessel continuously discharged oil and oily debris for a minimum of 40 days with no notice of the discharges being reported by the vessel owner. The owner of the DAVY CROCKETT pled guilty to two criminal violations of the Clean Water Act and is scheduled to be sentenced March 18, 2013.

The DAVY CROCKETT response was the second largest draw down in history from the National Pollution Fund Center Oil Spill Liability Trust Fund. The largest was for the wreck LUCKENBACH off the Golden Gate to San Francisco Bay. Not surprisingly, the West Coast is the origin of significant legislative and regulatory activity to address derelict vessels and orphan wrecks. The immense cost to taxpayers to respond to a private vessel problem triggered the formation of a Work Group in the spring of 2012 amongst the Federal Government, the States of Oregon & Washington and other regional Pacific Northwest public and private stakeholders. The Work Group submitted recommendations to the Washington State Department of Ecology and many of those recommendations have found their way into pending legislation discussed below.

Legislative Efforts

The Washington State legislature recently considered legislation that would have imposed a proof of financial responsibility requirement for potential pollution removal and salvage costs upon both transferors and transferees of vessels over 40 years old and over 65 feet long. Subsequent versions of the proposed legislation have been amended to back off on the formal imposition of a joint proof of financial responsibility requirement for pollution removal and salvage costs. As currently proposed the State legislature would convene a work group that would consult persons with relevant expertise in

financial responsibility mechanisms such as insurance, surety bonds and letters of credit. Recommendations from the work group would be due by December 15, 2013[40].

Federal and State government Regulators continue to seek private resources to address pollution and wreck removal costs for derelict vessel responses. When an owner of a derelict or abandoned vessel is insolvent or cannot be identified, regulators frequently seek to tap past insurance coverages for mitigation costs. These efforts are not always successful given the government's burden of proving that a covered incident/peril occurred or arose during an applicable policy period.

This becomes an insurance issue on several levels. The main level is that the government after incurring DAVY CROCKET types of expenses will seek to find a company or subsequent company from which to recover the costs and as mentioned before, the costs can be high. Questions will arise for those companies if the vessel was abandoned intentionally or left after a casualty.

Prior to 1976 P&I policies did not in general contain a pollution exclusion clause nor did the removal of wreck provisions. With the increased government attention to derelict vessels and their efforts to identify potential applicable past insurance carriers, activity in these areas, there could be some unwelcomed surprises for underwriters.

CONCLUSION

The legal landscape for litigation and resolution of outstanding issues for the pollution underwriter has been limited and as this paper shows it is evolving and new issues arise at a frequent rate. The Justice Department and State authorities will continue to utilize any law that could be relevant to further their perceived interests no matter what the original intent of the law was intended to be.

The ability for the underwriter to understand and price the risk is also limited and is subject to change as the legal landscape shifts. When litigation arises, the industry must be very careful to select issues that will allow further clarification, not just issues that will win. The expense of the litigation is small compared to the cost of bad law.

[40] State of Washington 63rd Legislature Substitute House Bill 1245, Section 49 (2)-(3)