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Lawyers, Booms, & Money

Understanding the Traditional Damages Collection Response to the *Deepwater Horizon* Oil Spill, and Using the Rule of Law to Support Increased Damage Prevention¹

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¹ This paper is presented provisionally due to the exigencies of the oil spill. Nothing in this paper should be construed as legal advice. In this paper, the author harnesses the law and his “I can’t believe this is happening” syndrome to place the spill in context. Written informally, sloppily, and self-referentially, with a Florida bias but without spell check, much of the legal analysis nonetheless has bearing on other affected jurisdictions. Ranting almost incoherently in places, the author eventually identifies some potentially valuable pressure points for anti-BP lawyers and their clients.

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Introduction

“Tin cup in hand, we beg you oh Lordly BP to save our assets and bestow thy grace upon us.”

That pretty much sums up the street understanding of applicable federal law, at least buying into the sober narrow Oil State-friendly analysis some like to make. But we are way too desperate in many Florida coastal communities for a sober narrow Oil State-friendly analysis. And, but for small land-based oil fields in the northwestern and southwestern parts of the State, we are not presently an Oil State.

Yet, like it or not, we are all in this together. Our neighbor Gulf of Mexico Oil States are a big part of our current dynamic. They coddle and cajole for the oil industry, keep the oil tax revenues for themselves, and now, when we bear their downstream externalities, they will no doubt try to keep jurisdiction over this disaster in the Federal District Court and Court of Appeals of BP’s choice.

Meanwhile, traditional approaches to mass disasters can seem overly focused on hasty and competitive client-recruitment and monetary damages claims. The 2010 Gulf of Mexico oil spill is no exception. Within days of the news that the explosion of the *Deepwater Horizon* on April 20, 2010, was more than just a personal tragedy for the killed, injured and surviving family members, dozens of class action suits solely for money damages were filed on behalf of fishermen, property owners, and various other categories of claimants, many seeking to represent the same or substantially similar classes across entire states or even multiple states.

In such circumstances, cynicism about trial lawyer motivations is an inevitable result. Certainly criticism of the zeal displayed to be first, or even fortieth, to the

courthouse with class action papers is at least in part justified. Contingency lawyers try to make money for themselves, and they do not get paid for being bashful about their profession. Nonetheless, while arguably understandable if not excusable in our legal system, this NASCAR approach to litigation in the face of ongoing environmental tragedy seems unseemly to many members of the general public, though doubtless not to the victims.

This paper first examines whether, in the face of the oil spill disaster, traditional monetary damage claims, and the seemingly hypercompetitive and self-serving strategies employed by lawyers, may be in part a result of legal limitations imposed by the lobbyist-driven systems of laws that led to the tragedy in the first place.

Then, free advice is given to Louisiana fishermen and others who have been or may soon be ripped off by BP.

Lastly, this paper examines whether room might exist outside the current federal legal regime to enable class counsel and other public and private advocates to support damage prevention policy goals, rather than simply being damage collectors. The author concludes that lawyers may yet have laudable opportunities to promote skimming of oil, instead of simply seeming to be skimming for fees.

Anatomy of an Epic Race to the Courthouse

I deleted the section of this paper bashing industry lobbyists. I will miss sharing the trite self-congratulatory war stories. But it might not have been fair to single out the folks who greased the wheels for BP at *Deepwater Horizon*. Much fairer to equate lawyers, who competitively collect clients every day in every city in America, with lobbyists, who every day in every capital city in America collect industries and pursue

these industries' goals. Sometimes, the lobbyists' industry clients kill people or cause mass environmental disasters, but alas, sometimes the lawyers' arguments or their client's claims are frivolous, and lawyers do after all typically file claims rather quickly and tackily after mass disasters. So, we'll put the lawyers in the same section of Hell with the lobbyists.

In any event, it is always questionable to blame lobbyists for convincing elected officials and bureaucrats to act a certain way. Ah democracy, with Niebuhr reminding us that the politicians merely are reflecting the selfish instincts of the majority of the voting members of us all. Plus, the lobbyists remind us, we all drive cars. So, we all really are deserving of damnation. Kumbaya K Street. You merely made money for giving us what we must want.

Yet, if you really want to get a claimant, such as a desperate unemployed fisherman, and his greedy legal advocate hopping, tell them that the fund they may have to collect against is arbitrarily capped regardless of the size of the natural disaster. That is what Congress did in the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq.³

The upside for the claimants and their lazy good for nothing lawyers is that under 33 U.S.C. § 2702(a), they don't have to prove much. It is "strict liability"—yippee. That is, if there is a discharge of oil from a covered vessel or facility, then the responsible party is liable without further proof.⁴

Also nice is that lots of different categories of damages are theoretically recoverable by private claimants under 33 U.S.C. § 2702(b)(2), including real and personal property damages and, my favorite, profits and earning capacity. One would

³ Note that the act appears to have a condition precedent for 90 days notice prior to filing in court. 33 U.S.C. § 2713(a), (c)(2).

⁴ Of course there are some exceptions here and there, but this is pretty much the case.

think that truly compassionate corporate lobbyists drafted this, what with the broadness of the damage categories and all. Heck, while they were at it, they should have made everyone who'd ever been to a gas station entitled to lifetime massage and dinner rolls! The coverage is almost that dad gum good!

But, er um, no so fast wastrel. What oily man giveth, he taketh away.

Can this be true?

Alas, yeh. You see, if there is a really big bad terrible meltdown of a disaster, with huge removal costs, with huge damages, an utter apocalyptic situation, well, we let them off the hook after a down payment. We don't want to bankrupt a company that bankrupts thousands or millions of others. So, under 33 U.S.C. § 2704, Congress in its little tiny wisdom tightly capped damages!!!!

(Before I state the simpleton interpretation of this statute [\$75,000,000 cap period], which you have probably read ten times in the press, let me pause parenthetically to observe that there is some, for me, really complicated language about treating an oil rig like the *Deepwater Horizon*, which apparently is a mobile offshore drilling unit, "first as a tank vessel," and some truly bizarre language before that in the first part of the statute where you have to know all sorts of details I don't know about the size and design of the rig, but that in a nutshell, when it is all read together, may add upwards of several handfuls of extra millions to the amount that shall eventually be discussed herein [hint: \$75,000,000].)

So (except for the parenthetical caveats above), what Congress did was say, if you cause, lets say for purposes of discussion, \$75,000,000,000 in damages, you only have to pay \$75,000,000 in damages (relating to an "offshore facility"). Close enough right?

Thanks a lot Congress for all of the help with the strict liability and the free donuts for a lifetime. Now let's race to the punch bowl to fill our cup before it runs out.

You see sucker, there ain't no more obligation to pay damages after BP pays the downpayment!!!! Hah, hah, we lose!!!!!!

And now back to our sober analysis. One item of good news is that Congress apparently did say that the oil companies have to pay removal costs too, on top of the \$75 million. See 33 U.S.C. §§ 2702(b)(1), 2704(a)(3). But there is a huge catch to that too, which I'll try to get to in a minute, heh, heh.

Another bit of, what, generosity?, by Congress is that if the responsible party, or its contractual comrades in corporate crime (my term, hereafter "CCCC"), commits "gross negligence or willful misconduct," then the cap gets thrown out! So naturally, the blood sucking lawyers are arguing gross negligence and willful misconduct. Because surely, it is only their lawyerly greed, NOT THE DAMN GREED OF BP AND ITS CCCC, that could be in play here.

You see, those charcoal grey suited lobbying maggots I was going to talk about in my now deleted first section of this paper might have had a tiny little bit to do with, uh, just about every damn thing they did not like being made to not apply to BP AND ITS CCCC. Cost saving measures!!!!!!!!!! Get government off the backs of BP AND ITS CCCC!!!!!! Rallying cry for the ages.

One other good reason to let the bloodsucking lawyers prove BP's gross negligence and willful misconduct is that the federal government has its own oil pollution fund, funded from oil taxes, penalties, and other sources, separate and apart from BP's ostensibly capped liability. This fund, reported to have reached to around \$1.4 billion

prior to the *Deepwater Horizon* disaster, cannot be reached by BP for reimbursement of its own costs, **IF** BP's own gross negligence or willful misconduct caused the incident, removal costs, or damages. 33 U.S.C. § 2712(b).

Think you're ticked at BP now, but wait until they try to claim for reimbursement from the government's pot. Then all of the lily-livered anti-trial lawyer crowd suddenly might realize that this wouldn't be exactly fair and just and responsible and moral. So the greedy trial lawyers will be doing everyone who is damaged a favor by keeping BP's hands out of that cookie jar.

Bonus Tips To Louisiana Fishermen Reportedly Being Forced To Sign Waivers In Order To Be Hired By, Or Get Small Payments From, BP, and to Claimants Contemplating Dealing Directly with BP Without Hiring a Lawyer

Before we resume our regularly scheduled Florida-focused analysis, let us make a point that might be valuable to those poor fishermen that BP is reportedly ripping off, as stated in the above section title. Please read 33 U.S.C. § 2705(a) carefully. It says in part:

The responsible party shall establish a procedure for the payment or settlement of claims for interim, short term damages. Payment or settlement of a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled shall not preclude recovery by the claimant for damages not reflected in the paid or settled partial claim.

Perhaps this statutory language will help you out down the road. Perhaps not. I'm not your lawyer.

But it is a good lesson in why claimants need to hire those greedy lawyers in the first place. Otherwise, BP may very well take advantage of you and get you to sign a waiver that you later regret. Get a lawyer people.

How We, the 27th State of the American Union, Learned to Stop Taking BP's So-Called Charity and Instead Take BP To The Wood Shed

Brownie (I can't help this) does not always do a heck of a job, and, thankfully, State and County governments, and private citizens, are not required to feign that he is doing so. Why not? Because even the best-laid lobbyist plans to obtain a fully favorable federal oil pollution law can go wrong.

Based on the below analysis, I believe that the tin cup held out to BP should be replaced with a big Florida pine two-by-four. I think I may have already, how shall we say, alluded, to the possibility that BP was grossly negligent or committed willful misconduct, and that therefore, even under the industry-friendly Oil Protection Act of 1990, the **damages** caps may not fit, in which case they may not quit—paying.

But going back to the main topic of this erudite monograph, damages prevention as opposed to damages collection:

In my humble opinion, BP may also potentially be forced to fund **removal actions under applicable State law**. Shocking I know. If I am right, the received wisdom of some that BP has done Florida a big favor by recently voluntarily writing it a check for \$25,000,000 to protect the entire State, with its longest coastline in Union other than Alaska, is simply wrong.⁵ Similarly, in my humble opinion, BP is subject to the State's police powers and its various and sundry applicable state environmental enforcement regimes.

Why do I think this?

⁵ This budgetary limitation, while seemingly at a large amount, is already apparently causing some cash-strapped local governments to flinch in their pursuit of aggressive protection strategies. Hence, getting rid of this artificial barrier to environmental protection would seem to be imperative. County governments should be fully supported to protect their citizens.

Because the Oil Protection Act of 1990, and the related oil spill clean-up statute in the Clean Water Act, 33 U.S.C. § 1321, appear to me to give support for this interpretation.

33 U.S.C. § 2711 states:

The President shall consult with the affected trustees designated under section 2706 of this title on the appropriate removal action to be taken in connection with any discharge of oil. For the purposes of the National Contingency Plan, removal with respect to any discharge shall be considered completed when so determined by the President in consultation with the Governor or Governors of the affected States. However, ***this determination shall not preclude additional removal actions under applicable State law.***

(Emphasis added.) Perhaps even more directly on point, 33 U.S.C. § 2718 expressly preserves State authorities:

Sec. 2718 Relationship to other law

- (a) ***Preservation of State authorities***; Solid Waste Disposal Act ***Nothing in this Act*** or the Act of March 3, 1851 ***shall—***
- (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—***
- (A) the discharge of oil or other pollution by oil within such State; or***
- (B) any removal activities in connection with such a discharge; or***
- (2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law.***

(Emphasis added.)

33 U.S.C. § 1321(d)(2)(H), which further lays the framework for the National Contingency Plan (the governing federal emergency response document), likewise states that the Plan shall include:

(H) A system whereby *the State* or States affected by a discharge of oil or hazardous substance *may act where necessary to remove such discharge* and such State or States may be reimbursed in accordance with the Oil Pollution Act of 1990, in the case of any discharge of oil from a vessel or facility, for the reasonable costs incurred for that removal, from the Oil Spill Liability Trust Fund.

(Emphasis added.)

Likewise, 33 U.S.C. § 1321(o), states in pertinent part:

(o) Obligation for damages unaffected; *local authority not preempted*; existing Federal authority not modified or affected

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substances or from the removal of any such oil or hazardous substance.

(2) *Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters with such State, or with respect to any removal activities related to such discharge.*

(3) *Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.*

(Emphasis added.)

Therefore, in my opinion, Florida State and County governments still have independent state-derived rights against BP to make BP pony up and protect their citizenry from damages occurring in the first place, even if the federal government is in whole or in part asleep at the wheel or, to mix metaphors (why not?), being led around by the nose by BP.

I believe that these rights could even include the right for citizens of the State of Florida to sue under Section 403.412, Florida's "Environmental Protection Act of 1971."

This is a law all Floridians should be proud of, enacted back in the days when corporate anti-environmental lobbyists were temporarily absent from Tallahassee. Because this law could be important to some threatened Florida communities in upcoming days, I quote from it in pertinent part at some length (although you should read it all, including the attorney's fee provision):

403.412 Environmental Protection Act.—

(1) This section shall be known and may be cited as the "Environmental Protection Act of 1971."

(2)(a) ***The Department of Legal Affairs, any political subdivision or municipality of the state, or a citizen of the state may maintain an action for injunctive relief*** against:

1. Any governmental agency or authority charged by law with the duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations;

2. Any person, natural or corporate, or governmental agency or authority to enjoin such persons, agencies, or authorities from violating any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state.

(b) In any suit under paragraph (a), the Department of Legal Affairs may intervene to represent the interests of the state.

(c) As a condition precedent to the institution of an action pursuant to paragraph (a), the complaining party shall first file with the governmental agencies or authorities charged by law with the duty of regulating or prohibiting the act or conduct complained of a verified complaint setting forth the facts upon which the complaint is based and the manner in which the complaining party is affected. Upon receipt of a complaint, the governmental agency or authority shall forthwith transmit, by registered or certified mail, a copy of such complaint to those parties charged with violating the laws, rules, and regulations for the protection of the air, water, and other natural resources of the state. The agency receiving such complaint shall have 30 days after the receipt thereof within which to take appropriate action. If such action is not taken within the time prescribed, the complaining party may institute the judicial proceedings authorized in paragraph (a). However, failure to comply with this subsection shall not bar an action for a temporary restraining order to prevent immediate and irreparable harm from the conduct or activity complained of.

(Emphasis added.)

These state remedies are not necessarily a panacea. But they do at least give non-federal affected parties colorable arguments to make. They give them pressure points to apply to BP when it comes around with its PR representatives looking for backslaps while not immediately funding Florida and each threatened County to the maximum extent potentially necessary. We don't want our State officials and County commissioners looking at ledgers now but rather looking at technology that might help to protect our coastal areas.

Conclusion

As BP's massive greasy discharge drifts our way in Florida, we must not quit and we must fight, to collect damages, but before getting to that, to prevent damages from occurring in the first place. True, we should try to make BP pay like no corporation in the history of the United States ever has had to pay before, using the greedy trial lawyers and their traditional monetary claims.⁶ But class counsel, along with Florida state and local government and mere Florida citizens themselves (hopefully with legal representation), have every right to demand from BP in appropriate cases that ample, redundant environmental safeguards be funded, put in place, and maintained until hopefully, one day, this disgrace upon our coastal areas is eliminated.

⁶ However, apparently the United States Supreme Court's 2008 Exxon Shipping Co. v. Baker decision, ruling that punitive damages awards in maritime cases cannot exceed the amount of compensatory damages, may make it difficult to adequately punish BP.