THE GREAT SPILL IN THE GULF ... AND A SEA OF PURE ECONOMIC LOSS: REFLECTIONS ON THE BOUNDARIES OF CIVIL LIABILITY

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ABSTRACT

This chapter is a series of reflections inspired by a devastating event and the worldwide problem it represents. Oil spills have occurred virtually everywhere around the globe, and they pose challenges to the environmental, administrative, regulatory, maritime, and tort laws of legal systems. In this chapter I narrowly focus upon one of the most important legal issues: whether the extensive economic losses suffered by those in the general population and surrounding economy can be recovered against the polluter. The question will be explored and answered primarily in terms of American law, but also with the insights afforded by provisions of the Chinese Civil Code and comparative law.

Keywords: Oil Spills, Pure Economic Loss, Strict Liability, Proximate Cause

1. INTRODUCTION

1.1. The Event and Aftermath

What has been called the greatest oil spill in history, and certainly the largest in United States history, began with an explosion on 20 April 2010 some 41 miles off the Louisiana coast. The accident occurred during the drilling of an exploratory well by the Deepwater Horizon, a mobile offshore drilling unit (MODU) under lease to BP (formerly British Petroleum) and owned by Transocean. The well-head blowout resulted in 11 dead and 17 injured and oil spewing from the seabed 5000 feet below at a rate of perhaps 25,000-30,000 barrels per day. The Deepwater Horizon is technically described as ‘a massive floating, dynamically positioned rig’ capable of operating in waters 8000 feet deep. In maritime law such a rig qualifies as a vessel but as a MODU it also qualifies as an offshore facility. The operator and principal developer of this well is BP which owns a 65 per cent interest. Various

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1 Anadarko Petroleum Co (25 per cent share), and MOEX Offshore (10 per cent share) are BP’s partners in the project, and each is regarded as a ‘responsible party’ under the Oil
attempts at stemming the flow of oil were initially tried and failed, and the oil spread on the surface and in the depths over a very wide area, killing marine life and water birds, entering estuaries and polluting shores. The National Oceanic and Atmospheric Administration closed commercial and recreational fishing in a very wide area of the Gulf, and the federal government declared a moratorium on exploratory drilling for six months, thus idling about 33 drilling operations in progress. Meantime BP, after meetings with the President, agreed to establish a $20 billion compensation fund which would be independently administered by a nongovernmental agency led by Kenneth Feinberg.\(^2\) BP carried very little or no third party liability insurance and reportedly operated on a self-insured basis.\(^3\) Questions may arise, however, whether BP’s pockets are deep enough to meet its overall liabilities which, in addition to the compensation fund already discussed, may include $21 billion further in civil fines under the Clean Water Act.\(^4\) The compensation fund, after an initial $5 billion deposit in 2010, would receive quarterly instalments of $1.25 billion until the full amount is reached in mid-2013. The fund would pay for damage to natural resources, state and local response costs, and individual economic losses (whether in the form of civil judgments or settlements with the fund), but it will not be used to cover any fines and penalties incurred by BP. The right of individuals to seek compensation through the courts instead of the Fund remains open.

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\(^1\) Pollution Act. See para. 2701(32). Transocean also qualifies as a responsible party under this provision. Concerning the legal effect of this designation, see infra notes 70 and 71 and accompanying text.

\(^2\) See, Deepwater Horizon Oil Spill Trust, executive agreement dated 6 August 2010. Available at www.media.nola.com/2010_gulf_oil_spill/other/Trust%20Agreement.pdf (accessed August 2010). This fund operates independently of the statutory compensation scheme set up under OPA (the Oil Spill Liability Trust Fund) which is funded by taxes on oil exports and imports into the US. The OPA fund clearly has inadequate reserves to deal with the BP spill.

\(^3\) OPA requires the responsible party operating an offshore facility like Deepwater Horizon to produce proof of ‘financial responsibility’ up to $150 million either by insurance, surety bond, letter of credit and/or qualification as a self-insurer. Paras. 2716(c) and (e). Transocean reportedly carried $500 million in physical damage insurance and $900 million in third party liability insurance. Halliburton carried more than $1 billion in insurance. See Howard Epstein and Theodore Keyes, “BP Oil Spill: An Insurance Perspective,” New York Law Journal, (18 August 2010), no. 34.

\(^4\) The Justice Department sued BP and other companies in late 2010 to recover the fines and penalties owing under the act. See, Jerry Markon, “BP, 8 Other Firms sued by Justice Dept. over Gulf Oil Spill,” www.washingtonpost.com/wp-dyn/content/article/2010/12/15/AR2010121503894 (accessed 15 December 2010).