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## GLOBAL INSURANCE GROUP WHITE PAPER

**The Deepwater Horizon Catastrophe:**  
*A Factual Overview and Preliminary First-Party Analysis*

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## INTRODUCTION

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The devastating explosions and fire at the *Deepwater Horizon* semi-submersible drilling platform then located in the Gulf of Mexico around 45 miles off the coastline of Louisiana late in the evening of Tuesday, April 20, 2010 led to the tragic loss of eleven lives, and injuries to 17 of the 126 people on board, three of which were critical. By the morning of Thursday, April 22nd, just thirty-six hours after the explosion, the rig, reportedly insured for \$560 million, capsized and sank. But that was just the beginning of what could prove to be one of if not the worst environmental disaster in United States history. BP plc, which owned the well and leased the *Deepwater Horizon* from Transocean, Ltd., as well as the Coast Guard, initially reported that there was "virtually no leakage" at the site. However, within days it became clear that the well was leaking, and within a week it was reported to be leaking at a rate of 5,000 barrels (210,000 gallons) per day. Attempts to stem the leaks have proved futile to date. In a worst case scenario it is possible that the leak could rise to fully 60,000 barrels (2.5 million gallons) per day. To put this in context, the *Exxon Valdez* disaster in Prince William Sound, Alaska in 1989 is the worst spill in US history. That involved 258,000 barrels (10.8 million gallons) of oil. If the *Deepwater Horizon* spill remains leaking at its present rate, it will surpass the *Exxon Valdez* by June 10th of this year. At a rate of 60,000 barrels per day, it would put the equivalent of the Alaskan spill into the Gulf every four days. While the oil slick from the disaster has largely hovered in the Gulf, and very little has found its way to shore to date, that may be starting to change. Nevertheless, the impact on Gulf area industries has already been severe and may get worse. Individuals and companies outside the immediately affected areas may also be impacted.

Given the constantly changing developments concerning the event, and the wave of news releases and information coming out about the event on a daily basis, much of it conflicting, Cozen O'Connor takes this opportunity to issue a report in which we summarize what is now known about the event and its causes, and the potential claims that may result from the event. We caution that this is but a snapshot in time of this evolving catastrophe.

The catastrophe can be expected to give rise to a multitude of third party claims directly against the responsible parties, which we review below. It will also undoubtedly give rise to insurance claims by people and businesses under their own first party property policies seeking compensation for property damage and business interruption losses caused by the spill. This report reviews some of the issues likely to arise from such claims, particularly the potential application of contamination and pollution exclusions incorporated in many first party policies. We also review a range of time element coverages under which claims may be expected and some of the issues likely to arise when evaluating such claims.

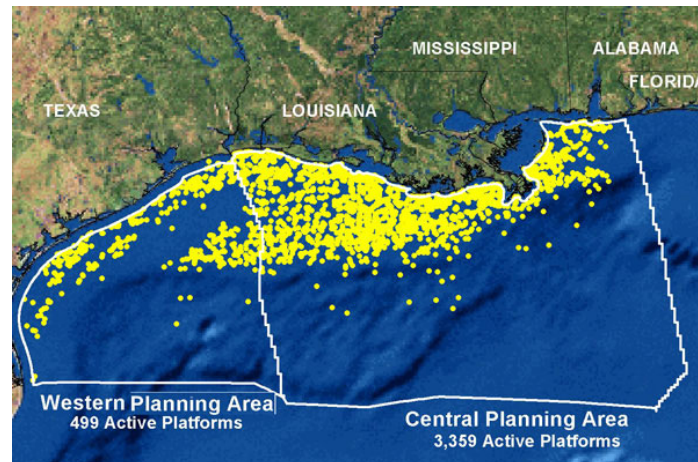
## FACTUAL OVERVIEW

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### DEEPWATER DRILLING

The Gulf of Mexico has become increasingly important to domestic oil production over the course of the last decade because of the advent of "deepwater drilling," which is usually defined as drilling in water over 1,000 feet deep. While production from the North Slope in Alaska is now declining, as it has been for twenty years from the shallower waters of the Gulf, breakthroughs in offshore technology and improvements in

supercomputers and three-dimensional imaging have now made it feasible to retrieve oil from reservoirs in water up to one mile deep. Deepwater drilling has been growing tremendously as a result. Deepwater rigs now generate almost 10% of oil production worldwide. There are presently 146 drill rigs capable of sinking a well in water 3,000 feet deep; this number is up 43% from 2006, and fully sixty-five more rigs are under construction. A significant number of the wells in the Gulf – which generates 1.6 million barrels (“bbl”) per day or roughly 30% of America’s domestic oil production – are now deepwater platforms.



Seismic survey ships and magnetic surveying equipment are first used to locate “traps” – rock formations likely to contain a reservoir of gas and oil. An offshore drill rig such as the *Deepwater Horizon* is then maneuvered into place to actually drill the well. Once that has been done, the well is temporarily capped, and the drill rig is replaced by a permanent production platform. This anchors above the wellhead, connects piping to the well, and begins the extraction of oil and gas.

### THE PROCESS OF DRILLING A WELL

Once the wellhead’s location has been selected and the drill rig is in position directly above it, a wide-diameter 300-400 feet deep pilot hole is drilled into the seabed and “cased.” This is known in the industry as “spudding in.”

The pipe used below the seabed is “casing,” and placing it in the well is called “casing” the well or “running the casing.” Casing comes in 40 foot sections with two threaded male ends; these are connected with short, double-female pieces of pipe called couplings. Its diameter varies from 36 inches down to only 7 inches; progressively smaller diameter casing is used as the well deepens.



The initial run of wide-diameter casing in the pilot hole serves to anchor and support a piece of heavy machinery positioned at the wellhead that is known as a “blowout preventer” (“BOP”). The BOP on this well was a steel-framed stack that stood 53 feet tall and weighed 450 tons.

The BOP is deployed at the wellhead by successively attaching pieces of pipe known as “riser” or “marine riser” to the top of it and then slowly lowering it to the seafloor. Riser is wide-diameter, high-strength pipe that connects the wellhead to the drill rig on the surface. Here, it was 21 inches outside diameter pipe in 90 foot spools that was rated for 15,000 psi and had a load-bearing capacity of 3.5 million pounds. Spools of riser are connected to each other by bolted flanges, and there are smaller-diameter pipes running parallel to the riser for the hydraulic and electrical conduits that communicate with and control the BOP. Once the lowering process is complete and the BOP has reached the seabed, it is securely fastened to the top of the wellhead casing by a remotely-operated vehicle (“ROV”) – an unmanned submersible with a pair of robotic arms.

When the BOP is in place, the drillstem – which consists of the drill bit and the drillstring connecting that bit to a rotary table on the rig – is passed down inside the riser and begins drilling the rest of the well. Any additional casing placed below the seabed is also sent down inside the riser.

A “blowout” is a sudden and uncontrolled flow of crude oil or natural gas that travels quickly up the casing and the riser, with potentially catastrophic results if it reaches the rig. Blowouts can occur once a well has gone into production, but they are a much greater danger during the initial drilling process.





The BOP is a pressure-sensing assembly of massive, hydraulically-operated valves that is designed to prevent a blowout from reaching the rig. Each valve in the stack is mounted perpendicularly to the oil flow. If the well is empty, a “blind ram” is used to close it off. If the drillstem is currently in use and passes through the BOP, a “pipe ram” drives two opposing, hemispherical pieces of steel-reinforced rubber firmly against the drill pipe, closing off and sealing the annular (ring-shaped) area around it. Finally, if casing is presently being passed down through the BOP, a “shear ram” – a device of last resort – can be used. This has two opposing, hardened steel blades that are designed to cut through the casing and/or the drillstring if other measures have failed.<sup>1</sup> All of these rams typically close in 30 seconds or less.

Any of the BOP’s rams can be manually activated from the drill rig. In addition, there is a deadman’s switch that is supposed to activate the device’s rams if hydraulic and electrical connections to the rig are severed, using hydraulic accumulators on the BOP itself.<sup>2</sup> Finally, the BOP’s rams can be activated by ROVs at the wellhead, using on-board hydraulic accumulators.

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<sup>1</sup> In 2002, experts recommended that all American BOPs have a pair of pipe-cutting shear rams. The reason was that these devices do not always work when they strike the thicker coupling between two pieces of casing; 10% of a string of casing consists of these joints. In addition, a 2004 Minerals Management Service study suggested that shear rams be made larger and more powerful to ensure that they could sever the thicker types of pipe that are presently being used for deepwater drilling. The oil industry successfully lobbied against both of these requirements. The absence of a second shear ram or a more powerful device appears to have played no role here, however, because there was neither drillstem nor casing passing through the BOP at the time of the explosion.

<sup>2</sup> Drillers sometimes leave this safeguard unarmed because an accidental or premature activation would damage the well in ways that are time-consuming and expensive to fix.



The BOP that capped the *Deepwater Horizon's* well was successfully tested ten days before the accident. Despite that, it failed to operate on April 20th for reasons that are still unclear.<sup>3</sup>

After installation of the BOP, the drillstem is passed back down inside the riser and through the BOP and the initial run of casing in order to extend the well downwards. As it does so, drilling fluid or “mud” is pumped down the center of the drill pipe and out through nozzles in the drill bit. Mud serves to cool the bit and also carries suspended cuttings from the penetrated rock formations back to the surface as it flows upwards outside of the drillstem and inside the riser. The mud’s most important purpose, however, is to serve as a primary line of defense against blowouts. It is a thick, viscous blend of clay, water, barite and various chemicals, and its density is tailored to match the ambient fluid and gas pressure conditions of the rock strata so that the hydraulic pressure of the column of mud in the well always exceeds the countervailing upward pressure exerted by gas and oil in the formations being drilled.

Successively smaller diameter runs of casing are periodically passed down inside the riser and the borehole and permanently installed. After each such run, the casing is then cemented by passing a wet cement slurry down the well and forcing it out the open bottom of the deepest spool of casing. The cement then flows upwards into the space between the outside of the casing and the rock walls of the borehole, hardening and anchoring the well in place.<sup>4</sup>

Once the hydrocarbon reservoir has been reached, the casing is extended through it and then capped off with a plug of cement. After that, the cementing contractor then places a second, temporary cement plug in the shaft just below the BOP. The riser is disconnected from the top of the BOP, drawn to the surface, and taken apart, and the drill rig is then deployed to another site. Once a permanent production platform has been maneuvered into place and moored above the well, riser pipe is re-positioned between the surface and the wellhead and the temporary concrete plug in the well is drilled out and removed. A “perforation gun” is then lowered into the sections of casing inside the underground reservoir of hydrocarbons. This is a cylinder with shaped charges that blow a series of holes, penetrating the casing and its cement sheath and permitting oil and gas to pass upwards inside the pipe.

## THE PARTIES

The four parties named as defendants in virtually all of the litigation filed to date are:

- BP plc (“BP”);
- Transocean, Ltd. (“Transocean”);
- Halliburton, Inc. (“Halliburton”); and

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<sup>3</sup> In Norway and Brazil, there is another back-up means of activation – a switch that activates the BOP when it detects an acoustic pulse in the water that could signal a blowout. The oil industry in this country also successfully lobbied against this safeguard. As with the absence of a second shear ram, however, it is extremely doubtful that the presence of such a switch would have served to avert this disaster in view of the fact that the BOP failed to activate despite being triggered in fully three separate ways.

<sup>4</sup> The cement can take up to 18 hours to set properly, and the drilling crew can do nothing while waiting for it to cure. This is known in the industry as “WOC” or waiting on cement time.

- Cameron International Corporation (“Cameron”)

BP is the owner of the well, and it leased the *Deepwater Horizon* from Transocean. BP (formerly British Petroleum), which is headquartered in London, is the world’s fourth largest company according to Fortune Magazine’s latest list. It is the largest deepwater oil producer on earth and the leading oil producer by volume in the Gulf of Mexico. It is almost completely self-insured through Jupiter Insurance, Ltd., a captive domiciled on the Island of Guernsey in the United Kingdom. BP only secures policies from the commercial market where regulations require it to do so.

Transocean was the owner and operator of the *Deepwater Horizon*. It is the world’s largest offshore drilling contractor, with a fleet of 139 mobile, offshore drilling platforms. It was founded in Louisiana in 1926, and it was headquartered in Houston, Texas until 2008, when the corporate offices were moved to Zug outside of Geneva, Switzerland, for tax reasons. Transocean has both captive insurance and also policies issued by commercial market carriers. Lloyd’s of London is its primary insurer. AXIS Capital Holdings, Ltd., ACE Ltd., and Lancashire Holdings, Ltd. are known to be other participants in this coverage. Transocean has a layered program affording a total of \$950 million in third-party liability coverage, with a \$10 million “per occurrence” deductible for personal injury claims. The *Deepwater Horizon* was insured for \$560 million.

Halliburton is a contractor that provides a number of services to Transocean, with the most important one being cementing. It is the world’s second largest oil field services provider, and it is headquartered in Houston, Texas.

Finally, Cameron manufactured the BOPs that failed to activate on April 20<sup>th</sup>. It is also based in Houston, and newspaper accounts indicate that it has \$500 million of third-party liability coverage.

## THE DEEPWATER HORIZON

The *Deepwater Horizon* was a semi-submersible drilling platform and one of the largest and most sophisticated deepwater drilling rigs in the world. The rig was 396 feet long and 256 feet wide, occupying an area slightly less than two football fields laid side-by-side, and she displaced almost 53,000 tonnes (metric tons). The rig had diesel engines, and she was capable of making four knots. When the rig had reached a new drilling location, it was partially submerged by ballasting four enormous pontoons. A number of vertical underwater columns also served to stabilize the rig during drilling operations.



Most semi-submersibles are tethered to the seabed by six to twelve anchors with heavy wire cables, and that is how they maintain their position directly above the wellhead. The *Deepwater Horizon's* sister ship, the *Deepwater Nautilus*, employs this system. The *Deepwater Horizon*, however, used what is called “dynamic positioning.” She was not moored. Instead, a triply-redundant computer system used satellite signals to operate eight powerful thrusters that maintained precise station-keeping above the well. A modern, dynamically-positioned platform such as the *Deepwater Horizon* can typically stay within 5 feet of the wellhead at all times.

The rig was capable of operating in water up to 8,000 feet deep. In 2009, she drilled the Tiber well in the Gulf of Mexico. This was a 35,050 feet deep well beneath 4,132 feet of water to what is estimated to be a 3 million bbl deposit of oil and gas. It is the deepest oil well in history.



The *Deepwater Horizon* was laid down in 2000, and completed in 2001 at Hyundai Heavy Industries' shipyard in Ulsan, South Korea. The rig cost Transocean \$350 million. Her port of registry was Majuro in the Marshall Islands.

BP leased the *Deepwater Horizon* from Transocean in September, 2007, for a three-year term. The lease price was \$544 million; the *Deepwater Horizon* cost BP \$496,000 per day. In October of this year, BP renewed the lease for a second three-year term through September 20, 2013.

The rig had 130 berths, and 126 people were on board at the time of this incident. These included seventy-nine Transocean employees, forty-one contractors' employees, and six BP executives, who had helicoptered in that day to celebrate the fact that the *Deepwater Horizon* had operated for seven years without a serious accident!

## THE LOSS LOCATION

On April 20th, the rig was completing a well some fifty-two miles southeast of Venice, Louisiana. The site is forty-five miles off the Louisiana coastline, and the water is approximately 5,000 feet deep.

The United States government has exclusive rights to any oil and gas found up to 200 miles offshore. In the Gulf of Mexico, the sea floor is divided into rectangular "blocks" some two-three miles square, and the federal Minerals Management Service ("MMS") – which is responsible for overseeing all American offshore oil and gas drilling – auctions off the rights to drill in each block.

The well that was being completed was in Mississippi Canyon Block 252 ("MC252"), which is a block leased by BP and its business partners Anadarko Petroleum Corporation ("Anadarko") of The Woodlands outside of Houston, Texas, and Mitsui Oil Exploration Co., Ltd. ("MOECO") of Tokyo, Japan. BP owns 65% of the rights to the block, and Anadarko (25%) and MOECO (10%) own the rest. The lease price was \$34 million.

MC252 sits above a prospective oil deposit known as the Mancondo Prospect. This is a reservoir that may contain as much as 100 million bbl.

## THE INCIDENT

The explosion took place at 9:45 p.m. CST on Tuesday, April 20, 2010. At the time, the *Deepwater Horizon* had nearly completed the well, which was 18,360 feet deep according to a BP spokesman.<sup>5</sup>

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<sup>5</sup> BP's permit allowed the company to drill to 20,211 feet in MC252. Some newspaper accounts state that at least one BP employee has reported that the well was actually 22,010 feet deep.



The exact sequence of events is presently unclear. It is known that the last run of casing – the 7” diameter “production casing” which is the casing that passes through the hydrocarbon reservoir itself – had been permanently emplaced, and Halliburton had cemented it and had also poured the cement plug that seals off the very bottom of the shaft. In the words of the contractor’s April 30th press release:

Halliburton had completed the cementing of the final production casing string in accordance with the well design approximately 20 hours prior to the incident ... [T]ests demonstrating the integrity of the production casing string were completed. At the time of the incident, well operations had not yet reached the point requiring the placement of the final cement plug which would enable the planned temporary abandonment of the well.

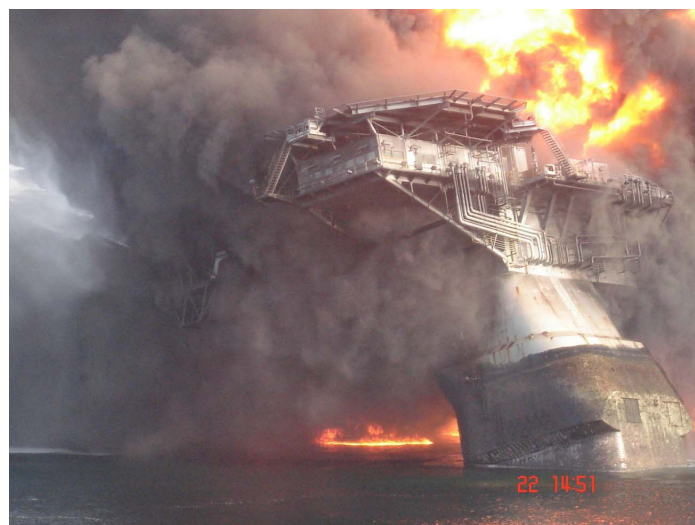
The reference to “20 hours” should mean that the cement plug that caps off and seals the bottom of the well had hardened and been tested, and some accounts seem to confirm this by reporting that Transocean was in the process of flushing out the shaft with sea water, following which Halliburton would install an additional cement plug below the BOP to temporarily seal the shaft and to permit the process of disconnecting the riser to begin. Other accounts, however, report that Halliburton’s employees were either still curing the bottom plug or had actually poured the temporary plug and were curing that by “introducing heat” into the well to help the cement set.

At 9:45 p.m., the workers in the “moonpool” – the large opening in the center of the rig floored by metal gratings where drilling activity takes place – heard a series of “thuds” or “booms.” A 240 foot column of sea water shot out of the top of the riser, followed immediately by a geyser of oil and gas. Workers reported a strong smell of methane, which is the principal component of natural gas. Two explosions occurred in quick succession, with the second stronger than the first, signaling that the gas had found ignition sources. The *Deepwater Horizon* was immediately engulfed in flames.



The order to abandon ship was given, and most of the crew piled into the diesel-powered, fiberglass lifeboats suspended from the sides of the rig and lowered these to the surface of the Gulf, 100 feet below. Fortunately for all concerned, the 260 foot work boat *Damon B. Bankston* was alongside the rig at the time, and she took the crew aboard. Coast Guard vessels and helicopters were also dispatched to the scene, and these promptly began fire-fighting operations with jets of water, but the blaze was out-of-control and could not be put out because it was being continually fed by the well. Flames soared hundreds of feet into the air and were visible thirty-five miles away.

The *Deepwater Horizon* ultimately began listing as a result of damage and the weight of water from fire-fighting activities. At 10:21 a.m. CST on Thursday, April 22, 2010, just thirty-six hours after the explosion, the rig capsized and sank. She presently rests upside down on the seabed, some 1,300 feet northwest of the wellhead.





Seventeen of the 126 people on board were injured, and three of these injuries were critical. The bodies of eleven others – nine Transocean employees and two employed by contractors – were never recovered.

## THE LEAKS

Initially both BP and the Coast Guard reported that there was “virtually no leakage” at the site. On April 23rd, however, the well was said to be leaking at a rate of 1,000 bbl (42,000 gallons) per day.<sup>6</sup> When the rig sank, the 5,000 foot riser broke away and fell to the sea bed, and it kinked badly in at least two places. ROVs surveilling it discovered it was leaking from the disconnected end (that had originally been attached to the rig) and also from a kink near the wellhead where the riser buckled and descended to the sea bed from the height of 1,500 feet.



On April 28th, ROVs discovered a much bigger leak near a second kink between these two locations. BP and the Coast Guard then revised their estimates, announcing that the well was leaking at a rate of 5,000 bbl (210,000 gallons) per day, with 85% flowing from the riser at the newly-discovered location.

On May 4<sup>th</sup>, BP executives told members of Congress that it was possible that the leak could rise to fully 60,000 bbl (2.5 million gallons) per day. There is as yet no evidence that the 5,000 bbl per day rate has increased, however.

To put this in context, the *Exxon Valdez* disaster in Prince William Sound, Alaska in 1989 is the worst oil spill in US history. That involved 258,000 bbl (10.8 million gallons) of oil. If the *Deepwater Horizon* spill remains

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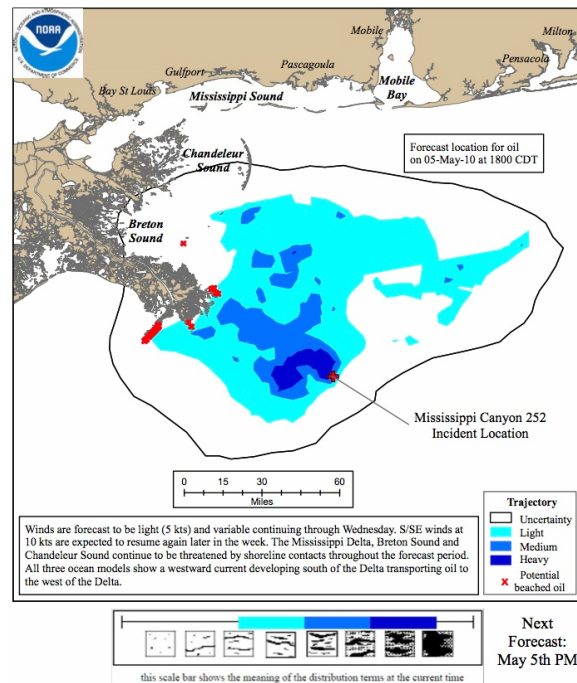
<sup>6</sup> There are 42 gallons in a barrel of oil.



leaking at its present rate, it will surpass the *Exxon Valdez* by June 10<sup>th</sup> of this year. At a rate of 60,000 bbl per day, it would put the equivalent of the Alaskan spill into the Gulf every four days.<sup>7</sup>

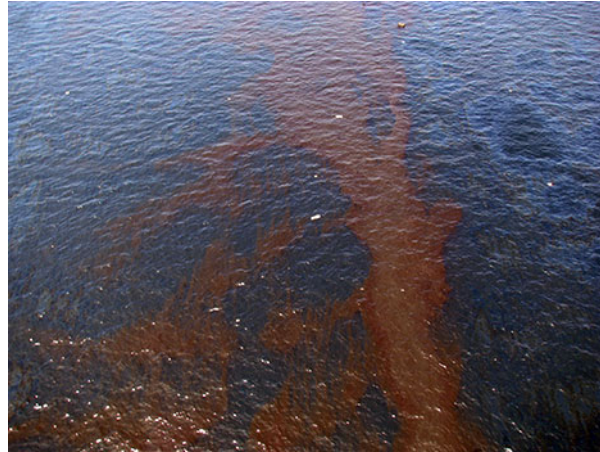
## THE OIL SLICK

The *Deepwater Horizon* well had released approximately 100,000 bbl (4.2 million gallons) of oil into the Gulf by May 10th. The resulting oil slick was said to occupy 3,850 square miles on May 3rd and to be 130 miles by 70 miles in size four days later.



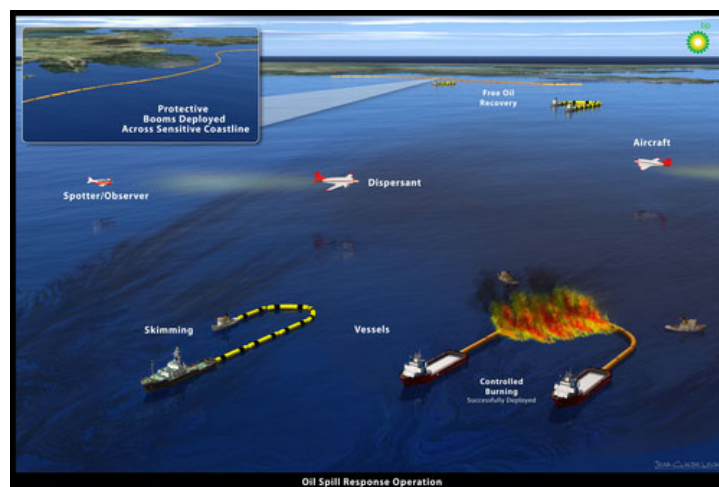
It has hovered out in the Gulf, however, and very little of it has found its way to shore to date, though that may be starting to change. May 6th saw reports that oil was beginning to wash ashore on Freemason Island in the Chandeleur chain, an uninhabited wildlife and bird sanctuary in Louisiana. On May 8th, golf ball-sized clumps of tar were also washing up on Dauphin Island off the mouth of Mobile Bay, Alabama.

<sup>7</sup> The worst spill in history is generally believed to be the massive Gulf War oil spill in the Persian Gulf in 1991, when Saddam Hussein's retreating Iraqi troops sabotaged most of Kuwait's fields. This may have involved as much as 7 million bbl (300 million gallons) of oil. The worst shoreline pollution in history was the grounding of the *VLCC Amoco Cadiz*, in March of 1978, off the small town of Roscoff in Brittany, France. The supertanker's entire cargo of 1.3 million bbl (55 million gallons, or five times the size of the *Exxon Valdez* spill), came ashore. The worst spill in the Gulf of Mexico took place in 1979 when the Ixtoc platform off the coast of Campeche, Mexico caught on fire and collapsed, releasing 3.5 million bbl (140 million gallons).



The mouth of the Mississippi has yet to be threatened, and scientists report that the outflow from that river may be one factor that is keeping the oil away from shore. Should the slick drift too far south and even farther away from the Louisiana, Alabama, Mississippi, and Florida coastlines, however, it could be caught in the Loop Current, a Gulf of Mexico current that loops north before turning south and passing through the Keys to join the Gulf Stream. That could carry the oil around the southern tip of Florida and up past Miami and the Bahamas.

To date, BP and the Coast Guard have fought the slick in three ways:



**Burning:** Fire-proof booms 500 feet long have been used to corral pockets of oil so that they can be set on fire. The tar residue from these surface burns can then be removed with nets or skimmers. This has met with very limited success, however, because 97% of the spill is an oil-water mixture that cannot be ignited. The oil is spread much too thinly in most places, and burning is only possible in calm waters and light winds.



**Containment Booms:** Over 100 miles of containment booms had been deployed by May 5<sup>th</sup>. While these are used in part to allow oil to be concentrated and skimmed, their primary purpose is to keep it away from land. The thinly-spread slicks and high winds and choppy seas have also reduced the effectiveness of this tactic.

**Dispersants:** BP's principal means of fighting the slick has been the use of surfactants, known as dispersants, which are typically sprayed on the oil by C-130s and other types of aircraft. Indeed, the *Deepwater Horizon* disaster has seen the most extensive use of dispersants ever; over 200,000 gallons had been used by May 5<sup>th</sup>.

Dispersants do not remove the oil from the environment but break up the surface tension of the oil molecules so that a larger slick "dispersed" into smaller droplets thereby reducing the oil's buoyancy, causing it to sink, and also enhancing biodegrading, since smaller droplets are easier for marine organisms to digest. They also introduce toxins into the water, however, and ultimately into the food chain as these microorganisms are themselves eaten by fish and shellfish. The initial round of dispersant spraying was suspended on May 5<sup>th</sup> when toxic residues began to wash up on Louisiana beaches, though BP was permitted to begin a new spraying program five days later on the 10<sup>th</sup>. Although dispersants are significantly less harmful to the environment than the detergents used to fight the *Torrey Canyon* oil spill in 1967, their use remains controversial, especially since, as a general matter, they are manufactured by oil companies.

Since May 4<sup>th</sup>, BP has also been using a hose manipulated by an ROV to spray dispersants directly into the plume of oil rising from the main leak on the seabed in an effort to break up the oil at its source.

## INTERIM FIXES AND PERMANENT SOLUTIONS

Ultimately, the only permanent solution is almost certainly to seal the well below the seabed by driving a relief well diagonally to intersect the existing shaft. BP began using Transocean's *Development Driller III* rig to sink one on Sunday, May 2nd and it plans to begin a second relief well nearby during the next few days.<sup>8</sup>

A single relief well could cost as much as \$300 million to drill. In addition, each relief well will take three months to complete. At the present rate of leakage, the *Deepwater Horizon* well will have pumped 450,000 bbl (18.9 million gallons) of oil into the Gulf by that time.

Once the leaking well has been penetrated, a specialized heavy fluid is injected to block the oil and gas flow and drive it back down towards the reservoir. This allows large quantities of cement to be injected for a permanent seal.

In the interim, BP has successfully capped the smallest of the three leaks, which was the one at the end of the disconnected riser. On May 4<sup>th</sup>, the company announced that it had used ROVs to cut off the end of the riser, leaving a clean surface, and then installed a one-half-ton valve there which enabled the leak to be closed off. This has had essentially no effect on the overall rate of leakage, however.

Interim fixes with respect to the other two leaks have not been successful. BP has understandably focused on the larger of the two, which is responsible for 85% of the oil, and its principal fix was to construct and lower a cofferdam or "containment dome" over that. This was a 98-ton rectangular concrete and steel box, 24 feet by 14 feet at its base and 40 feet high. It was manufactured by Wild Well Control in Port Fouchon, Louisiana in the weeks after April 20<sup>th</sup>, and it was transported to the site by the supply ship *Joe Griffin* on May 5<sup>th</sup>. On Friday the 7<sup>th</sup>, the dome was lowered 5,000 feet to the seabed, where ROVs positioned it over the leak. The plan was then to run a pipe from the opening at its top to the *Discover Enterprise* on the surface, allowing the oil to be captured.



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<sup>8</sup> This is literally like finding the proverbial needle in a haystack. Relief wells were used to seal up Australia's Montara spill in August, 2009, but five wells had to be drilled before the fifth one intersected the leaking shaft, and the Montara well was located in only 250 feet of water.

This technique had been used before in shallow water, but it had never been tried at these depths. On Saturday the 8th, it was discovered that gas hydrates – ice-like crystals that form when natural gas and water mix in a low temperature, high pressure environment – had accumulated in and plugged the outlet at the top of the dome “like sand in a funnel.” The effort was a failure, and the dome now rests 600 feet from the leak while BP explores other options. Some of these include:

**The Top Hat:** BP is now building a tiny, 2-ton version of the containment dome called a “top hat”. This is only 5 feet high and 5 feet in diameter. It can be lowered to the seabed with the pipe running to the surface already attached to it, allowing the pipe and the top hat to be filled with a mixture of heated water and methanol as it descends and thereby preventing the formation of gas hydrates. BP plans to deploy this on Thursday, May 13<sup>th</sup>.

**The Junk Shot:** BP is also considering a “junk shot” which involves injecting materials such as golf balls, pieces of rubber tire, and knots of rope directly into a port on the side of the BOP in an effort to clog and choke off the flow. This technique was used successfully on leaking Kuwaiti wells set on fire during the Gulf War in 1991, but it has also never been attempted at these depths.

**Top Kill:** This is a variant of the junk shot in which cement and mud is injected instead.

**Cutting the Riser:** Another possible technique would be to cut the riser just above the BOP and then lower a larger-diameter pipe directly over the end, funneling the escaping oil up the pipe to a tanker on the surface. The downside to this method is that cutting the riser would almost certainly result in a dramatic increase in oil flow.

Alternatively, it might be feasible to cut the riser below the BOP. The existing BOP would then be moved aside and a new BOP bolted in place and then activated. This idea was suggested by BP’s Drilling Operations Manager Charlie Holt on May 3<sup>rd</sup>, and it is apparently still being investigated by the company. The advantage to it from BP’s standpoint is that – if feasible – it is both a permanent fix and one that might enable the company to save and continue to use the well.

## THE CAUSE OF LOSS

The investigations into the cause of the disaster are just beginning and will undoubtedly take months to complete. In addition, it is not entirely clear what the sequence of events was at the present time. Halliburton’s press release would suggest that the cement end cap that sealed the bottom of the well was already in place and fully-hardened, and that Transocean employees were in the process of flushing the shaft with seawater when the blowout occurred. The fact that nine Transocean employees but only two contractor – presumably Halliburton – employees were among the eleven killed suggests that no cementing was going on in the moonpool at the time, and the 240’ geyser of seawater that preceded the oil and gas is also consistent with such an account. On the other hand, press interviews with workers on Friday, May 7th, indicate that active cementing operations were in fact underway at 9:45 p.m. on the 20th, and these accounts speculate that “introducing heat” into the shaft to help cure the cement may have caused “a chemical reaction ... that destabilized the seal and allowed a gas bubble to form inside the pipe.”





Both versions would appear to implicate Halliburton, however. It now seems clear that the initiating event was a failure at the bottom of the shaft. As Transocean's CEO Steven Newman testified at a Senate subcommittee hearing on Wednesday, May 12th:

The one thing we know with certainty is that on the evening of April 20th there was a sudden, catastrophic failure of the cement, the casing, or both. ... [W]ithout a disastrous failure of one of these elements the explosion could not have occurred.

A cement failure is far more probable than a casing failure, which would take the form of a separation of two spools of pipe. Pressurized oil and gas will find any weak spot in improperly-hardened cement and ultimately channel through it. Indeed, the MMS recently released a study analyzing thirty-nine oil well blowouts between 1996 and 2006, and it attributed eighteen of these to cement failures. It is also suggestive that Halliburton was using a special foamed cement on the *Deepwater Horizon* job that was blended with nitrogen gas to make it lighter and therefore better able to flow upwards outside the casing. This foamed cement is reportedly harder to use than regular deepwater drilling cement, and it requires "great care in mixing and application" according to press accounts.

Cameron is obviously implicated as well. Neither the manual switches on the rig nor the deadman's switch succeeded in activating the BOP, and a number of post-loss attempts to activate the rams by ROVs also failed. The reasons are not clear, but the failure of this crucial safety device was clearly a "but for" cause of the catastrophe.



At least some newspaper accounts suggest that BP and/or Transocean may have been pushing things because they were in a hurry to finish the job and redeploy the expensive rig to its next wellhead. The *Deepwater Horizon* was within a few days of completing its work at this location. There are also reports that workers on the rig were less vigilant than they had been once the cement cap at the bottom of the well had been put in place, for that theoretically ended the danger of a blowout – a spectre that is constantly present when the well is still in the process of being drilled.

Finally, the Congressional hearings that began on Wednesday, May 12<sup>th</sup>, suggest that Transocean may well bear a substantial amount of liability. The usual industry practice is to leave mud in the wellbore after the cement cap at the bottom of the well has been installed and until the temporary cap just below the BOP has been put in place. In other words, the pipe between the bottom cap in the hydrocarbon reservoir and the temporary cap at the BOP that allows abandonment of the well is left full of mud. This mud is only flushed out once the permanent production platform is in place.

According to BP's Chairman and President Lamar McKay, who testified before the Senate's Energy & Natural Resources Committee on the 12<sup>th</sup>, Transocean chose instead "to replace mud with sea water in the well in preparation for the setting of the cement plug" below the BOP. That means that the integrity of the bottom plug was the only thing preventing oil and gas from exploding upwards inside the casing.

## FEDERAL OVERSIGHT

The disaster has already brought calls for tighter federal oversight over offshore drilling. The MMS – a branch of the Interior Department founded in 1982 – is responsible for regulating offshore oil drilling. Over the course of the last decade, however, it has largely shifted that responsibility to the industry itself. MMS enforcement actions leading to penalties dropped from a peak of sixty-six in 2000 to only twenty last year. In 2005, the MMS inspected 1,292 rigs; in 2009, only 760 were inspected.

In part, the problem lies in the fact that the MMS wears two hats. It is simultaneously a safety-oversight agency and a revenue-collection agency; 50% of its 2009 budget of \$342 million was made up of taxes and fees paid by the oil companies themselves. In most other oil-producing countries (such as Britain, Norway, Canada, Australia, and the Netherlands), these tasks are handled by two separate bodies. The divided



loyalties inherent in such a scheme may be in part responsible for the fact that over the last five years, United States oil workers have been four times as likely to be killed as those in European waters. During 2007-08, the United States had five major “loss of well control incidents;” the European producers had none.

On Wednesday, May 12th, Interior Secretary Ken Salazar announced that the administration would recommend to Congress that the MMS be split into two separate agencies.

### THE IMPACT ON THE AREA

Even though the slick has yet to come ashore, the impact on Gulf area industries has already been severe. The National Oceanic & Atmospheric Administration (“NOAA”) halted fishing anywhere along the coastline from the Mississippi Delta in Louisiana to Pensacola Bay in Florida on May 3rd, and it expanded the prohibited zone four days later. No fishing is presently allowed in an area 10,807 square miles in size. The fear is that microbes digesting the oil will find their way up the food chain.



Twenty percent of America’s fish and shellfish presently come from the Gulf; the Louisiana shrimp industry alone is a \$1.3 billion per year business. The predictable effect has been a dramatic rise in prices. Shrimp now costs as much as six times what it did before the spill, and even unaffected Atlantic ocean species have experienced a price spike. By May 10th, fluke had risen from \$7.50 to \$12.50 per pound and stripped bass went from \$4.50 to \$6.50 per pound in the Philadelphia marketplace.

The lower Mississippi is a crucial gateway. The Port of South Louisiana is the nation’s busiest port, with 224 million tons of cargo each year, and it is a key transit point for grain and other agricultural commodities, coffee, and rubber. The Port of Gulfport further up the river is the country’s second largest importer of fruit. The slick has had no impact on river traffic so far, but if it were to move off the mouth of the great river, all vessels traveling upstream would be forced to stop and powerwash their hulls to avoid contaminating the Mississippi. This could lead to both costly delays and also decisions by shippers to load or offload cargo at other ports.



Finally, the Louisiana bayous and marshes in the Delta are an environmentally-fragile ecosystem that is home to hundreds of threatened and endangered species of fauna, including pelicans, alligators and hawks. On May 2<sup>nd</sup>, President Obama declared this spill to be “a potentially unprecedented environmental disaster,” and Homeland Security Secretary Janet Napolitano characterized it as an event of “national significance” on April 29<sup>th</sup>. The federal cleanup is being supervised by Admiral Thad W. Allen, the Commandant of the Coast Guard, who took over the task from Rear-Admiral Mary Landry, the Commander of the Coast Guard’s Eighth District in the Gulf.

### THE CLAIMS AGAINST BP

The incident has given rise to three types of claims against BP and the other defendants:

- Claims for death and injury by oil workers;
- Claims from state and federal governments for emergency response and clean-up costs; and
- Economic loss claims by private parties

The latter category include claims by: (1) local maritime industries such as charterers, shrimpers, crabbers, and oystermen; (2) tourism-related businesses such as hotels, casinos, and restaurants; and (3) coastal property-owners, such as condominium complexes. As of Tuesday, May 4th, BP reported that it had already received over 4,700 individual claims, virtually all of which were for loss of income, and that it had reached a settlement with approximately 800 claimants for amounts totaling \$3.5 million. It is anticipated that the oil company will quickly pay off and obtain releases from as many small claimants as possible in order to minimize the impact of class action litigation. The more problematic claims are the bigger ones – multi-million dollar business interruption claims by resort industry businesses and other large Gulf coast property owners.

BP has also begun reimbursing state governments in the area for emergency response and clean-up costs. On May 5<sup>th</sup>, it announced \$25 million “block grants” to Louisiana, Alabama, Mississippi, and Florida.



Finally, the oil company has also sustained other losses of considerably greater magnitude as a result of the disaster. As of Monday, May 10, 2010, it had expended \$350 million of its own funds in efforts to staunch the leaks and to clean up the oil slick.<sup>9</sup> BP has also seen its stock prices plummet; its stock was down 13% by May 1<sup>st</sup>, erasing \$16 billion in market value.<sup>10</sup> Transocean and the other involved companies experienced similar losses; On April 30<sup>th</sup>, Merrill Lynch announced that BP, Transocean, Halliburton, Cameron, and BP’s business partner Anadarko had lost a grand total of \$21 billion in market capitalization.

### THE STATUTORY SCHEME

BP and Transocean have officially been named “responsible parties” by the Coast Guard, and President Obama has made it clear that BP will bear financial responsibility for the costs associated with the *Deepwater Horizon* disaster. As he stated on May 2nd:

Let me be clear: BP is responsible for this leak; BP will be paying the bill.

So far, BP’s CEO Hayward has not contended otherwise, stating that:

We are taking full responsibility for the spill and we will clean it up and where people can present legitimate claims for damages we will honor them. We are going to be very, very, aggressive in all of that.

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<sup>9</sup> The *Exxon Valdez* spill in 1989 cost Exxon a grand total of \$4.3 billion. It made \$300 million in voluntary settlement payments and spent fully \$3.5 billion cleaning up the oil in Prince William Sound. Exxon paid a significant criminal fine and also paid \$507.5 million in punitive damages, plus interest of about the same amount, after the punitive damages award was reduced from \$5 billion to \$2.5 billion by the Court of Appeals and then reduced still further by the United States Supreme Court.

<sup>10</sup> At one point, BP’s Chief Executive Officer Tony Hayward plaintively commented on the slide, saying: “What the hell did we do to deserve this?”

It is perhaps noteworthy, however, that the oil giant's press release announcing that it was setting up a claims-handling facility was somewhat more reticent, stating that BP would pay "legitimate and objectively-verifiable claims" for assessment, mitigation and clean-up, real and personal property damage, death and personal injury, and commercial loss.

BP's liability flows from the Oil Pollution Act ("OPA") of 1990. The OPA and other aspects of the federal regulatory scheme are discussed in greater detail below. In brief, however, the OPA makes BP strictly liable for any and all clean-up costs associated with the spill. That law also set up an alternative to litigation. Those claiming for economic damages unrelated to clean-up and containment as a result of the spill can recover directly from an Oil Spill Liability Trust Fund, ("the Trust Fund"), which is funded by a per-barrel tax on oil producers. The Trust Fund held \$1.6 billion in assets at the time of this incident. BP is ultimately responsible for reimbursing the fund for any payments. The total amount of economic damages recoverable under this statutory scheme is only \$75 million, however, unless the claimants can show either gross negligence or a violation of a federal safety rule on BP's part or on the part of one of its contractors.

Not surprisingly, Congress is already trying to raise that cap. On May 3<sup>rd</sup>, Senators Robert Menendez and Frank Lautenberg (D-NJ) and Bill Nelson (D-Fla.) introduced the evocatively-titled "Big Oil Bailout Prevention Act." This would retroactively raise the economic damages liability cap from \$75 million to \$10 billion. President Obama and Senate Majority Leader Harry Reid have announced their support, but the industry is adamantly opposed to any retroactive change in existing law.

## THE IMPACT ON THE INSURANCE INDUSTRY

Estimates of the overall insurance industry payout have been rising steadily. J. P. Morgan Chase & Co. stated that it could reach \$1.6 billion on April 23<sup>rd</sup>, and Swiss Re revised that figure upwards to as much as \$3.5 billion on the 6<sup>th</sup> of May. Swiss Re has announced that it expects to pay \$200 million as a result of the spill, and other carriers have also predicted substantial payments as well. These include Hannover Re (\$53 million), PartneRe, Ltd. (\$60-70 million) and Montpelier Re (\$20 million).

## LITIGATION

Predictably, the *Deepwater Horizon* disaster has already spawned a large number of lawsuits. As of May 12th, there were over six dozen actions in state and federal courts in Florida, Mississippi, Alabama, Louisiana, and Texas. The defendants are typically BP, Transocean, Halliburton, and Cameron.

At least one of these is a personal injury action brought by three Deepwater Horizon crew members and the estate of a fourth. The plaintiffs were all Transocean employees, so the defendants are BP, Halliburton, and Cameron. The case is venued in Galveston, and it was filed by Kurt P. Arnold of Galveston's Arnold & Itkin.

In addition, BP already faces a shareholders' derivative action brought by a Pennsylvania investor alleging that the company "recklessly disregarded accidents and safety warnings for years." Transocean, Halliburton, and Cameron are defendants in that action as well. It is venued in the Eastern District of Louisiana.

The vast bulk of the litigation – fifty-nine cases to date – is made up of putative class actions, however, brought by charter boat operators, commercial fishermen, resort management companies, and individual property owners. The claimants are represented by a number of the country's most prominent plaintiffs'

lawyers, including Mark Lanier of the Lanier Law Firm in Houston, Daniel Becnel of the Becnel Law Firm in New Orleans, Eric Holland of Holland, Groves, Schneller & Stolze in Chicago, and Robert Anderson of Cunningham Bounds in Mobile. The cases will eventually be consolidated into a single piece of Multistate District Litigation (“MDL”), and that matter will almost certainly go forward in the Houston Division of the United States District Court for the Southern District of Texas; Halliburton and Cameron are headquartered there, as Transocean was until two years ago. On April 30th, plaintiffs in six of the fifty-nine would-be class actions moved to have their cases consolidated as an MDL styled *In re Gulf of Mexico Oil Contamination*. BP did the same thing on May 7th, asking that all of the various pieces of litigation against it be consolidated in the Houston Division as *In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico on April 20, 2010*. A hearing on BP’s motion to consolidate is presently set for July 29, 2010.

## STATUTORY AND REGULATORY FRAMEWORK

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### THE OIL POLLUTION ACT OF 1990

The comprehensive federal statute governing the Gulf Oil Spill is the Oil Pollution Act of 1990<sup>11</sup> (“OPA”), passed in the wake of the Exxon Valdez disaster. Under OPA, a “responsible party for a vessel or a facility from which oil is discharged . . . into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages . . . that result from such incident”.<sup>12</sup>

A threshold issue with regard to OPA is whether the *Deepwater Horizon* is a vessel or a facility. OPA treats a facility and a vessel differently in a number of ways, including who is a “responsible party”, and for purposes of limiting liability.

OPA defines a “facility” as “any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil.”<sup>13</sup> The term “vessel” is defined as “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, other than a public vessel.”<sup>14,15</sup>

The distinction between a vessel and a facility affects who is a “responsible party”. The determination of “responsible party” is important because for a defendant to incur liability under OPA, a claimant need only show that a discharge of oil occurred and that the defendant is a “responsible party”.<sup>16</sup> Under OPA, if the Rig

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<sup>11</sup> 33 U.S.C. § 2701 et. seq.

<sup>12</sup> 33 U.S.C. § 2702(a).

<sup>13</sup> 33 U.S.C. § 2701(9).

<sup>14</sup> A “public vessel” is defined as “a vessel owned or bareboat chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce[.]” 33 U.S.C. 2701 § 29.

<sup>15</sup> 33 U.S.C. § 2701(37).

<sup>16</sup> Benedict on Admiralty, Vol. 3, § 112 (Matthew Bender).

is considered a vessel, then the responsible party includes “any person owning, operating, or demise chartering the vessel.”<sup>17</sup> This section would implicate Transocean Ltd., the owner of the Rig and possibly BP as the “operator”. If the Rig were an offshore facility, then the responsible party is defined as 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 for the area in which the facility is located”.<sup>18</sup> This provision would implicate BP.

Whether the structure is a vessel or a facility will also have an impact on potential liabilities. Pursuant to OPA, a responsible party is liable for removal costs and damages. Removal costs include all removal costs incurred by the United States<sup>19</sup>, a State<sup>20</sup>, or any person whose acts are consistent with the National Contingency Plan<sup>21</sup>.

With regard to an offshore facility, removal costs are unlimited and “damages”, as described below, are capped at \$75,000,000.<sup>22, 23</sup> If the structure is a vessel, then the total of the damages and removal costs are capped at \$950 per gross ton or \$800,000, whichever is greater.<sup>24, 25</sup>

The above limits on liability do not apply in two cases. First, the limitation does not apply in any instance where the incident was proximately caused by the gross negligence, willful misconduct or violation of an applicable Federal safety, construction, or operating regulation by (i) a responsible party (ii) an agent or employee of the responsible party or (iii) a person acting pursuant to a contractual relationship with the responsible party.<sup>26</sup> This suggests that if BP is considered a “responsible party” and a party that contracted with BP engaged in gross negligence, willful misconduct, or a violation of an applicable Federal safety, construction, or operating regulation, then BP would not be able to assert the limitation. Second, the limitation of liability does not apply to removal costs incurred by the United States Government or any State

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<sup>17</sup> 33 U.S.C. § 2701(32)(A).

<sup>18</sup> 33 U.S.C. § 2701(32)(C).

<sup>19</sup> 33 U.S.C. § 2702(b)(1)(A).

<sup>20</sup> 33 U.S.C. § 2702(b)(1)(A).

<sup>21</sup> 33 U.S.C. § 2702(b)(1)(B).

<sup>22</sup> 33 U.S.C. § 2704(a)(4).

<sup>23</sup> Recently after the Gulf Oil Spill, several news agencies reported that the White House may work with Congress to lift the \$75 million cap by enforcing a law that raises the limit retroactively. Indeed, three senators have introduced legislation in an effort to increase the limit to \$10 billion. See Matthew L. Wald, *Clarifying Questions of Liability, Cleanup and Consequences*, N.Y. Times, May 7, 2010, at A19. A retroactive law (also called an *ex post facto* law) may conflict with Article 1, Section 9 of the United States Constitution which states that “No Bill of Attainder or ex post facto Law shall be passed.” If a retroactive law is passed, it will likely face substantive due process challenges.

<sup>24</sup> 33 U.S.C. § 2704(a)(2).

<sup>25</sup> Limits are greater for “tank vessels” but the facts of this incident do not suggest that the Rig was this category of vessel. See 33 U.S.C. § 2704(a)(1).

<sup>26</sup> 33 U.S.C. § 2704(c)(1).



or local official or agency with regard to the discharge of oil from an Outer Continental Shelf facility<sup>27, 28</sup> or a vessel. The owner or operator of said facility or vessel must bear the aforementioned costs without limit.<sup>29</sup>

With regard to damages, they include the following:

“(A) Natural Resources

Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage...”;

(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;

(C) Subsistence Use<sup>30</sup>

Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources;

(D) Revenues

Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof;

(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 resources, which shall be recoverable by any claimant;

(F) Public Services

Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a State.”<sup>31</sup>

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<sup>27</sup> 33 U.S.C. § 2704(c)(3).

<sup>28</sup> “Outer Continental Shelf facility” is defined under OPA as “an offshore facility which is located, in whole or in part, on the Outer Continental Shelf and is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the Outer Continental Shelf.” 33 U.S.C. § 2701(25).

<sup>29</sup> 33 U.S.C. § 2704(c)(3).

<sup>30</sup> This category of damages is intended to compensate individuals who are sustained by their use of a natural resource as opposed to those who use a natural resource for commercial purposes. See Benedict on Admiralty, Vol. 3, § 112(b)(3) (Matthew Bender). Consequently, a fisherman who sells fish, shrimp, etc. for commercial purposes could not recover under this category of damages for injury to his or her business, whereas an individual who fishes to feed him or herself may.

<sup>31</sup> 33 U.S.C. § 2702(b)(2)



In 1986, the Oil Spill Liability Trust Fund (“Fund”) was established to pay for certain costs associated with oil pollution.<sup>32</sup> The source of the Fund is a tax on petroleum production. The President may borrow up to \$1 billion in the aggregate<sup>33</sup>, with a limitation of \$1 billion per-incident and a limit of \$500 million per-incident for damages to natural resources.<sup>34</sup> The following expenditures may be covered by the Fund:

- “(1) . . . removal costs incurred by the federal or state government;
- (2) . . . costs of assessing natural resources damages and for developing and implementing plans to restore, rehabilitate, replace or acquire those resources;
- (3) . . . claims for removal costs and damages from a spill from a foreign offshore unit;
- (4) . . . claims for uncompensated removal costs or damages;
- (5) . . . federal expenses to implement, administer and enforce OPA up to \$25 million annually for Coast Guard operating expenses, \$30 million annually for two years to establish the National Response Systems and \$27.5 million annually for oil pollution research and development.”<sup>35</sup>

If the Fund compensates a claimant, then the Fund is subrogated to the rights of said claimant. Specifically, “[a]ny person, including the Fund, who pays compensation pursuant to th[e] [Oil Pollution Act] to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law.”<sup>36</sup> Thus it may well be that the federal government will be a significant claimant in any recourse actions.

Section 2713 of OPA sets out claim procedures for presentment to the Fund. A claim may be presented directly to the Fund (1) where claimants have been notified by the President (2) by a responsible party, (3) by the Governor of a State for removal costs incurred by said State or, (4) by a United States claimant for “damages” if a foreign offshore unit has discharged oil.<sup>37</sup> A claimant may either present a claim directly to the Fund or sue the responsible party in federal court.<sup>38</sup> However, if a claimant elects to sue a responsible party, then the claimant may not claim against the Fund during the pendency of the litigation.<sup>39</sup> This last provision discourages litigation. In the event that a claim is presented that complies with section 2713 and

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<sup>32</sup> Benedicts on Admiralty, Vol. 3, § 112(b)(1) (Matthew Bender).

<sup>33</sup> 26 U.S.C. § 9509(d)(2).

<sup>34</sup> 26 U.S.C. § 9509(c)(2).

<sup>35</sup> Benedicts on Admiralty, Vol. 3, § 112(b)(1) (Matthew Bender).

<sup>36</sup> 33 U.S.C. § 2715(a).

<sup>37</sup> 33 U.S.C. § 2713(b)(1).

<sup>38</sup> 33 U.S.C. § 2713.

<sup>39</sup> 33 U.S.C. § 2713(b)(1).

full and adequate compensation is not available, then a claim for the uncompensated damages and removal costs may be brought to the Fund.<sup>40</sup>

Nothing in OPA prevents a party from obtaining insurance for any liability under OPA.<sup>41</sup> The logical question that follows is whether an insurer has the right, through subrogation or otherwise, to seek compensation from the Fund. Pursuant to the doctrine of subrogation, “an insurer stands in the place of the insured and obtains equivalent but no greater rights than held by the insured”. *Quarles Petroleum Co., Inc. v. U.S.*, 551 F.2d 1201, 1207 (Cl. Ct. 1977) (internal citations omitted) (*Cf.*, *U.S. v. Munsey Trust Co.*, 332 U.S. 234, 242 (1947)). Hence, the insurer is subrogated to whatever rights the responsible party may have under OPA, no more and no less. Pursuant to OPA, a responsible party may present a claim for removal costs or damages to the Fund if (1) it can establish by a preponderance of the evidence that the discharge of oil and the resulting damage or removal costs were caused solely by an act of God, war or omission of a third party or any combination of the aforementioned factors<sup>42</sup> and (2) the incident was not proximately caused by its gross negligence, willful misconduct or violation of a Federal safety, construction, or operating regulation<sup>43, 44</sup>. Thus it would appear that nothing in OPA would prevent an insurer, subrogated to the rights of a responsible party who is entitled to submit a claim to the Fund from submitting such claim as subrogee. However, it would appear no reported case has addressed this issue.

A final significant aspect of OPA is that it does not pre-empt States from imposing additional liability or requirements with regard to the discharge of oil within their State or any removal activities in connection with said discharge.<sup>45</sup> Since here, the oil was actually “discharged” beyond the three mile state territorial limit, a question may arise as to whether state law will apply at all, in the case where the oil subsequently migrated to state territorial waters.

## THE OUTER CONTINENTAL SHELF LANDS ACT

OCSLA provides that the subsoil and the seabed of the outer Continental Shelf appertaining to the United States fall within the jurisdiction of the United States.<sup>46</sup> Furthermore, “outer Continental Shelf” is defined as “all submerged lands lying seaward and outside of the area of lands beneath navigable waters . . .”<sup>47</sup> Though the Rig spilled oil in the outer Continental Shelf, it is unlikely that OCSLA applies to the matter at hand because the Rig was not fixed to the subsoil or seabed. If OCSLA did apply, the Longshoremen’s and Harbor

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<sup>40</sup> 33 U.S.C. § 2713(d).

<sup>41</sup> 33 U.S.C. § 2710(a).

<sup>42</sup> 33 U.S.C. § 2703(a).

<sup>43</sup> 33 U.S.C. § 2704(c).

<sup>44</sup> 33 U.S.C. § 2713(b)(1)(B).

<sup>45</sup> 33 U.S.C. § 2718.

<sup>46</sup> 43 U.S.C. § 1332(1).

<sup>47</sup> 43 U.S.C. § 1331(a).

Workers' Compensation Act ("LHWCA") (which is incorporated under OCSLA) would apply to the deaths or disabilities resulting from the spill.<sup>48</sup>

## THE DEATH ON THE HIGH SEAS ACT

The Death on the High Seas Act (DOHSA), 46 USC §30302, et seq., creates a cause of action for wrongful death on the high seas, which is defined as any point past 3 nautical miles from shore, "for the exclusive benefit of the decedent's spouse, parent, child or dependant relative." DOHSA is limited to pecuniary loss only, with the exception of death occurring as a result of a commercial aviation accident<sup>49</sup>, in which case non pecuniary damages may be recovered for "loss of care, comfort and companionship"<sup>50</sup>. However, clearly this incident does not involve commercial aviation and thus, it would appear that only pecuniary losses are recoverable. Indeed, it has been held by the US Supreme Court on several occasions that DOHSA is the exclusive mechanism for wrongful death claims occurring as a result of accidents on the high seas. See *Dooley v. Korean Airlines Co., Ltd.* 524 U.S. 116 (1998).

As indicated above, should it be determined that the rig in question was a fixed platform coming within the jurisdiction of OCSLA, which is unlikely based on current information, it is possible DOHSA would not apply and an argument could be made that adjoining state law would apply to death or injuries on the platform, thereby significantly expanding the exposure of responsible parties, since Louisiana state law provides for non pecuniary as well as pecuniary damages as a result of wrongful death. See *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996); See also *Alleman v. Omni Energy Services Corp.*, 580 F.3d 280 (5<sup>th</sup> Cir. 2009).

## GENERAL MARITIME LAW

Apart from the specific statutory scheme set forth above, general principles of maritime law may well apply to claims arising from the explosion and consequent oil spill. Maritime jurisdiction attaches to maritime torts which are defined as torts occurring on navigable waters and which involve a traditional maritime activity and potential impact on maritime commerce. See, *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982) and *Sisson v. Ruby*, 497 US 358 (1990). The Admiralty Extension Act, 46 USC §30101, extends admiralty jurisdiction to cases resulting from maritime torts causing injury on land. As a result, there would be maritime jurisdiction pursuant to Article III §2 of the United States Constitution with regard to any claims arising from the explosion and consequent oil spill.

General principles of tort law apply in maritime cases. Maritime law expressly incorporates the doctrine of strict liability for defective products. *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). There are, however certain unique features of general maritime law which may be relevant to the incident in question.

First, general maritime law did not recognize claims for wrongful death until 1970, when the Supreme Court, in *Moragne v. States Marine Lines, Inc.*, 398 US 375 (1970), expressly overruled *The Harrisburg*, 119 US 199

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<sup>48</sup> 43 U.S.C. § 1333(b)(1).

<sup>49</sup> 46 U.S.C. § 30303.

<sup>50</sup> 46 U.S.C. § 30307.

(1886), and held that a claim for wrongful death would be cognizable under general principles of maritime law. DOHSA, however, has been held to preclude claims for non pecuniary losses, where the death occurs on the high seas as described above, notwithstanding the ruling in Moragne, which has left open at least the possibility of “borrowing” from state wrongful death statutes in US territorial waters which are contiguous of those waters extending out 3 miles from shore.

The second and probably more significant unique feature of maritime law is the limitation on pure economic loss, best illustrated by *State of Louisiana, ex. rel. Guste v. Testbank*, 752 F.2d 1019 (5<sup>th</sup> Cir 1985). In *Testbank*, the 5<sup>th</sup> Circuit reaffirmed the traditional bright line rule of *Robins Dry Dock and Repair Co. v. Flint*, 275 U.S. 303 (1927) which held that “a tort to the property of one which results in the negligent interference with contractual relationships of another does not state a claim.” In other words, under general principles of maritime law, not only must tort damages be foreseeable, the victim must establish physical injury to a proprietary interest in order to recover for economic loss. In the *Testbank* case, claims of sport fisherman, restaurateurs, tackle and bait shops, marine and boat rental operators and wholesale and retail seafood enterprises were dismissed given the lack of any evidence of physical injury to the claimants’ operations.<sup>51</sup>

Of course, to a large extent, OPA has overruled *Testbank* with regard to claims brought pursuant to that statutory scheme. However, the rule in *Testbank* should still apply to claims being brought against third parties who are not subject to the OPA regime. In other words, to the extent any claims can be brought under general maritime law and outside the scope of OPA, claimants will be required to establish physical injury in order to claim for any category of pure economic loss.

## THE LIMITATION OF LIABILITY ACT

A unique feature of maritime law is the ability of an owner or demise charter of a “vessel” to limit its liability for claims arising out of the operation of the vessel to the value of the vessel at the completion of the voyage during which the claims arose, and pending freight. The concept originated to promote investment in the fledgling maritime and shipping industries of the United States in the mid-Nineteenth Century. Although greatly disfavored, the law remains in place today and continues to be regularly invoked by ship owners and demise charterers. See 46 U.S.C. Section 30501 *et seq.* The rule is that the value of the vessel is determined after the accident or incident which arose during the voyage. An extreme example would be the limitation petition filed by Barracuda Tanker Corporation following the first major catastrophic tanker oil spill from the Torrey Canyon in 1967, polluting extensive shoreline areas of Britain and France, wherein the limitation fund was claimed to be \$50, the declared value of one life boat which survived the sinking. *In the matter of the Complaint of Barracuda Tanker Corporation*, 409 F.2d 1013 (2d Cir. 1969).

An owner or demise charter will be able to limit its liability if it can establish that the accident or damage that gave rise to the loss was “done, occasioned, or incurred, without the privity and knowledge of the owner”. 46 U.S.C, section 30505. A classic example of a lack of privity or knowledge would be a case of pure navigation error on the part of an otherwise competent captain, causing a collision and damage. In the case of personal

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<sup>51</sup> Economic claims brought by commercial fishermen were held sustainable on the principle that a commercial fisherman has the equivalent of a proprietary interest in the fish resource.

injury or death, the limitation is subject to a minimum of \$420 per vessel ton. For property damage there is no minimum.

Apart for the obvious advantage of limited liability, the limitation proceeding provides for *concursum* of all claims before the court in which the limitation petition is filed and an automatic injunction of all claims asserted against the owner/petitioner anywhere, other than before the limitation court. It is a sort of automatic multi-districting, but in the court of the owner/petitioner's choosing. The statute provides that the limitation action must be brought within six months of the first notice of claim. 46 U.S.C. section 30511.

In the case of the Gulf Oil Spill, given the characteristics of the *Deepwater Horizon* which, in all respects, appears to fit the definition of a "vessel" under maritime law, it would appear highly likely, indeed virtually certain, that the Rig's owner, Transocean, will file a limitation petition in federal court somewhere, seeing to limit its liability to the \$420/ton minimum in regard to the injuries and deaths caused by the explosion and fire and to 0 (presumably the current value of the Rig) in regard to property loss. Whether limitation is granted or not, the filing will have the effect of staying all actions against Transocean in any other court and requiring that claimants file their claims in the limitation action. The limitation action is a "pure" admiralty matter, as a consequence of which the issue of limitation is determined by a judge sitting without a jury. As of the writing of this, reports indicate that Transocean has, or shortly will file a limitation petition in federal court in Houston. The limitation fund is reported to be about \$27 million.

OPA has repealed the right of a "responsible party" to assert limitation with regard to removal costs and the damages defined therein. 33 U.S.C. section 2702(a). However, we see no reason why the limitation statute could not be invoked by a party qualified to assert it, but not covered by OPA or in regard to claims not covered by OPA or a non-responsible party.

## REGULATORY FRAMEWORK

The regulatory framework governing offshore drilling is highly complex and technical. A detailed analysis would be beyond the scope of this article. Very briefly, the MMS, authorized by the Secretary of the Interior, regulates oil exploration, development, and production operations in the outer Continental Shelf (OCS).<sup>52</sup>

The following duties apply to a person who engages in oil operations in the OCS:

- “(1) Perform[] all operations in a safe and workmanlike manner; and
- (2) Maintain[] all equipment and work areas in a safe condition.
- (b) ...immediately control, remove, or otherwise correct any hazardous oil . . . accumulation . . .
- (c) use the best available and safest technology (BAST) whenever practical on all exploration, development, and production operations.”<sup>53</sup>

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<sup>52</sup> 30 C.F.R. § 250.101 (2009).

<sup>53</sup> 30 C.F.R. § 250.107 (2009).

In order to conduct drilling operations in the OCS, one must submit applications for approval by MMS<sup>54</sup> that include projected plans and safety information<sup>55</sup>. In addition, owners, operators, and their contractors and subcontractors<sup>56</sup> must, when engaging in oil drilling operations, (i) “[u]se the best available and safest drilling technology to monitor and evaluate well conditions and to minimize the potential for the well to flow or kick;” and (ii) “[u]se and maintain equipment and materials necessary to ensure the safety and protection of personnel, equipment, natural resources, and the environment.”<sup>57</sup>

## OVERVIEW OF COVERAGE ISSUES: PROPERTY DAMAGE

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While many policyholders will undoubtedly be economically impacted by the *Deepwater Horizon* catastrophe, relatively few individuals or businesses will have property that actually comes into contact with oil from the spill. For those that do, the issue will arise as to whether their property has sustained physical loss or damage, a threshold requirement to coverage under a first party property insurance coverage. In the case of boats, docks, other seaside structures or even land owned by an insured that come into contact with oil, it is likely that such contamination will rise to the level of physical loss or damage at least if there is enough oil on the property so that its removal is warranted or required.

Contamination, in and of itself, can constitute physical loss or damage. There have been a series of cases that have held that exposure to chemicals sufficient to trigger a regulatory response constitutes physical loss or damage to that property, even if it does not physically alter the property or even physically impair its utility. *See, Henri's Food Products Co., Inc. v. Home Insurance Co.*, 474 F.Supp. 889 (E.D. Wis. 1979) (smoke permeated packaging of powdered eggs and milk destined to be used by the U.S. Army. The Army subsequently rejected the milk and eggs. Held to be physical loss or damage even though the actual food products had not been contaminated); *General Mills v. Gold Medal Insurance Co.*, 622 N.W.2d 147 (Minn. 2001) (application of unapproved pesticide virtually identical to approved version constitutes physical loss or damage to oats, even though their safety not impacted); *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 98 N.W.2d 280 (Minn. 1959). Contamination with oil may be analogized to smoke damage from fire. While smoke may not physically char or consume property as would the fire itself, and merely sits on the surface of property so the property remains unchanged once the surface smoke is removed, no one would seriously contend that property covered with smoke to the degree it had to be removed to restore the property to a usable condition had not sustained physical loss or damage.

But, in order to constitute covered physical loss or damage, the oil contamination must be of covered property as a result of a covered peril. Many personal lines and commercial property policies exclude land and water from the scope of covered property. Therefore, any contamination of wetlands, land, beach or other outdoor property may not fall within the scope of covered losses for that reason alone.

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<sup>54</sup> 30 C.F.R. § 250.102 (2009).

<sup>55</sup> 30 C.F.R. § 250.414 (2009).

<sup>56</sup> 30 C.F.R. § 250.400 (2009).

<sup>57</sup> 30 C.F.R. § 250.401 (2009).

Moreover, even if covered property was damaged as a result of contact with oil, coverage for such losses may be barred under one or more exclusions contained in the applicable policy. The most obvious potentially applicable exclusions are the so-called contamination and/or pollution exclusions contained in most first party property policies. Cases discussing their potential application under the Gulf states of Texas, Louisiana, Mississippi, Alabama and Florida are discussed below. Even if damage from contact with oil would seemingly fall within a contamination or pollution exclusion, we anticipate insureds may contend that the real cause of damage to its property was not oil contamination, which was only the "form" of damage, but the explosions and fire on the *Deepwater Horizon* drilling rig, both of which are typically not excluded under all risks policies. Accordingly, we review the law in the Gulf states concerning concurrent causation, as well as their treatment of anti-concurrent cause provisions.

Finally, consideration of the potential application of contamination and pollution exclusions are also important beyond consideration of potential property damage claims. It is anticipated that insurers will ultimately be faced with many more business interruption or other time element claims, than actual property damage claims. But even in cases where insureds have sustained little or no property damage, most business interruption and other time element coverages still require that whatever losses were sustained by the insured resulted from property damage to someone's property as a result of a covered peril. Therefore, the potential application of contamination or pollution exclusions will have major impact on the handling of business interruption claims as well

## POLLUTION AND CONTAMINATION EXCLUSIONS

Property insurance policies typically include an exclusion for loss due to contamination. How the courts have defined the term "contamination" and how they have interpreted the exclusion vary from state to state. Though cases are usually fact-specific and turn on the individual policy language, courts traditionally interpret the term "contamination" in a manner consistent with the word's common understanding, and apply the exclusions fairly broadly to mean "a condition of impurity resulting from a mixture or contact with a foreign substance." See, e.g., *American Casualty Co. v. Myrick*, 304 F.2d 179, 183 (5th Cir. 1962). The contamination exclusion therefore presents a significant obstacle for most environmental claims. By their very nature, environmental claims involve damage caused by contaminants.

Traditionally, first-party policies have utilized "contamination" exclusions. More recently, however, insurers have been adding pollution exclusions to these policies. Both exclusions are intended to preclude coverage in circumstances in which the insured's property is damaged due to contact with contaminants interfering with the property's intended use. Some pollution exclusions in first-party policies include an exception providing that coverage does not apply when the pollution is caused by one of several enumerated perils, such as fire, lightning, explosion, windstorm, collapse, etc. Therefore, careful consideration must be given to the precise language of the exclusion.

Courts have considered pollution exclusions in both the first and third-party contexts, but there are many more reported third-party cases. When interpreting the definition of "pollutant," courts have had no trouble finding that the exclusion applies to common industrial and environmental pollutants like benzene, coal tar, insecticides and PCBs. But the courts have struggled with other substances such as carbon monoxide, fuel, lead paint, asbestos, biological contaminants and chemical fumes. How the contamination and pollution



exclusions will affect coverage for the recent oil spill remains to be seen. But it is likely that most courts would hold that oil is a pollutant or contaminant.

### Alabama

There are very few cases in Alabama in the first-party context regarding pollution and contamination exclusions. In *Haman, Inc. v. St. Paul Fire & Marine Ins. Co.*, 18 F.Supp.2d 1306, 1309 (N.D. Ala. 1998), the court found that an absolute pollution exclusion in a first-party policy applied to preclude coverage for the insured's business interruption claim arising from the use of methyl parathion, a toxic pesticide, by a hotel owner on the hotel premises. The exclusion at issue provided:

This Policy does not insure against loss or damage caused by or resulting from:

\* \* \*

Pollution caused directly or indirectly by the release, discharge, dispersal, seepage, migration, or escape of pollutants or containments unless the release, discharge, dispersal, seepage, migration, or escape is caused by fire, lightning, explosion, windstorm, hail, leakage from fire protection equipment, smoke, vehicles and aircraft, riot, civil commotion, vandalism, sinkhole collapse, volcanic action, falling objects, weight of snow, ice or sleet, or water damage. However, this policy does not cover the costs arising out of the enforcement of any law, ordinance, regulation or order by civil or judicial authority requiring the removal, disposal, replacement, cleanup, restoration or containment of insured property or for costs to monitor or test for the existence or effects of pollutants.

This exclusion applies regardless of any other cause or event that contributes concurrently or in any sequence of the loss.

*Id.* at 1380. The court held that although methyl parathion had "legitimate" commercial uses, the substance was nonetheless a "pollutant" given that it was a highly regulated chemical which could not be used in the presence of humans. The court held further that even if the pollution provision did not exclude coverage for the extermination incident, the insured's damages were excluded under the contamination exclusion provision which explicitly excluded coverage for loss or damage "caused by or resulting from . . . contamination . . ." the court explained that the atmosphere on the hotel premises was so "impure" that it became uninhabitable, and that the impurity resulted from "contact with a foreign substance," which caused contamination. *Id.*

In the third-party context, Alabama courts have held that pollution and contamination exclusions are clear, unambiguous and enforceable according to their terms. *See, e.g., Federated Mut. Ins. Co. v. Abston Petroleum, Inc.*, 967 So.2d 705 (Ala. 2007). In *Shalimar Contractors, Inc. v. American States Ins. Co.*, 975 F.Supp. 1450, 1457-58 (M.D. Ala. 1997), the court held that there was no coverage for claims arising out of an insured's disposal of lead-contaminated debris from a construction project. The court observed that the language in the exclusion was not ambiguous and that a person of ordinary intelligence would interpret the

plain meaning “that any bodily injury resulting from the release or escape of pollutants as a result of [the insured’s] handling or storage of waste or from any location occupied by [the insured]” would not be covered under the insurance contract. *Id.* at 1457.

Given the industrial nature of this spill and the fact that oil is clearly being discharged and dispersed, it is likely that contamination and pollution exclusions will be upheld in first-party policies and that coverage will be barred for claims arising from property contaminated from by the oil spill, at least in those cases where the exclusion does not include an exception for pollution caused by certain enumerated perils, such as explosion.

## Florida

At least one Florida court has addressed the proper application of an exclusion for loss or damage caused by the discharge or release of “pollutants” in the first-party context. *See, Florida Farm Bureau Ins. Co. v. Birge*, 659 So.2d 310, 311 (Fla.Ct.App. 2nd Dist. 1994). In *Birge*, the Florida Court of Appeals was asked to determine whether the policy’s exclusion for loss or damage caused by the release of “pollutants” applied to damage caused by the back-up of raw sewage. The court determined that the term “pollutant,” which was not defined in the policy at issue, was ambiguous and, therefore, should be construed against the insurer. Consequently, the court held the exclusion inapplicable to the claim at issue.

Courts may distinguish *Birge* from claims arising from the oil spill by looking to the policy. If the term “pollutant” is sufficiently defined, the reasoning employed in *Birge* is no longer applicable. If the term “pollutant” is not defined, however, insurers may still be successful arguing that under the common, ordinary understanding of the term, spilled oil qualifies as a “pollutant.”

In the third-party context, Florida does not limit the application of a pollution exclusion to losses involving industrial and/or environmental pollution. *See, e.g., Philadelphia Indemnity Ins. Co. v. Yachtsman’s Inn Condo Ass’n, Inc.*, 595 F.Supp.2d 1319, 1325 (S.D. Fla. 2009) (finding pollution exclusion unambiguously applied to allegation that employee was exposed to “feces, raw sewage and battery acid” that was accumulated and overflowing on the premises); *Nova Cas. Co. v. Waserstein*, 424 F.Supp.2d 1325, 1332-1337 (S.D. Fla. 2006) (applying an absolute pollution exclusion to allegation that an office building’s owner exposed tenants to airborne organisms and pathogens); *James River Ins. Co. v. Ground Down Engineering, Inc.*, 540 F.3d 1270, 1277 (11<sup>th</sup> Cir. 2008) (applying an absolute pollution exclusion to construction debris); *Auto Owners Ins. Co. v. City of Tampa Housing Auth.*, 231 F.3d 1298, 1300-1 (11<sup>th</sup> Cir. 2000) (applying an absolute pollution exclusion to claims that a child ingested and inhaled lead from paint on the walls of a housing complex); *Technical Coating Applicators, Inc. v. U.S. Fidelity and Guaranty*, 157 F.3d 843, 846 (11<sup>th</sup> Cir. 1998) (holding that an absolute pollution exclusion “unambiguously excluded coverage for bodily injuries sustained by breathing vapors emitted from [the insured’s] roofing products, regardless of whether [the insured] used the products properly or negligently”); *West Am. Ins. Co. v. Band & Desenberg*, 925 F. Supp. 758, 762 (M.D. Fla. 1996) (holding that coverage for the dispersal of air-borne contaminants from attic space of a building into indoor air supply was precluded by an absolute pollution exclusion).

Florida courts also apply the exclusions as written, without resorting to extrinsic evidence to interpret the purpose of the exclusion. *See Deni Assoc. of Florida Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135,

1138 (Fla. 1998). The Florida Supreme Court's decision in *Deni* involved the applicability of an absolute pollution exclusion in a CGL policy to lost business income and bodily injury claims arising out of an accidental spill of ammonia in a two-storey commercial building. The spill resulted in the evacuation of the tenants and damage to the building itself. The Florida Supreme Court barred coverage and held that the pollution exclusion was unambiguous. As a result, the court refused to consider extrinsic evidence to interpret the exclusion. *Id.* at 1140.

### Louisiana

It is well-established in Louisiana that pollution exclusions contained in liability policies will be enforced to exclude coverage for active, industrial, environmental polluters only when those businesses knowingly emit pollutants over extended periods of time. *See, e.g., Thompson v. Temple*, 580 So.2d 1133, 1134-35 (La.Ct.App. 4th Cir. 1991); *Grefer v. Travelers Ins. Co.*, 919 So.2d 758, 772 (La.Ct.App. 5th Cir. 2005). Louisiana courts have also held, however, that the plain meaning of "contamination" in a contamination exclusion is unambiguous. *See, e.g., Barry Concrete, Inc. v. Martin Marietta Materials, Inc.*, 531 F.Supp.2d 766 (M.D. La. 2008) (finding that losses sustained by buyer when a load transported in insured's truck was allegedly contaminated by sugar remaining in the trailer from a previous load constituted "contamination" within the meaning of the contamination exclusion in the insured's cargo policy).

The chief judge of Orleans Parish Civil District Court recently stated in *dicta* that the pollution exclusion in a first-party policy did not apply to indoor pollution in the context of "off-gassing" sulfur from Chinese drywall. *See Finger v. Audubon Ins. Co.*, No. 2009-08071, \*4 (La. Civil Dist. Ct., Parish of Orleans, March 22, 2010). Though deleted before the loss, the policy originally contained a "Pollution or Contamination" exclusion that provided:

We do not cover any loss, directly or indirectly, regardless of any cause or event contributing concurrently or in any sequence to the loss, caused by the discharge, dispersal, seepage, migration or release or escape of pollutants. Nor do we cover the cost to extract pollutants from land or water, or the cost to remove, restore, or replace polluted or contaminated land or water. A "pollutant" is any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and "waste." A "contaminant" is an impurity resulting from the mixture of or contact with a foreign substance. "Waste" includes materials to be disposed of, recycled, reconditioned or reclaimed.

*Id.* at 4-5. The court concluded that pollution exclusions do not and were never intended to apply to residential homeowner claims for damages caused by substandard building materials because the Louisiana Department of Insurance had determined that a "pollution incident" under a pollution exclusion in homeowners' policies only refers to an incident that causes "environmental damage" or that is "injurious to the environment, not the claimant, presence in an [sic] upon the land, atmosphere, or any watercourse or body of water of solid, liquid, gaseous or thermal contaminants, irritants or pollutants." *Id.* at 5.

In *Sandbom v. BASF Wyandotte, Corp.*, 674 So.2d 349, 363-64 (La.App. 1<sup>st</sup> Cir. 1996), the court considered a pollution exclusion that did not incorporate the terms “discharge, dispersal, release or escape of the pollutant or contaminant,” but instead only required that there be loss or damage caused by the “exposure” or the “threat of exposure” to a pollutant or contaminant for the exclusion to apply. Despite this broad language, the court read into the provision the requirement that there be a “discharge, dispersal, release or escape” of a pollutant or contaminant because the exclusion contemplated the concept of “pollution” and because the term “pollution” necessarily implies the “discharge” or “dispersal” of a polluting substance. *Id.* The court then reiterated Louisiana’s long-standing rule that the “pollution exclusion” or exclusions precluding coverage for loss or damage caused by pollutants and/or contaminants, only apply in the traditional sense, *i.e.*, to industrial or environmental pollution.

Though another third-party decision, *Doerr v. Mobil Oil Corp.*, 774 So.2d 119, 127 (La. 2000), mentioned above, is worth noting. In *Doerr*, the Louisiana Supreme Court was asked to consider a ruling of the lower court that the absolute pollution exclusion precluded coverage for claims against a municipality whose residents alleged personal injuries as a result of ingesting contaminated water that had entered the municipal water supply due to an oil spill from a Mobil refinery on the Mississippi River. The majority concluded that that “there is no history in the development of this exclusion to suggest that it was ever intended to apply to anyone other than an active polluter of the environment.” *Id.* The court further clarified that the “applicability of a total pollution exclusion” turns on (1) “whether the insured is a ‘polluter’;” (2) “whether the injury-causing substance is a ‘pollutant;” and (3) “whether there was a ‘discharge, dispersal, seepage, migration, release or escape’ of a pollutant by the insured.” *Id.* at 135. Determination of the first two prongs depends upon the nature of the insured’s business, the risk of pollution, whether a separate policy provides pollution coverage, who the insurer typically insures, the nature of the injury-causing substance, the substance’s typical use, the quantity of the discharge, whether the substance was being used as intended when the injury occurred, and whether the substance would be viewed as a pollutant as that term is generally understood. *Id.* Finally, the court stated that the trier of fact should consider the intent of party responsible, the amount discharged, and whether the polluter’s actions were active or passive. *Id.*

While the majority of pollution cases in Louisiana are in the third-party context, courts may find the reasoning in those cases to be persuasive, especially if it helps them find coverage for innocent property owners who did not cause the spill. As stated above, at least one judge has already considered *Doerr* in deciding a first-party claim. It should be noted, however, that oil from a large spill is much more likely to qualify as a “pollutant” than substandard building materials are.

## **Mississippi**

Though Mississippi courts have not yet applied the pollution or contamination exclusions in the first-party context, they have generally upheld absolute pollution exclusions to bar coverage for environmental-related third-party claims. *See, e.g., American States Ins. Co. v. F.H.S., Inc.*, 843 F. Supp. 187, 188 (S.D. Miss. 1994) (absolute pollution exclusion precluded coverage for claims arising out of contractor’s accidental release of ammonia fumes inside a cold storage warehouse); *U.S. Fidelity & Guaranty Co. v. B&B Oil Well Service, Inc.*, 910 F. Supp. 1172, 1180-81 (S.D. Miss. 1995) (absolute pollution exclusion precluded coverage for claims resulting from release of pollutants during the insured’s drilling operations). Additionally, the Fifth Circuit has held that the absolute pollution exclusion bars coverage for injuries caused by fumes from standard paint and

glue materials. *American States Ins. Co. v. Nethery*, 79 F.3d 473, 474 (5th Cir. 1996) (applying Mississippi law).

Applying Mississippi law, the Louisiana Court of Appeals ruled in *Harrison v. R.R. Morrison & Son, Inc.*, 862 So.2d 1065, 1072 (La.App. 2<sup>nd</sup> Cir. 2003) that the absolute pollution exclusion precluded coverage for a claim by Louisiana property owners whose land became contaminated due to a gasoline leak from an underground storage tank at a convenience store operated by a Mississippi corporation. The court found that Mississippi law clearly required that these claims be treated as arising out of the discharge or release of a pollutant on or from the insured's premises for which no coverage was afforded under the policy. *Id.*

In contrast, the United States District Court for the Southern District of Mississippi held in 2004 that the absolute pollution exclusion did not apply when the damages at issue were not the result of a "discharge." *EOTT Energy Pipeline L.P. v. Hattiesburg Speedway, Inc.*, 303 F. Supp. 2d 819, 825 (S.D. Miss. 2004) (the absolute pollution exclusion did not preclude coverage for damages to the pipeline that was struck by a blade on a road grader that resulted in an extensive oil spill).

## Texas

Texas courts have disallowed coverage on the basis of a contamination exclusion. For example, the Fifth Circuit, applying Texas law, upheld a contamination exclusion in the first-party context where ammonia gas entered a poultry processor cooler, ruining the insured poultry products stored there. *American Cas. Co. of Reading Pa. v. Myrick*, 304 F.2d 179, 183-84 (5th Cir. 1962). In determining the meaning of contamination, the court stated as follows:

'Contamination' connotes a condition of impurity resulting from mixture or contact with a foreign substance. In its charge, the trial court defined the term as meaning the '... state of being contaminated; an impurity; that which contaminates; to make inferior or impure by mixture; an impairment of purities; loss of purity resulting from mixture or contact.' This definition is consistent with common understanding ... which is the proper criterion for construing words in an insurance policy.

*Id.* at 183.

In *Auten v. Employers Nat'l Ins. Co.*, homeowners sued their insurer for coverage after an exterminator's misapplication of pesticides rendered the insured home uninhabitable. The policy contained an exclusion providing that it did "not cover . . . loss caused by . . . contamination." *Auten v. Employers Nat'l Ins. Co.*, 722 S.W.2d 468, 470 (Tex.App. – Dallas 1986, writ denied). The court explained that "[c]ontamination occurs when a condition of impairment or impurity results from mixture or contact with a foreign substance." *Id.* at 469. The court also noted that "foreign" is synonymous with "inappropriate" and held that while the use of pesticide was appropriate, the amount of pesticide sprayed was inappropriate. *Id.* In reversing the trial court's holding in favor of the policyholders, the appeals court concluded that the contamination exclusion applied to bar coverage under the homeowner's policy. *Id.* at 470.

The United States District Court for the Northern District of Texas has addressed the applicability of the pollution exclusion in the context of a first-party property policy where the claimed damage was caused by mold. *See Lexington Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd.*, Cause No. 399-CV-1623-D, 2002 WL 356756, \*4 (N.D. Tex. 2002). The exclusion at issue in that case provided:

This policy does not cover loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy.

CONTAMINANTS or POLLUTANTS means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, fungi, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency. Waste includes materials to be recycled, reconditioned or reclaimed.

*Id.* at \*2. The court found that the mold causing the property damage was dispersed within the covered properties and, consequently, that the damage falls within the scope of the Pollution and Contamination Exclusion contained in the policy. *Id.* at \*3.

Texas courts have also enforced pollution exclusions in the third-party context, and courts consider the exclusion to be absolute. *See, e.g., National Union Fire Ins. Co. v. CBI Industries, Inc.*, 907 S.W.2d 517, 522 (Tex. 1995) (“This pollution exclusion is just what it purports to be – ‘absolute’”); *Zaiontz v. Trinity Universal Ins. Co.*, 87 S.W.3d 565, 573-74 (Tex.App.-San Antonio 2002) (affirming summary judgment in favor of the insurer and applying the pollution exclusion to the release of fumes from a smoke and fire eliminator within the interior of a smoke-damaged airplane).

In addition, Texas courts have found that the contamination and pollution exclusions apply to the injection of salt water into producing zones under an oil and gas lease and into a fresh water aquifer. *See Mesa Operating Co. v. Cal. Union Ins. Co.*, 986 S.W.2d 749, 752 (Tex.App – Dallas 1999, pet. denied) (holding that escaped salt water contaminated fresh water aquifer, thereby invoking saline substances contamination endorsement); *Investors Ins. Co. of Am. V. Breck Operating Corp.*, Cause No. 1:02-CV-122-C, 2003 WL 21056849, \* 9 (N.D. Tex. 2003) (finding pollution exclusion in policy precluded coverage for any contamination allegedly caused by insured’s migration of injected salt water into producing zones under oil and gas lease).



## Conclusion

Very few courts in the five Gulf Coast states have applied pollution and contamination exclusions in the first-party context. In the third-party context, the exclusions are generally upheld except in Louisiana, which enforces the exclusions on a more limited basis, based on the application of the factors discussed above. For first-party claims filed in any of these states, courts are likely to examine and rely on cases decided in the third-party context, despite the lack of precedential value, which may be good news for property insurers in Alabama, Florida, Mississippi, and Texas. Insurers of Louisiana property, however, should be aware of that state's reluctance to enforce pollution exclusions, especially when the policyholders are not responsible for the oil spill damaging their property.

## CONCURRENT CAUSATION

Concurrent causation issues arise when a loss results from a combination of covered and excluded perils. First-party insurers in Alabama, Florida, Louisiana, Mississippi, and Texas will face multiple property damage claims, triggering coverage decisions about whether the cause of loss is the initial explosion and fire or excluded pollution or contamination from the oil spill.

If the policy has no anti-concurrent cause provision, which provisions are discussed below, courts will look to both the applicable theory of causation as well as to the relevant policy language. They have generally adopted two primary theories: (1) efficient proximate causation and (2) pure concurrent causation. The efficient proximate causation approach is used when one cause sets in motion another cause of loss, which may or may not be covered. The pure concurrent causation approach, on the other hand, permits coverage when damage results from a combination of covered and excluded causes of loss that are independent.

While Florida employs the pure concurrent causation approach, Alabama, Louisiana and Mississippi have used efficient proximate causation. Texas, however, has adopted a "concurrent cause" approach that is different from many other jurisdictions. Under the Texas rule, when covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused *solely* by the covered peril.

### Alabama

Alabama courts have employed the efficient proximate causation doctrine but have also held that the rule does not invalidate exclusions that do not have an efficient proximate cause requirement to trigger their application. In *State Farm v. Slade*, 747 So.2d 293, 297-98 (Ala. 1999), homeowners sued their insurer to recover damages caused by lightning that struck a retaining wall of their home. The wall collapsed, and, subsequently, the ground around the insureds' backyard pool gave way. *Id.* at 298-99. Approximately nine months after the lightning strike, the insureds noticed some cracking in the ceilings and in the interior and exterior walls of their home and informed the insurer. *Id.* Though damage proximately caused by lightning was a covered cause of loss, the insurer ultimately denied coverage for damage to the house based on an earth movement exclusion. *Id.*

The insureds argued that the earth movement exclusion was unenforceable because it violated the rule of "efficient proximate causation" adopted by the courts in Alabama, because their loss was covered

“regardless of whether the excluded event of earth movement was in the chain of events that caused their loss.” *Id.* at 312-13. The court noted the following about efficient proximate causation:

The active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started, and working actively from a new and independent source, is the direct and proximate cause . . . .

*Id.* at 313. The insureds claimed that they produced evidence that the lightning strike was the efficient proximate cause of their loss and that earth movement was “but an incident in the chain of events” and maintained that the insurer’s interpretation of the earth movement exclusion would violate the efficient proximate causation rule. *Id.* The court refused to invalidate the broad earth movement exclusion, however, and held in favor of the insurer because the “efficient-proximate-cause rule does not state a principle of public policy”, and parties can contract for narrower coverage. *Id.* at 313-14.

### Florida

Florida courts have employed the pure concurrent causation approach in recent years. The court in *Paulucci v. Liberty Mut. Fire. Ins. Co.*, 190 F.Supp.2d 1312, 1318 (M.D. Fla. 2002), citing *Wallach v. Rosenberg*, 527 So.2d 1386 (Fla. Dist. Ct. App. 1988), explicitly stated that “the concurrent cause doctrine is the prevailing standard under Florida [law].”

In *Wallach*, the Rosenbergs and Wallach owned adjoining property encircled by a continuous sea wall. After a storm, Wallach’s sea wall collapsed, “precipitating a domino-like crumbling of a portion of the Rosenbergs’ sea wall.” *Wallach*, 527 So.2d at 1386. The Rosenbergs filed suit against Wallach, alleging that Wallach breached his duty to use reasonable care in maintaining his premises. *Id.* They also filed a first-party claim under their all risk homeowners’ policy. *Id.* at 1387.

At trial, the Rosenbergs alleged that their loss was caused by Wallach’s negligence, which was covered under his all-risk policy. *Id.* Wallach and Old Republic, however, sought to prove that the proximate cause of the Rosenbergs’ loss was earth movement or water pressure caused by the storm, both of which were excluded under that policy. *Id.* The jury found Wallach negligent and Old Republic in breach of the insurance contract. *Id.*

On appeal, the court held that Wallach and Old Republic were not entitled to a directed verdict because the evidence suggested that the defective wall and the storm could have both been the efficient cause of loss. *Id.* Moreover, the court rejected Wallach and Old Republic’s theory that when concurrent causes join to produce a loss and when one of the causes is a risk excluded under the policy, no coverage is available to the insured. *Id.* The court concluded, “Where weather perils combine with human negligence to cause a loss, it seems logical and reasonable to find the loss covered by an all-risk policy even if one of the causes is excluded from coverage.” *Id.* at 1388.

Other courts applying Florida law have also used this approach. See, e.g., *GuideOne Elite Ins. Co. v. Old Cutler Presbyterian Church*, 420 F.3d 1317, 1329-30 (11<sup>th</sup> Cir. 2005) (“concurrent cause doctrine” permits coverage under an insurance policy when the loss can be attributed to multiple causes, as long as one of the causes is

an insured risk); *Allstate Ins. Co. v. Safer*, 317 F.Supp.2d 1345, 1353 (M.D. Fla. 2004) (noting that the concurrent cause doctrine, which allows for recovery under an insurance policy if the loss stems from multiple causes provided that one of the causes is an insured risk, only applies when the multiple causes of injury are independent and involve separate and distinct risks); *Ohio Cas. Ins. Co. v. Continental Cas. Co.* 279 F.Supp.2d 1281, 1284 (S.D. Fla. 2003) (stating the concurrent cause doctrine allows recovery if the loss stems from multiple causes provided that one of those causes is an insured risk); *Paulucci v. Liberty Mut. Fire. Ins. Co.*, 190 F.Supp.2d 1312, 1318 (M.D. Fla. 2002) (stating that *Wallach* sets for the mandate that the pure concurrent cause doctrine provides coverage when a loss would not have occurred but for the joinder of independent covered and excluded causes); *but see Hartford Accident and Indemnity Co. v. Phelps*, 294 So.2d 362, 364 (Fla. Dist. Ct. App. 1974) (“where there is a concurrence of different causes, the efficient cause – the one that sets the others in motion – is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster.”).

### Louisiana

Although the Louisiana Supreme Court has not specifically ruled on the issue, the default analysis applicable to insurance policies is the efficient proximate cause doctrine. *See, In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 222, n. 8 (5th Cir. 2007); *Landry v. Louisiana Citizens Prop. Ins. Co.*, 983 So.2d 66, 83 (La. 2008); *Cameron Parish School Board v. RSUI Indem. Co.*, 620 F.Supp.2d 772, 780 (W.D. La. 2008); *but see, Johns v. State Farm Fire & Cas. Co.*, 349 So.2d 481, 484-85 (La. Ct. App. 1977) (adopting the concurrent causation doctrine, citing the same California Supreme Court decision relied upon by the *Wallach* court in Florida). Louisiana courts have interpreted “direct loss” in a windstorm policy to have the same meaning as “proximate cause” in negligence actions. *Lorio v. Aetna Ins. Co.*, 232 So.2d 490 (La. 1970); *Arias-Benn v. State Farm Fire & Cas. Ins. Co.*, 495 F.3d 228, 231 (5th Cir. 2007). The “proximate cause” or “efficient cause” does not mean, therefore, that the covered peril must be the sole contributing cause. *See, Leonards v. Travelers Ins. Co.*, 506 So.2d 509 (La. Dist. Ct. App. 1986). It is sufficient to show that a particular peril was the efficient cause of the loss notwithstanding that another cause or causes contributed to the loss. *Riche v. State Farm Fire & Cas. Co.*, 356 So.2d 101, 103 (La. Ct. App. 1978).

The key case cited for efficient proximate causation in Louisiana is *Lorio*. The analysis for proximate cause is fact-specific. The suit involved an insured who sought recovery on a windstorm policy issued on a horse. *Lorio*, 232 So.2d at 491. The horse was removed from a barn where it was usually stabled and placed in an open lot the night of the hurricane that allegedly caused the loss. *Id.* After the barn was inspected for damage, the insured quartered his horse in a stall next to the feed stall. Four days later, the horse was suffering from acute laminitis after overeating. The horse had kicked off two boards on the side of the stall to gain access to the wheat in the stall next to it and subsequently died. *Id.* at 492. The insured argued that the horse’s death was caused by the windstorm because the hurricane made it necessary to relocate the horse, and the sideboards kicked in by the horse were weakened by the storm. *Id.* The trial court found in favor of the insured, and the appellate court reversed the judgment.

The Louisiana Supreme Court upheld the reversal. While agreeing that if the windstorm had been the dominant or efficient cause of the loss, the loss would be covered, the court stated that the windstorm was “at most an indirect or remote cause of the animal’s death.” *Id.* at 494. The horse did not have to be quartered in the barn, so the hurricane was not the proximate cause of the horse’s death. *Id.* Using this

reasoning, Louisiana courts may conclude that any property damages related to the oil spill were caused by contamination and/or pollution rather than the earlier explosion and fire.

### Mississippi

Mississippi follows the efficient proximate causation doctrine. It is long standing law in Mississippi that “in order that there may be recovery on the [windstorm] policy, the cause designated in the policy must have been the proximate, and not a remote, cause of the loss, particularly where the policy requires it to be the ‘direct’ cause of loss.” *Grain Dealers Mut. Ins. Co. v. Belk*, 269 So.2d 637, 640 (Miss. 1972); *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 431-32 (5th Cir. 2007). Furthermore, if the peril insured is the proximate cause of loss, it does not need to be the sole cause. Rather, it is sufficient if the cause was the efficient cause of loss. *Belk*, 269 So.2d at 640. Mississippi courts have held that for recovery under a homeowner’s policy that covers wind damage but excludes damage caused by water, “it is sufficient to show that wind [the covered peril] was the proximate or efficient cause of the loss . . . notwithstanding other factors [excluded perils like water] contributed. . . .” *Lititz Mut. Ins. Co. v. Boatner*, 254 So.2d 765, 767 (Miss. 1971) (citing and quoting *Kemp v. Am. Universal Ins. Co.*, 391 F.2d 533, 535 (5th Cir. 1968)).

### Texas

Texas has adopted a “concurrent cause” approach that is distinct from the approaches in most other jurisdictions. *See, e.g., Wallis v. United Services Auto. Ass’n*, 2 S.W.3d 300, 302-03 (Tex. App.-San Antonio 1999, pet. denied). Under the Texas rule, when covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril. In *Wallis*, a homeowner sued his insurer to recover for foundation damage caused by several excluded perils as well as a covered event. *Id.* at 303. The insureds’ failure to show the extent to which the covered peril caused damage was fatal to their claim. *Id.* at 302-03. The *Wallis* court observed that the doctrine of concurrent causation is not an affirmative defense or an avoidance issue; rather, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove their damage is covered by the policy. *Id.* at 303. The burden is on the insured to prove coverage. *Id.* *See also All Saints Catholic Church v. United Nat. Ins. Co.*, 257 S.W.3d 800, 802-03 (Tex. App.-Dallas 2008).

In *State Farm v. Rodriguez*, 88 S.W.3d 313, 321 (Tex. App.-San Antonio 1999), the San Antonio Court of Appeals wrote that because an insured can recover only for covered losses, the onus of segregating the damage attributable solely to the covered cause of loss is an issue for which the insured carries the burden of proof. *Id.* “To this end,” the court continued, “the insured must present some evidence upon which the jury can allocate the damage attributable to the covered peril.” *Id.*

### Conclusion

Because there was an explosion and fire, and then an ensuing oil spill, it is at least arguable that multiple causes combined to damage property in the Gulf Coast region. In states applying the doctrine of efficient proximate causation, the courts may be less inclined to enforce the contamination and pollution exclusions, but they will likely look closely at policy language. Florida’s concurrent causation majority approach may allow for recovery if the loss stems from multiple causes provided that one of those causes is an insured risk. Texas, however, will likely allow recovery for only that portion of the damage caused solely by the covered peril. Additionally, while many policies are now written in an “all-risk” or “open” perils format, where the

line between covered and uncovered losses is drawn through the use of exclusions, rather than in a “named perils” format, the causation analysis is basically the same. As discussed below, any anti-concurrent causation provisions may affect coverage.

## ANTI-CONCURRENT CAUSE PROVISIONS

Because the efficient proximate causation doctrine has the effect of invalidating policy exclusions in the case of losses arising from concurrent causes, insurers often include anti-concurrent causation language in their policies providing that a combination of covered and excluded causes of loss will not be covered. The majority of states, including those along the Gulf Coast, uphold anti-concurrent cause provisions.

### Alabama

Though the Alabama Supreme Court has not ruled directly on the enforceability of anti-concurrent cause provisions, the court’s decision in *Slade*, discussed above, indicates that the clauses would be upheld. As previously noted, the court excluded coverage in that case for property damage caused by earth movement even though the policy covered losses caused by lightning. *Slade*, 747 So.2d at 310. The court stated that insurance companies and their insureds “are free to agree to any terms in a contract ‘so long as they do not offend some rule of law or contravene public policy.’” *Id.* at 313-14. Because the efficient proximate cause rule is not a principle of public policy, the court held that a provision narrowing coverage was acceptable. *Id.*

### Florida

Florida courts have generally held that anti-concurrent causation provisions are enforceable. The United States District Court for the Middle District of Florida held that parties could contract around the concurrent cause doctrine through an “express anti-concurrent provision.” *Paulucci*, 190 F.Supp.2d at 1320. In *Paulucci*, the policy’s anti-concurrent cause language stated, “Such ‘loss’ is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the ‘loss.’” *Id.* After analyzing the *Wallach* decision and another Florida Court of Appeals decision, *W. Am. Ins. Co. v. Chateau La Mer II Homeowner’s Ass’n*, 622 So.2d 1105, 1108 (Fla. Dist. Ct. App. 1993), as well as decisions from other jurisdictions, the *Paulucci* court held that the anti-concurrent cause language of the policy was agreed to by the contracting parties and must be applied. *Id.* at 1321.

In *State Farm Fire & Cas. Co., v. Metro. Dade County*, 639 So.2d 63, 65 (Fla. Dist. Ct. App. 1994), the court enforced anti-concurrent cause language after Hurricane Andrew. The court held that an insurer was not obligated to compensate policyholders who were rebuilding their home with structural improvements that were mandated by law because an exclusion in the policy barred coverage for loss due to the enforcement of any ordinance or law regulating the construction or repair of a building. *Id.* In applying the anti-concurrent cause provision, the court held that this particular loss was excluded regardless of “whether other causes acted concurrently or in any sequence with the excluded evidence to produce the loss.” *Id.*

Florida’s amended Valued Policy Law (“VPL”) provides that “[i]n the event of the total loss of any building ...located in this state and insured . . . as to a covered peril, in the absence of any change increasing the risk without the insurer’s consent . . . the insurer’s liability under the policy for such total loss . . . shall be in the amount of money for which such property was so insured as specified in the policy and for which a premium has been charged and paid.” Fla. Stat. Ann § 627.702 (1)(a). With regard to the VPL, the Supreme Court of

Florida's decision in *Fla. Farm Bureau Cas. Ins. Co. v. Cox*, 967 So.2d 815, 818-20 (Fla. 2007) set a new precedent when the court found that an insurer was only liable for that part of a covered peril for which a premium was paid and did not find that the plain language of the VPL statute intended that the insurer be mandated to pay for a total loss even when a covered peril contributed to the loss, which is directly contrary to *Mierzwa v. Florida Windstorm Underwriting Ass'n*, 877 So.2d 774, 821 (Fla. Dist. Ct. App. 2004).

## Louisiana

Louisiana courts also enforce anti-concurrent cause provisions. In *Sweeney v. City of Shreveport*, 584 So.2d 1248, 1250 (La. App. 2 Cir. 1991), writ denied, 589 So.2d 1057 (La. 1991), the court applied an anti-concurrent causation clause to enforce a policy exclusion precluding coverage even though negligence -- a covered cause -- contributed to the loss. The insured's home in *Sweeney* was demolished by the City because it was in a dilapidated condition. The City mistakenly identified the house's street number and sent the notices of condemnation to the wrong person. The policy contained an exclusion for losses caused by enforcement of ordinances with an anti-concurrent causation clause that provided that "[s]uch loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." *Id.* The court found that "the exclusion provides that any loss directly or indirectly resulting from enforcement of an ordinance is excluded regardless of any contributing causes." *Id.* at 1251. The court held that "the negligence of the city employees [may have resulted] in Mrs. Sweeney not getting notice and that this negligence contributed to the demolition of the house; however, the exclusion by its own terms still applies." *Id.*; see also *Prytania Park Hotel v. General Star Indem. Co.*, 896 F. Supp. 618, 624 (E.D. La. 1995) (enforcing anti-concurrent causation language in exclusion for loss caused by enforcement of any ordinance or law, even though cost to comply with code arose from repair of hotel after fire); *Travelers Indem. Co. v. Powell Ins. Co.*, Cause No. 95-4188, 1996 WL 578030, \*3 (E.D. La. Oct. 4, 1996) (holding water damage exclusion containing anti-concurrent causation language was unambiguous); *Morgan v. Auto Club Family Ins. Co.*, 899 So.2d 135, 137 (La. App. 3 Cir. 2005) (holding that an exclusion in a homeowner's policy for loss caused by mold was unambiguous and precluded coverage even though the insured claimed that the accumulation of condensation was an ensuing loss that was not specifically excluded); *Dawson Farms, LLC v. Millers Mut. Fire Ins. Co.*, 794 So.2d 949, 951 (La. App. 2 Cir. 2001), writ denied, (La. 2001) (finding damage to a refrigerated storage facility caused by faulty workmanship was specifically excluded under the policy even though loss of the sweet potato crop from the accumulation of condensation was a loss insured under the policy).

## Mississippi

In *Leonard v. Nationwide Mutual Insurance Company*, 499 F.3d 419, (5<sup>th</sup> Cir. 2007), the Fifth Circuit, applying Mississippi law, found an anti-concurrent cause provision to be unambiguous and held that the policy excluded all losses caused by storm surge. The *Leonard* court noted that Mississippi law yields to the default rule of causation: the efficient proximate cause rule. Nevertheless, the court found that no Mississippi case purports to enshrine efficient proximate cause as an immutable rule of Mississippi policy interpretation. The court observed that "Insurers developed [anti-concurrent cause] clauses specifically in response to court decisions that applied the efficient proximate cause doctrine to resolve thorny issues of policy coverage for concurrently caused perils." *Leonard*, 499 F.3d at 433, footnote 7. The Court also noted that Mississippi had not adopted the efficient proximate cause doctrine as a matter of public policy. *Id.* at 435.



The Fifth Circuit has also held that an anti-concurrent cause provision was not rendered ambiguous by a hurricane deductible endorsement. *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 354-56 (5<sup>th</sup> Cir. 2007). In *Tuepker*, the court found that the anti-concurrent cause language overrode the efficient proximate cause doctrine and unambiguously excluded coverage for damages caused by both excluded and covered perils. *Id.*

In a unanimous 2009 decision, however, the Mississippi Supreme Court held that a homeowners' insurer may be liable for a portion of the damages to an insured's home caused by Hurricane Katrina. *Corban v. United Servs. Auto. Ass'n*, 20 So.3d 601, 615-17 (Miss. 2009). Specifically, the court determined that the anti-concurrent causation clause in the policy was ambiguous and did not preclude coverage for hurricane losses due to wind damage that happened in sequence with water damage. *Id.* at 617. The court reasoned that the wind and flood acted sequentially rather than concurrently, which caused different damage and resulted in separate losses. The court explained that the anti-concurrent causation clause would apply to exclude coverage only if the wind and water perils "contemporaneously converged, operating in conjunction to cause loss." *Id.* at 615.

### **Texas**

While Texas courts have not often directly addressed anti-concurrent cause language, courts have enforced the clauses to exclude all damages caused, even indirectly, by an uncovered peril. In *Lexington Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd.*, Cause No. 399-CV-1623-D, 2002 WL 356756, \*4 (N.D. Tex. 2002), the policy excluded coverage for damages caused directly or indirectly by faulty workmanship. Damage was excluded regardless of whether the faulty workmanship combined with another cause to create the loss. The court found that if the insurer presented evidence that faulty workmanship caused the damage, at least in part, it was freed from "liability for all damages caused directly or indirectly" by that excluded peril, which was the intended legal effect of the anti-concurrent language. The *Unity* court cited decisions from other jurisdictions enforcing anti-concurrent causation provisions. *Id.*

### **Conclusion**

With the exception of Mississippi, which now distinguishes sequential and concurrent causes of loss, courts in the Gulf Coast states generally enforce anti-concurrent cause provisions and find that they unambiguously exclude coverage where a covered cause of loss and an excluded cause of loss combine to cause the insured's damages.

## **OVERVIEW OF COVERAGE ISSUES: BUSINESS INTERRUPTION**

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In addition to claims involving direct physical loss or damage to insured property, it is anticipated that business interruption losses stemming from the spill could total in the billions of dollars, and represent a significant portion of the total losses resulting from this event. As with other large catastrophes, it is anticipated that the Gulf Coast oil spill will impact business enterprises both regionally and nationally. But in contrast with disasters such as hurricanes, wildfires, and acts of terrorism, which often result in direct physical loss to private property, the direct physical loss caused by leaking oil may be largely confined to public waterways, lands, and wildlife. The absence of direct physical loss to covered property may preclude coverage for many business interruption claims.

Those suffering business interruption losses include both marine and non-marine related businesses. Commercial marine enterprises affected include tugs, barges, oil field service vessels, port facilities, cargo, ship repairers, fisheries, fishermen, and Gulf Coast casino boats. Commercial cruise lines operating in the Gulf may also be impacted to the extent their usual shipping lanes are closed.

Due to its unique location near the mouth of the Mississippi River, New Orleans is a major port of entry or exit for all sorts of commodities necessary for the agricultural and industrial Midwest. For at least a while cargo vessels were stacked up at the mouth of the Mississippi River and not allowed to steam up river to the Port of New Orleans for fear of polluting the river and adjacent wetlands. Shippers of products such as grain, coffee, sugar, steel, fruit, oil, and natural gas rely on the Port to move these commodities in the U.S. and throughout the world. Because of the importance of the Port in New Orleans, and other ports along the Gulf Coast and along the lower Mississippi River, many non-marine related companies will also be affected by the spill, such as food processing plants that receive commodities from these ports. Additionally, many Gulf Coast businesses dependant on tourism have already suffered financial losses including hotels, restaurants, golf courses, and other tourist attractions. Indeed, a number of lawsuits have already been filed alleging financial losses attributable to the spill. These lawsuits have been filed by property owners, fishermen, seafood processors, and restaurants in Louisiana, Alabama, Mississippi and Florida.

These early lawsuits have been filed against BP, Transocean, Halliburton, and Cameron. It is likely that many of those suffering financial losses will assert claims against the Oil Spill Liability Trust Fund as well. But given the significant amount of time it may take to sort these claims out, many of those impacted will also consider making claims for business interruption losses under their own first party property insurance policies.

### **BASIC BUSINESS INTERRUPTION COVERAGE**

Business interruption insurance coverage is the most common and important variety of coverage for indirect or consequential loss. Business interruption coverage is designed to provide indemnity for loss of business income that results from direct physical damage to covered property from a covered peril. Generally, a covered claim for business interruption losses must satisfy the following requirements:

- (1) the insured incurs business income losses or extra expense
- (2) due to the interruption of its business operations
- (3) during the period of restoration
- (4) caused by direct physical loss or damage to covered property
- (5) as a result of a covered peril.

As noted earlier in this paper, there is a significant question as to whether damage caused by leaking oil constitutes a covered or excluded peril largely depending on the potential application of the contamination and/or pollution exclusion contained in many first party policies. But even if the insured can meet that threshold requirement, there are a number of other hurdles to coverage for financial losses caused by the Gulf Coast oil spill as outlined below.

### **Direct Physical Loss to Covered Property**

Like most coverage under a first-party property policy, covered business interruption losses typically require that the insured suffer “direct physical loss” or “physical loss” to covered property giving rise to the business interruption loss. Thus one of the preliminary issues that can arise when evaluating a business interruption claim is whether insured property has even sustained physical loss or damage.

For example, in *Source Food Technology, Inc. v. United States Fidelity & Guarantee Co.*, 465 F.3d 834 (8th Cir. 2006), the court determined there was no direct physical loss to property as required under a business interruption insurance policy following an embargo on Canadian beef based on a mad cow disease report. The policyholder, Source Food, could not fill orders and was forced to locate a new beef products supplier. As a result, Source Food’s best customer terminated its contract seven months early. Source Food filed a business interruption claim seeking compensation for lost profits based on early termination of its contract and the costs of obtaining alternative products from a new supplier. Applying Minnesota law, the court held that there was no covered business interruption loss, reasoning that although Source Food’s beef product could not be transported into the United States, there was no physical contamination or damage in any manner to the product.

Not only must there be physical loss or damage to property in order to trigger coverage, but the damage must be to insured property, not property of third parties. In *Southeast Mental Health Center, Inc. v. Pacific Ins. Co., Ltd.*, 439 F.Supp.2d 831 (W.D. Tenn. 2006), a commercial policyholder sought coverage under an all-risk property policy providing business interruption insurance after the insured medical clinic and its operations center were damaged by heavy rain and windstorm following a hurricane. Power and utility poles adjacent to the insured property were blown down or destroyed, resulting in the loss of electrical and telephone service at the policyholder’s location. The policyholder alleged that loss of electricity damaged and caused loss of data from its pharmacy’s computer, its operations were suspended, and it lost significant business income as a result of loss of electricity and telephone service. The court held that the electrical and telephone outages were caused by damage to power and utility lines that were not located on the insured property. Therefore, the power outage did not constitute direct physical loss of or damage to the *insured property* as required by the policy. But the resulting corruption of the insured pharmacy’s computer was direct physical loss of or damage to property under the business interruption policy, and the resulting loss of business income would fall within the scope of the policy’s business interruption coverage.

It is also important to bear in mind that while many insureds will be asserting claims under standard business interruption coverage forms, others may have broker written manuscript forms that may offer broader coverage for business interruption losses. For example, the manuscript form may broaden the definition of “real and personal property” of the insured to include “any real or personal property in which an insured may have an insurable interest or for which the insured may be responsible for the insurance.”

For example, in *Zurich American Ins. Co. v. ABM Industries, Inc.*, 397 F.3d 158 (2nd Cir. 2006), the court construed a business interruption provision that covered loss resulting from the interruption of business caused by damage “to insured property at an insured location.” The policy form included a broadly worded scope of coverage provision, which defined the scope of covered property as “the interest of the Insured in all real and personal property owned, controlled, used, leased or intended for use by the Insured.” The insured, ABM Industries, provided janitorial, lighting and engineering services for the common areas of the

World Trade Center, and for the premises of many of the buildings' tenants. Following the terrorist attack on the World Trade Center, Zurich declined coverage for ABM's business interruption losses on the grounds that ABM did not "own" or "lease" the damaged premises. But the court determined that the broadly worded scope of coverage provision extended such coverage to any property for which the insured had an "insurable interest." Therefore, the court held that ABM was entitled to reimbursement of its business interruption losses because it "controlled", "used", or "intended to use" the common areas and the premises of the other tenants in the World Trade Center.

While it is clear that commercial fisherman (or cruise ship owners for that matter) do not own the waters of the Gulf of Mexico, arguably they have an insurable interest in the Gulf in that it is where they derive their income, in the same way that ABM conducted its business operations at the World Trade Center. For this reason, it is always important to review the policy language at issue carefully in making coverage determinations.

### **Causation Requirements**

Even assuming there is physical loss or damage to covered property, that damage must cause the business interruption in order to give rise to covered business income losses. Just because the insured suffers business income losses as a result of a regional or national catastrophe in which there has been widespread damage to property, does not mean the insured's business income losses resulted from covered damage to its own property, a necessary element of covered business income losses. For example, it has been widely reported that there have been massive cancellations of vacation plans since the oil spill, including hotels and condominiums sitting vacant, fishing charters cancelled, and restaurants left empty. And yet, not a drop of oil has come in contact with these business enterprises. These cancellations were prompted more likely by the media attention that the spill has garnered and future fears of vacationers, rather than by any damage to insured property. Even in cases where there is covered physical damage to insured property, there may be no business income coverage where the financial losses are attributable to another non-covered cause. For example, even if a commercial fishing enterprise suffers oil damage to the hull of its fishing vessel, it may not be entitled to business interruption coverage if its losses are proximately caused by a non-covered cause, such as the closure of its fishing grounds.

While many businesses on the Gulf Coast affected by the oil spill may well have suffered a disruption of business operations and lost income, this circumstance in itself does not necessarily give rise to a valid business interruption claim. Even if the spill, and its resulting consequences, impede the operation of an insured's enterprise, the business interruption claim may be foreclosed if the insured did not suffer direct physical loss or damage to insured property caused by a covered peril. So while many commercial fishermen and seafood related industries will undoubtedly suffer significant financial losses as a result of the oil spill, their losses may not be covered where they have not suffered a direct physical loss to their covered property, or where any such damage is not the cause of the interruption of its business operations.

### **Period of Restoration**

Business interruption coverage compensates the insured for income lost due to damage to insured property by a covered peril, but is limited to those losses incurred during the period of restoration—typically the time needed to restore the property. Determining the "period of restoration" in a loss involving a single insured can be complex. In a regional catastrophe, such as the Gulf Coast oil spill, this determination may be far more

complicated. Numerous factors may affect the period of restoration, such as the delay in capping the affected well and cleaning the affected areas, the availability of cleaning and restoration services and insurance adjusters, the utility of the remaining civil infrastructure, acts of government authorities, weather conditions, and safety issues.

The term “period of restoration” is defined in ISO’s Commercial Property Form CP 0030, as the time that “[b]egins 72 hours after the time of direct physical loss or damage for Business Income Coverage ... caused by or resulting from any Covered Cause of Loss at the described premises ... and [e]nds on the earlier of: (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) The date when business is resumed at a new permanent location.” The expiration date of the policy will not cut short the “period of restoration.”

The insured’s right to business interruption coverage, however, may also be limited by the provision in the standard ISO form providing that the period of restoration “does not include any increased period required due to the enforcement of any ordinance or law that ... [r]equires an insured or others to test for, monitor, clean-up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of ‘pollutants.’”

While the definition of “period of restoration” may vary in different policy forms, courts have generally interpreted the “period of restoration” definition to mean the time *theoretically* necessary to repair or replace the damaged property. *See, e.g., SR Int’l Bus. Ins. Co. v. World Trade Ctr. Props.*, No. Civ. A. 9291, 2005 WL 827074, \*3 (S.D.N.Y. Feb. 15, 2005) (noting case law is “consistently” in accord and that the term “actual” did not appear anywhere in the subject policy’s definition of the restoration period). The courts reason that the use of the subjunctive “should” or “would” imply a hypothetical or constructive calculation. *Id. See also, Duane Reade Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 392 (2nd Cir. 2005).

In *Zurich American Ins. Co. v. ABM Industries, Inc.*, discussed above, Zurich issued a policy to ABM providing both standard business interruption and contingent business interruption coverage. In determining whether the period of recovery should end when the World Trade Center was rebuilt, or at some point earlier such as when the tenants of the World Trade Center have relocated, the court noted that ABM’s business was “fundamentally connected to its use of the common spaces at the World Trade Center.” Because restoration of the World Trade Center itself was necessary for ABM to resume its business operations, the court determined that the appropriate period of recovery is the hypothetical length of time required to rebuild the World Trade Center. *See also Children’s Place Retail Stores, Inc. v. Federal Ins. Co.*, 37 A.D. 3d 243 (N.Y. 2007) (insured retail store, having elected not to relocate after its World Trade Center location was destroyed, was entitled to business interruption coverage for the period of time it would have reasonably taken to resume operations at a different location); *Royal Indemnity Co. v. Retail Brand Alliance, Inc.*, 33 A.D. 3d 392 (N.Y. 2006) (once store resumed operations, business income coverage terminated regardless of whether insured’s income was restored to pre-loss levels).

These cases illustrate the critical point that determination of the applicable period of restoration depends on the scope of damage to covered property that is driving the business interruption, as opposed to damage to non-covered property.

Some courts have departed from the general rule and permitted recovery for the actual time taken to restore the property. For instance, in a Louisiana case, the court extended the restoration period to the actual length of the business interruption because the insured could not begin rebuilding until it received payments from the insurer. *United Land Investors, Inc. v. The Northern Ins. Co. of Am.*, 476 So.2d 432, 437–38. (La. Ct. App. 1975). Courts such as the one in *United Land Investors* may be willing to extend the restoration period when delays are attributable to actions taken by the insurers, as opposed to the insureds. *World Trade Ctr. Props.*, 2005 WL 827074 (S.D.N.Y. 2005). Other courts will not extend the restoration period, even for delays attributable to the insurer. See *Jonari Mgmt. Corp. v. St. Paul Fire & Marine Ins. Co.*, 448 N.E.2d 427 (N.Y. 1983).

In the case of the Gulf oil spill, the period of restoration may be difficult to determine. In the first place, it is not entirely clear how long it will take to clean the affected areas. By way of example, the Exxon Valdez spill impacted 1,300 square miles, and took Exxon four summers to clean. If the Gulf spill makes its way into the Mississippi Delta, it could soak deeply into the sponge-like marshes, and cleaning those wetlands would be far more difficult than the work on the rocky beaches of Alaska's Prince William Sound. Because the time necessary to clean the Gulf spill will depend on such variables as the amount of oil eventually discharged, the geographic area of its spread, and whether the oil reaches the shoreline, it is still too early to predict how long the clean-up will take. Further, even after the initial clean-up, the spill's impact on sea-life may continue even longer. Both the oil and the dispersants used to break up the oil are toxic to sea life. Most agree, however, that the clean-up will take years.

### **Total or Partial Shutdown**

Business interruption issues frequently arise where it is unclear whether the insured had suffered a complete or partial cessation of business operations. Insureds may assert business interruption claims if their business, when it reopens after a loss, is not operating at normal capacity. Resolution of these issues frequently hinges on specific language in the business interruption coverage.

The Eleventh Circuit Court of Appeals addressed a claim by the operator of a hotel who suffered a decrease in occupancy due to the loss of its restaurant by fire in *Ramada Inn Ramogreen, Inc. v. The Travelers Indemnity Company of America*, 835 F.2d 812 (11<sup>th</sup> Cir. 1988). The Court, applying Florida law, held that the insured was not entitled to recover its business interruption losses under a policy that insured the hotel "against loss of earnings resulting directly from the necessary interruption of the insured's business caused by loss or damage by a peril insured against to a building or personal property on the premises designated in the declarations." Though both the hotel and restaurant were designated in the declarations, the court determined that recovery was limited under the policy to loss due to the inability to use the premises where the damage occurs. Since the hotel was operational after the fire, the insured was not entitled to recover for its loss of income.

Similarly, in *Buxbaum v. Aetna Life and Cas. Ins. Co.*, 103 Cal. App. 4th 434 (Ca. Ct. App. 2002), the California court determined that if an insured continues to operate despite physical damage, business interruption coverage does not apply. The insured law firm submitted a claim under its property policy to compensate it for income lost due to reduced hours worked by its attorneys after the office was flooded when a pipe burst. The policy provided business interruption coverage as follows: "[the insurer] will pay for the actual loss of Business Income [the insured] sustain[s] due to the necessary suspension of [its] 'operations' during the



‘period of restoration.’” The policy defined “operations” as “[the insured’s] business activities occurring at the described premises.” The suspension of operations must be the result of property damage at the premises caused by a covered cause of loss.

The court determined that a complete cessation of business was necessary to trigger coverage under the business income provision of the insured's policy. A mere reduction in efficiency from normal operations was not sufficient to establish that the insured's business was suspended. The court based its decision upon both the plain and ordinary meaning of “suspension” and the policy's requirement that business must be resumed as soon as reasonably possible, implying that business had stopped. The court drew a distinction between a loss of business or business diminution, and business interruption. The insured's business as a whole continued and the policy did not provide coverage for interruption of work on a particular project.

Likewise in *Rothenberg v. Liberty Mutual Insurance Co.*, 115 Ga.App. 26, 153 S.E.2d 447 (1967), the court determined that the insured was not entitled to recover business interruption losses following the theft of merchandise resulting in a loss of business. The court observed that the insured had not suffered an interruption of business, but rather a diminution in volume.

As these cases demonstrate, some courts have interpreted the phrase “necessary suspension of your business operations” to require a complete cessation of all of the insured’s operations during the period of restoration. As a result, the Insurance Services Office modified the definition of the term “suspension” in its 2000 form to include a partial shutdown. The modified definition clearly establishes that a suspension means either the slowdown or the cessation of the insured’s business activities (or, with respect to rental value coverage, the untenability of part or all of the premises). Other policy forms premise coverage on the impairment of business operations, or interference or interruption of business operations. Therefore, it is important to check the policy terms carefully in evaluating potential coverage for any business interruption claims that may be presented.

### **Extended Period of Business Interruption**

While the time necessary to repair or replace damaged covered property normally determines the period of indemnity for time element coverages, the period of indemnity may be extended beyond the period of restoration by an “extended period of indemnity” or “extended recovery period” provision located in the policy or in an endorsement to the policy. These provisions provide compensation for losses incurred after the property has been restored but before the business has resumed full activity. For instance, an extended period of indemnity for business income reimburses the insured for reduced income after the premises have been restored and business has been resumed but before full operations have been achieved. One should carefully examine the policy for the presence of extended period of indemnity provisions and analyze how these provisions may operate to extend time element coverage beyond the period of restoration.

## **CONTINGENT BUSINESS INTERRUPTION COVERAGE**

While business interruption coverage is designed to indemnify an insured for business income losses sustained due to damage or destruction of the insured’s own property, contingent business interruption (“CBI”) coverage, also known as dependent business properties coverage, provides indemnity for business income losses sustained due to damage or destruction of another’s property. Many businesses are contingent or dependent on other business entities, such as customers or suppliers. CBI coverage protects

the company or individual whose income is largely derived from these “dependent properties.” The primary distinction between business interruption coverage and contingent business interruption coverage is the insured’s relationship to the damaged property that causes an interruption to the business of the insured. The perils insured against in both cases are those covered by the insured’s own policy, not by any policies purchased by the insured’s customers and suppliers.

In widespread losses, such as the Gulf oil spill, CBI insurance becomes a very important coverage for some insureds. For instance, it is already been reported that restaurants and food distributors that rely upon the fishing industry are anticipating future supply shortages due to the oil spill. Should the Port of New Orleans be shut down to cargo vessels, or if the lower Mississippi River is closed to shipping, businesses that depend on certain commodities that pass through the Port for their products could suffer shortages and even suspensions of operations. The more widespread the losses, the greater the chance that an insured’s dependent entities may also be affected. Thus, in the aftermath of the oil spill, insurers will likely be confronted with claims under the CBI portions of their commercial policies, even in cases where the insured’s business premises are not directly impacted by the spill.

CBI coverage can be provided either by a separate policy or by an endorsement to an existing property policy. It is still a relatively novel coverage, and is most often found in manuscript policies drafted by brokers. There are, however, standard dependant property forms. For example, the “Business Income from Dependant Properties-Broad Form” issued by the Insurance Services Office provides:

We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your “operations” during the “period of restoration”. The suspension must be caused by direct physical loss or damage to “dependent property” at a premises described in the Schedule caused by or resulting from a Covered Cause of Loss.

See ISO Form No. CP 15 08 (Ed. 04 02). Coverage may also be offered on a Limited Form, ISO Form No. CP 15 09 (Ed. 04 02), which provides coverage in much the same manner, but on a more limited basis allowing the insured to customize the business income coverage as needed. There need not be a total shutdown of the other “dependent property”, but only that the other property suffer physical damage caused by a covered peril that wholly or partially prevents the operation of the other property, and thereby causes an earnings loss to the insured. But in these circumstances, there still must be a *suspension* of the insured’s business operations, at least under the above quoted ISO provision.

Note also that “direct physical loss or damage” must occur to “dependent property” that is scheduled within the policy itself. If the “dependent property” is not scheduled, the coverage grant is significantly limited as follows:

C. The following is added to ADDITIONAL COVERGES:

Miscellaneous locations. We will pay for the actual loss of Business Income you sustain due to direct physical loss or damage at the premises of a “dependent property” not described in the Schedule caused by or resulting

from a Covered Cause of Loss. But we will not pay more than .03% of the Limit of Insurance for each day's suspension of "operations" due to loss arising from any one location.

ISO Form CP 15 08 (Ed. 4 02).

In the ISO forms quoted above, "dependent property" is defined to mean "property operated by others" on whom the insured depends. Of course, other policy forms whether broker manuscripted or issued by individual carriers may utilize different language providing narrower or broader ranges of dependent property, damage to which can give rise to CBI coverage. Generally speaking, there are four categories of dependent properties or locations which, when damaged, may give rise to CBI coverage:

(1) *Contributing Properties* deliver materials or services to the insured or to others on the insured's account. These "upstream" suppliers provide materials and services necessary for the insured to conduct its business. An example stemming from the spill might include a coffee distributor in St. Louis that suffers business interruption losses due to a shutdown of shipping on the Mississippi River preventing delivery of coffee beans from South America. Some policies carve out certain types of contributors from the definition of dependent properties, such as water supply services, power supply services, or communication supply services, including internet access. See, e.g., ISO Form Nos. 15 08 and 15 09.

(2) *Recipient Properties* accept the insured's products or services, i.e., customers. A recipient location lies "downstream" of the insured's operations and is usually one of the insured's prime customers. For example, a bait supplier whose primary customers are Gulf fishermen may sustain business interruption losses due to a suspension of fishing in the Gulf.

(3) *Manufacturing Properties* are locations that produce products for delivery to the insured's customers under contract of sale. For example, a distributor of luxury yachts does no manufacturing of its own, but simply acts as a sales clearing house for yachts. Orders are taken from customers and then placed with a ship builder, who in turn, manufactures the yachts to specification for the yacht sales company to ship to its customers. Oil damage at the manufacturing location may prevent the manufacturer from supplying the ordered yachts to the insured's customers, resulting in financial losses to the yacht distributor.

(4) *Leader Properties* are other businesses that attract customers to the insured's business. The business need not be related. The leader location is typically located in the vicinity of the insured and attracts customers to the insured's business as well as its own. For example, a golf club that relies primarily on hotel guests may sustain business interruption losses if the hotel closes or suffers a significant downturn due to cancellations.

Additionally, CBI policies typically require that the cause of the damage and the type of damage to the dependant property be the same as would be covered for the insured's own property. For example, if flood is not a peril covered under the insured's policy, there would similarly be no coverage under the CBI endorsement for flood loss at the supplier's or customer's premises. The ISO forms provide specifically that the business interruption must result from a "Covered Cause of Loss." If the insured's policy excludes

coverage for “pollution” or “contamination” and such exclusion is deemed to apply to the oil spill, then there would be no coverage for contingent business interruption losses.

The CBI period of indemnity is also typically limited to the period of restoration. This period is described in the ISO CBI form as follows:

“Period of Restoration,” with respect to “dependent property”, means the period of time that: a. Begins 72 hours after the time of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the premises of the “dependent property” . . . and b. Ends on the date when the property at the ‘dependent property’ should be repaired, rebuilt or replaced with reasonable speed and similar quality.

(Note that just as in the case of standard business interruption coverage, the ISO CBI Forms exclude from the period of restoration any increase in the period due to the enforcement of any ordinance or law that (a) regulates the repair, demolition, or construction of any property or (b) requires anyone to test, treat, or in any way respond to the effects of pollutants.) Additionally, the expiration date of the CBI policy does not cut short the period of restoration.

Also as with standard business interruption coverage, the period of restoration is a theoretical period — the length of time needed to repair the damaged property in the exercise of due diligence and dispatch, starting seventy-two hours after the loss.

As noted above, CBI coverage is often written on broker written manuscript forms, and these forms typically offer broader coverage than that offered in the standard ISO forms. For example, some manuscript policies will refer generally to the “suppliers” and “customers” of the insured. An example of such language is:

This policy covers against loss of earnings and necessary extra expense resulting from necessary interruption of business of the insured caused by damage to or destruction of real or personal property, by the perils insured against under this policy, of any supplier of goods or services which results in the inability of such supplier to supply an insured location.

This policy language was the subject of a coverage dispute in *Archer-Daniels-Midland Co. v. Phoenix Assurance Co.*, 936 F.Supp. 534, 537 (S.D. Ill. 1996). In this case, the court construed the above contingent business interruption endorsement in the aftermath of extensive flooding in the American Midwest during the summer of 1993. The insured, Archer Daniels Midland, is a large industrial farm processing company. In an extremely broad construction of the CBI coverage, the court held that the U.S. Army Corps of Engineers and the U.S. Coastguard were “suppliers of goods and services” to Archer Daniels Midland because they constructed and managed the facilities on the Mississippi River needed to make it navigable to shipping. Moreover, the various farmers who grew crops processed by ADM were suppliers for purposes of CBI coverage, even though ADM did not directly contract with the farmers, but rather purchased grain from dealers. *Id.* at 544. The court noted the policy language did not limit coverage to those suppliers in direct contractual privity. *Id.*

Other courts have limited the meaning of “supplier” for purposes of CBI coverage. *See, e.g., Pentair, Inc. v. Am. Guar. and Liab. Ins. Co.*, 400 F.3d 613, 615 (8<sup>th</sup> Cir. 2004) (electrical substation supplying power to Taiwanese manufacturer of products supplied to insured not a supplier because it did not supply a product or service ultimately used by the insured; applying Minnesota law.)

In any event, issues could arise as to whether the waters of the Gulf, wildlife, shores and marshes could constitute dependant property, particularly with respect to businesses such as commercial fishing, shipping, resorts or other businesses that depend on the clean waters of the Gulf and its shores for their livelihood. While it is unlikely that these impacted areas would constitute dependent property under ISO based forms, the issue may not be as clear under other forms.

## ORDER OF CIVIL AUTHORITY AND INGRESS/EGRESS COVERAGE

In the Gulf Coast, it was reported that the National Oceanic and Atmospheric Administration (NOAA) ordered the restriction of all commercial and recreational fishing on the Gulf of Mexico waters affected by the spill. According to NOAA, commercial fisherman in the Gulf harvested more than 1 billion pounds of finfish and shellfish in 2008. To the extent that these commercial fisherman are denied access to their normal fishing grounds for an extended period, they may suffer significant financial losses. Additionally, government officials declared a state of emergency after the spill, called in the National Guard, and closed ports and fishing fleets. Those enterprises effected may assert claims for financial losses suffered as a result of their inability to conduct business resulting from official proclamations under civil authority coverage. Further, some coastal businesses may suffer business income losses if their employees are denied permission to return to their businesses along the shore, on barrier islands, or in ports during any subsequent oil spill clean-up operations.

One of the typical extensions of coverage for business income losses in standard business interruption forms is the “Civil Authority” additional coverage. A typical ISO-based civil authority additional coverage provides:

a. Civil Authority

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

The coverage for Business Income will begin 72 hours after the time of that action and will apply for a period of up to three consecutive weeks after coverage begins.

The coverage for Extra Expense will begin immediately after the time of that action and will end:

- (1) 3 consecutive weeks after the time of that action; or
- (2) When your Business Income coverage ends; whichever is later.

The basic requirement for civil authority coverage under this and similar forms are as follows:

- business income loss or extra expense incurred by the insured
- caused by action of or order a civil authority prohibiting access to the insured premises
- due to direct physical loss or damage to property away from the insured premises caused by a covered peril.

As can be seen from the ISO language, civil authority coverage is similar to CBI coverage in that the required physical damage occurs at a third party location. Civil authority coverage is meant to provide protection where the insured's property may suffer no physical damage, but due to damage at another location civil or military authority issues an order that prevents the insured from accessing its own property. The prohibition must be real, and it must be the result of physical damage.

Another specialty coverage available in the market is Ingress/Egress coverage. This coverage is similar to civil authority coverage, but does not require "prohibition of access" by order of civil authority. Rather, it requires physical impediment of ingress and egress to the insured premises for a specified period of time. It covers loss of business income "sustained during the [specified] period of time when, as a direct result of a peril not excluded, ingress to or egress from real and personal property not excluded hereunder, is thereby prevented." See *Fountain Powerboat Indus., Inc. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552, 558 (E.D.N.C. 2000). Ingress/Egress coverage is usually found in manuscript or broker generated forms, and is not in ISO forms.

Regional catastrophes, such as the Gulf oil spill, commonly implicate these coverages. For example, although a business enterprise may not have sustained any physical loss or damage to its own property, it may nevertheless claim to have sustained business interruption loss as a result of some restriction on access to its property, or in some cases, on access to another's property. These catastrophes often generate governmental acts. As seen with Hurricane Katrina and, to a lesser degree, with the Gulf oil spill, various national, state, local and other administrative governmental bodies will issue declarations, evacuation orders, restrict various types of traffic, impose curfews, cordon off areas and issue warnings.

### **Prohibition of Access**

As noted above a fundamental requirement of the civil authority coverage is that access to the insured premises must be prohibited. During the oil spill, authorities ordered mandatory closures of ports and fishing fleets in some areas, most likely denying some businesses access to their facilities. In addition, clean up efforts may prevent access to some business enterprises. In this regard, policies may contain different formulations regarding the scope and event of the limitation needed to invoke coverage.

Several recent cases have addressed the parameters of the "access" requirement in civil authority and ingress/egress policy extensions. For example, *St. Paul Mercury Ins. Co. v. Magnolia Lady, Inc.*, 1999 U.S. Dist. LEXIS 17895 (N.D. Miss. 1999), involved financial losses suffered by a casino and hotel in Lula, Mississippi after a barge struck and damaged the Mississippi River bridge at Helena Arkansas. The casino/hotel suffered



no property damage, but state authorities closed the bridge for nineteen days to make repairs. The casino was able to continue operating while the bridge was being repaired, but claimed to have sustained an eighty percent decrease in business. Access was available to the casino despite the bridge closure. The court first rejected the insured's claim under the business interruption coverage because of the absence of the physical damage to the insured property. Next, the court addressed the claim for interruption by order of civil authority. In holding that there was no coverage under the policy for the casino's claim, the court focused on the phrase "denies access":

The plain and common definition of "deny" is to "refuse to grant" or "withhold." Upon applying these definitions to the insurance policy, it is clear to see that there was no denial of access to the defendant casino-hotel. The defendant's casino-hotel was accessible during the period of time the bridge was under repair, and the defendant continued operating business and accepting customers. Contrary to the defendant's assertion that customers from Arkansas were denied access, access was never totally denied because customers from Arkansas could have gained access from the Mississippi side of the bridge.

*Id.* at \*8.

Similarly, in *Kean, Miller, Hawthorne D'Armond, McCowan & Jarman, LLP. v. National Fire Ins. Co. of Hartford*, 2007 WL 2489711(M.D. La. 2007), the insured filed a claim to recover business losses after the Louisiana Governor declared a state of emergency in response to Hurricane Katrina, and Louisiana State police and local government officials requested residents to stay off the streets. The court noted that authorities did not actually "prohibit" access to the insured premises, but merely encouraged residents to remain off the streets. Based on the unambiguous policy language which required access to the insured premises be "prohibited" by civil authority, and absent a "direct nexus" between the civil authorities' actions and loss of access to the insured's premises, the court granted the insurer's motion for summary judgment.

Other cases are in accord with the principle that the "access" requirement of civil authority coverage is not met if a business remains accessible, even though it may be much harder to reach. For example, in *Abner, Herman & Brock, Inc. v. Great Northern Ins. Co.*, 308 F.Supp. 2d 331 (S.D.N.Y. 2004), the insured investment firm submitted a business income/extra expense claim pursuant to insurance coverage for when "civil authority prohibits access ...." *Id.* at 334. Although the firm had not suffered physical damage to its property, it claimed that access to lower Manhattan was prohibited by order of civil authority during the September 11-14, 2001 time period. In addition, the insured claimed that vehicular traffic was restricted through September 17, 2001, although pedestrian access was allowed and public transit was available. The insurer contended that coverage was available only for those days when access was actually prohibited, but not for subsequent days when other traffic restrictions simply made access more difficult. The court agreed with the insurer, holding that coverage did not exist for the time period after September 14, 2001, as a mere state of confusion, or difficulties encountered, with respect to access did not constitute a denial off access.

Another September 11 case, *730 Bienville Partners, Ltd. v. Assurance Co. of Am.*, 2002 WL 31996014 (E.D. La. 2002), *aff'd*, 67 Fed. Appx. 248 (5th Cir. 2003), involved a business interruption claim made by a Louisiana

partnership that sought to recover under a civil authority clause. The plaintiffs in the case contended that they had lost business at several New Orleans hotels because the FAA's order grounding air traffic prevented guests from reaching their facilities. The policy provided coverage, in part, when losses result from an order of civil authority that "prohibits access to your premises." *Id.* at \*2. In an unpublished decision, the Fifth Circuit held that the claim did not satisfy the policy's prohibition of "access" requirement. The court reasoned that the FAA did not "prevent" the customers from going to the insureds' hotels because it was not "impossible" for the guests to get there. No customer was actually prevented from getting to New Orleans. There were viable transportation options, such as automobiles and trains, even if customers chose not to use them. Therefore, the court concluded that it was not reasonable to interpret the FAA's actions as prohibiting access to the insureds' hotels under the policy.

These cases demonstrate that civil authority and ingress/egress coverage does not apply when access is still possible, even though it may be hindered by physical damage.

The orders issued by governmental authorities in connection with the Gulf oil spill may be distinguishable from those at issue in the aforementioned cases. In the cases cited above, the orders did not directly shut down access to the insured's business and therefore did not trigger the coverages. But in the case of the Gulf oil spill the government authorities closed ports and fishing fleets and cut off access to fishing grounds. Such denial of access may effectively halt all business by fishermen and transporters of commodities that utilize the port for business because there is not alternative option, whereas customers impacted by a FAA ban on flying or a bridge closure have other options to access the insured business if they so choose.

### **Order or Action of Authority Requirement**

The policy extension for business interruption losses caused by order of civil authority includes the requirement that the prohibition of access result from an order or action of civil or military authority. As a general rule, formal and informal actions, written and spoken, within the scope of an official's duty, or within administrative discretion, fall within the ambit of an order of civil authority. *See, e.g., Bankers Fire and Marine Ins. Co. v. Bukacek*, 123 So.2d 157, 166 (Ala. 1960); *See also Sweeney v. City of Shreveport*, 584 So.2d 1248, 1252 (La. Ct. App. 1991). Therefore, the meaning of an "order or action" under the policy is somewhat broad in scope. In the case of the Gulf oil spill, the governmental action of shutting down ports and fishing fleets would most likely constitute an order or action of authority necessary to satisfy that element of the coverage. But when dealing with civil authority coverage, courts will strictly and literally enforce the requirement that the order (in whatever form) prohibit access to the insured premises, in effect requiring that the premises be cordoned off.

### **The "Perils Insured Against" Requirement**

Another key requirement for the civil authority coverage and ingress/egress coverage is that the damage to third party property must be caused by an insured peril. In the case of the Gulf oil spill, there will likely be significant issues concerning whether loss or damage caused by the oil spill is a covered or excluded peril. Likewise, while standard form policies will typically require that the peril cause direct physical loss of or damage to property, that may not always be the case, as the wording of the policies will control. *See Fountain Powerboat Industries, Inc. v. Reliance Ins. Co.*, 119 F.Supp. 2d 552 (E.D.N.C., 2000) (claim for reduction in business income as a result of lack of ingress/egress to the insured's business was covered even

though there was no direct physical losses to the insured's property; policy did not require insured's property to be damaged to trigger a business income loss).

### The Causation Requirement

The damage to property away from the insured premises must impact and adversely affect conditions in the vicinity of the insured premises, which leads the civil authority to prohibit access to the insured premises. As a consequence, while civil authorities may issue orders prohibiting access to areas in the aftermath of a catastrophic event, when such orders are issued because of fear that similar incidents may take place, such as riots or acts of terrorism, such orders would not give rise to covered civil authority coverage because the prohibition of access was not necessitated by the property damage. So for example, were the government to impose a moratorium on drilling in the aftermath of the spill, businesses adversely affected likely would not be entitled to civil authority coverage.

The United States District Court for the Northern District of California discussed the causation requirement in *Syufy Enter. v. Home Ins. Co. of Ind.*, 1995 WL 129229 (N.D.Ca. 1995). The insured, a movie theater chain, had made a civil authority claim after several days of dusk-to-dawn curfews curtailed access to the insured's theaters in the wake of the Rodney King verdict in 1992. In that case, the civil authority provision extended coverage to situations in which access to insured property was "specifically prohibited" by order of civil authority issued "as a direct result of damage to or destruction of property adjacent to the premises described herein." *Id.* at \*1. The court denied coverage after the parties stipulated both that no nearby property was damaged in the riots and that no order ever "specifically prohibited access to a Syufy theater." *Id.* The court also noted that the necessary causal link had not been shown.

[T]he policy also requires that "as a *direct result* of damage to or destruction of property adjacent" to a Syufy theater, access to the theater is specifically denied. The requisite causal link between the damage to adjacent property and denial of access to a Syufy theater is absent.

\* \* \*

In fact, the curfews were imposed to *prevent* "potential" looting, rioting and resulting property damage.

*Id.* at \*2 (emphasis in original). In other words, existing damage to property, as opposed to a motivation to prevent future property damage, had to be the genesis of the order.

Recent case law addressing various claims asserted in the wake of the September 11, 2001 terrorist attack are also instructive on this causation issue. For example, courts have held that ingress/egress coverage requires the existence of a direct causal link between the covered peril and the impaired ingress/egress. The court addressed the lack of causation for remote 9/11 claims under an ingress/egress provision in *City of Chicago v. Factory Mut. Ins. Co.*, 2004 WL 549447 (N.D. Ill. 2004). The court ruled that the City of Chicago could not recover on a business interruption claim based on the closure of three Chicago-area airports. The court stated that the Federal Aviation Administration's ground stop order halting airline traffic was only to prevent "indirect and remote damage," because the order was ultimately imposed to protect against any further terrorist attacks. *Id.* at \*4. In other words, the closing of Chicago's airports had only a "remote and

indirect” relationship with the damage to the World Trade Center and the Pentagon. *See also United Airlines, Inc. v. Insurance Co. of the State of Pennsylvania*, 385 F.Supp 2d 343 (S.D. N.Y. 2005) (citing to the relevant order of civil authority) (Closing of Reagan National Airport, thereby prohibiting United Airlines access to its airport property, was not a direct result of damage to the Pentagon, rather it was intended to prevent further attacks and ordered as a matter of national security).<sup>58</sup>

Other cases also support the proposition that a direct relationship must exist between an order of civil authority and the alleged denial of access to an insured’s property, particularly when the act of civil authority was predicated on the threat of a potential, future event, as opposed to a covered peril. In *Cleland Simpson v. Firemen’s Ins. Co. of Newark*, 140 A.2d 41 (Pa. 1958), all the mountain streams in the area surrounding Scranton, Pennsylvania, flooded as a result of Hurricane Diane. The City’s water mains were destroyed, leaving the residents and businesses without any water, including the fire hydrants. *Cleland Simpson*, 140 A.2d at 42. The Mayor of Scranton declared a state of emergency and ordered all stores closed because of a “serious fire danger.” Plaintiff’s business was shut down as a result and plaintiff submitted a civil authority claim to its carrier.

The policy at issue afforded civil authority coverage “when as a direct result of a peril insured against access to the premises described is prohibited by order of civil authority.” *Id.* at 43. The *Cleland Simpson* court found that no coverage existed, explaining that the state of emergency had not been caused by physical loss or damage by an insured peril; rather, it was motivated by the fear of future loss from a fire which never occurred. *Id.*

Similarly, in *Two Caesars Corp. v. Jefferson Ins. Co.*, 280 A.2d 305 (D.C. 1971), the riots following Martin Luther King, Jr.’s assassination in 1968 led to a Washington, D.C. curfew prohibiting access to the insured’s restaurant. The District of Columbia Court of Appeals held that the carrier properly denied the subsequent civil authority insurance claim because the curfew order was not motivated by existing property damage, but rather by a fear that loss might occur in the future if no curfew had been imposed.

## Conclusion

With respect to the Gulf oil spill, the circumstances giving rise to each claim will have to be evaluated separately. Reviewing the language contained in any civil authority or ingress/egress provision will be the first step in analyzing a Gulf oil spill claim. In addition, the nature, scope and extent of any loss/damage claimed as a result of any order/act of governmental authority will require a comprehensive analysis of not only the terms of each governmental declaration or order, but also the rationale underlying each governmental act/order. In any event, civil authority and ingress/egress claims can raise causation and access issues that become important considerations in the claim adjustment process.

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<sup>58</sup> In another 9/11 airline case, a Virginia trial court reached an opposite result after a non-jury trial. *See US Airways, Inc. v. Commonwealth Ins. Co.*, 2004 WL 1637139 (Va. 2004). In that case, the policy defined the “[p]eril insured against” as “all risk of direct physical loss of or damage to property described herein ....” *Id.* at \*5. The *US Airways* court held that the civil and military orders closing national airspace after September 11, 2001 were “issued as a direct result of risk of damage or loss to U.S. Airways property.” *Id.* at \*5.

## CONCLUSION

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We hope this factual overview proves helpful in understanding the factual circumstances surrounding the tragic explosion, fires and eventual sinking of the *Deepwater Horizon*, with its tragic loss of life, and the resulting ongoing spill of oil threatening an environmental catastrophe along the already stressed Gulf Coast. We also trust that our analysis provides a useful introduction to some of the more prominent insurance coverage issues raised by the event. We caution, however, that the foregoing is by no means an all-inclusive discussion of the many legal issues that property damage and business interruption claims arising from the spill will pose for carriers and their counsel.

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