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# LEGAL LIABILITY ISSUES SURROUNDING THE GULF COAST OIL DISASTER

## HEARING

BEFORE THE

## COMMITTEE ON THE JUDICIARY
## HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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# CONTENTS

MAY 27, 2010

Page

## OPENING STATEMENTS


The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Chairman, Committee on the Judiciary ..... 1
The Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Ranking Member, Committee on the Judiciary ..... 8
The Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Member, Committee on the Judiciary ..... 10
The Honorable Howard Coble, a Representative in Congress from the State of North Carolina, and Member, Committee on the Judiciary ..... 10
The Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Member, Committee on the Judiciary ..... 10
The Honorable Darrell Issa, a Representative in Congress from the State of California, and Member, Committee on the Judiciary ..... 11
The Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Member, Committee on the Judiciary ..... 12
The Honorable Sheila Jackson Lee, a Representative in Congress from the State of Texas, and Member, Committee on the Judiciary ..... 16
The Honorable Maxine Waters, a Representative in Congress from the State of California, and Member, Committee on the Judiciary ..... 16
The Honorable Henry C. "Hank" Johnson, Jr., a Representative in Congress from the State of Georgia, and Member, Committee on the Judiciary ..... 17
The Honorable William D. Delahunt, a Representative in Congress from the State of Massachusetts, and Member, Committee on the Judiciary ..... 18
The Honorable Mike Quigley, a Representative in Congress from the State of Illinois, and Member, Committee on the Judiciary ..... 19


## WITNESSES


Mr. Keith D. Jones, Baton Rouge, LA
Oral Testimony ..... 23
Prepared Statement ..... 26
Mr. Douglas Harold Brown, Employee, Transocean, Ltd., Vancouver, WA
Oral Testimony ..... 33
Prepared Statement ..... 35
Mr. Stephen Lane Stone, Employee, Transocean, Ltd., Katy, TX
Oral Testimony ..... 41
Prepared Statement ..... 44
Mr. Byron Encalade, President, Louisiana Oysters Association
Oral Testimony ..... 47
Prepared Statement ..... 49
The Honorable Jim Hood, Attorney General, State of Mississippi
Oral Testimony ..... 52
Prepared Statement ..... 54
Mr. Daryl Willis, Vice President, Resources, BP America
Oral Testimony ..... 85
Prepared Statement ..... 87
Ms. Rachel G. Clingman, Acting General Counsel, Transocean, LTD.
Oral Testimony ..... 93
Prepared Statement ..... 96

Page

Mr. James W. Ferguson, Senior Vice President and Deputy General Counsel, Halliburton
Oral Testimony ..... 100
Prepared Statement ..... 102
Mr. William C. Lemmer, Senior Vice President and General Counsel, Cameron International Corporation
Oral Testimony ..... 108
Prepared Statement ..... 109
Mr. Vincent J. Foley, Partner, Holland & Knight, LLP
Oral Testimony ..... 111
Prepared Statement ..... 114
Mr. Thomas C. Galligan, President and Professor, Colby-Sawyer College
Oral Testimony ..... 120
Prepared Statement ..... 122

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Chairman, Committee on the Judiciary ..... 2
Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Member, Committee on the Judiciary ..... 13
Prepared Statement of the Honorable Mike Quigley, a Representative in Congress from the State of Illinois, and Member, Committee on the Judiciary ..... 20
Material submitted by the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Chairman, Committee on the Judiciary ..... 180
Material submitted by the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Chairman, Committee on the Judiciary ..... 182

APPENDIX

Material Submitted for the Hearing Record ..... 189

# LEGAL LIABILITY ISSUES SURROUNDING THE GULF COAST OIL DISASTER

**THURSDAY, MAY 27, 2010**

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Committee met, pursuant to notice, at 9:41 a.m., in room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Committee) presiding.

Present: Representatives Conyers, Nadler, Scott, Watt, Jackson Lee, Waters, Delahunt, Cohen, Johnson, Pierluisi, Quigley, Chu, Deutch, Baldwin, Gonzalez, Sánchez, Polis, Smith, Coble, Goodlatte, Issa, Forbes, King, Franks, and Poe.

Staff Present: Eric Tamarkin, Majority Counsel; Renata Strause, Majority Staff Assistant; Reuben Goetzl, Majority Clerk; and Zachary Somers, Minority Counsel.

Mr. CONYERS. Good morning. The Committee will come to order. We welcome everyone, particularly the distinguished witnesses that are before us, to discuss the legal liability issues surrounding the Gulf Coast oil disaster. The jurisdictional basis for this hearing in Judiciary is that the liability issues under the Federal law fall to the jurisdiction of this Committee, particularly the Death on the High Seas Act, and the Limitation of Liability Act in particular.

We all know that the oil spill in the Gulf Coast is one of monumental proportions—the worst spill in U.S. history. These considerations are particularly within the jurisdiction of this Committee.

The current state of the law is inadequate to deal with disasters of this size. The legal landscape the victims of the Gulf Coast disaster are navigating is exceedingly complex, outdated, and inconsistent. The remedy available under the Death on the High Seas Act for the families of those who were killed is woefully inadequate. They are limited to recovering for the direct loss of economic support the deceased would have given to dependent family members. The Death on the High Seas Act should be amended so that families who lose a loved one at sea can seek relief to the full measure of their loss, including the loss of care and comfort provided by the deceased.

I will put the rest of my statement into the record and recognize the distinguished gentleman from Texas, Mr. Lamar Smith.

[The prepared statement of Mr. Conyers follows:]

**Statement of John Conyers, Jr.**
**Committee on the Judiciary Hearing**
**Statement of the Honorable John Conyers, Jr.**
**for the Hearing on "Legal Liability Issues**
**Surrounding the Gulf Coast Oil Disaster"**
**Thursday, May 27, 2010, at 10:00 a.m.**
**2141 Rayburn House Office Building**

**Statement**

In late April, a series of explosions on board the *Deepwater Horizon*, an oil rig drilling in mile-deep water in the Gulf of Mexico, killed eleven people. The rig collapsed and, engulfed in flames, sank to the ocean floor.

As the Committee begins its examination of the legal liability issues surrounding this disaster, three things are clear to me:

- (1) the oil spill in the Gulf Coast is one of monumental proportions;

- (2) the current state of the law is woefully inadequate to deal with disasters of this size;
- and (3) Congress must consider changes in the law to that will ensure the victims are fairly compensated for their losses.

First, there is no question that this is by far the worst oil spill in U.S. history. More than a month after the *Deepwater Horizon* sank, oil continues to gush into the Gulf waters at an alarming rate. Tar balls and thick sludge are beginning to wash ashore across 150 miles of Louisiana, Mississippi, and Alabama coast, along with oil-covered wildlife.

The region's marshlands, which serve as nurseries for shrimp, crab, and oysters, could take years to repopulate. Local economies dependent on the fishing and tourism industries are already taking devastating hits, and family businesses that have been

passed down for generations are closing their doors.

As our national attention is captivated by the spreading environmental and economic catastrophe, we are also bound to honor the 11 lives lost when the *Deepwater Horizon* sank. Those men were fathers, husbands and sons, whose families depended on their care and support.

Second, as we will hear today, the legal landscape the victims of the Gulf Coast disaster are navigating is exceedingly complex, inconsistent and out-dated.

So far, much of the discussion of liability for the oil spill has focused on the $75 million dollar cap imposed by the Oil Pollution Act on BP for payments beyond the clean-up costs. It is obvious that this cap is much too low, if it can even be justified at all.

BP has said that it will spend more than $75 million if necessary – repeating a promise to pay "legitimate claims." But only the law can guarantee that legitimate claims are resolved through a fair and accessible process.

The remedy available under the Death on the High Seas Act for the families of those who were killed is also woefully inadequate. They are limited to recovering for the direct loss of economic support the deceased would have given to dependent family members.

Congress addressed this inadequacy for deaths that occur in commercial aviation accidents at sea, but left the inadequacy in place for deaths on ships.

Another antiquated law, the 1851 Limitation of

Liability Act, may limit the liability of Transocean, the owner of the *Deepwater Horizon*, to the value of the vessel as it sits on the ocean floor – an amount calculated by the law's outdated formula to be around $27 million.

Third, the victims of this disaster – some of whom are here with us today – should be compensated fully for their losses. The law should be changed so that the responsible parties can be held fully accountable, in a way that deters negligence in the future.

Today we begin consideration of what those changes might be:

- The caps on liability written into the Oil Pollution Act should be greatly increased, or perhaps eliminated altogether. That law's claims

process should be also improved to ensure sufficient remedies are available over the long haul, as the loss of income for many in the region is likely continue throughout the coming years.

- The Death on the High Seas Act should be amended so that families who lose a loved one at sea can seek relief for the full measure of their loss, including the loss of care and comfort provided by the deceased.

- And offshore oil rigs capable of harm in the billions of dollars should not be subject to the antiquated caps of the Limitation on Liability Act that were created before the world had even seen its first commercial oil well.

- In light of the 2008 Supreme Court decision limiting damages for fishermen affected by the

*Exxon Valdez* spill, Congress should also clarify the availability of punitive damages in appropriate circumstances under the Oil Pollution Act, the Death on the High Seas Act and general maritime law.

The continuing efforts to stop the leak and clean the spill are paramount. But as the damage to natural resources, local economies, and daily lives continues to grow, we must be sure that the victims of this disaster can be made whole.

Today we continue the Committee's investigation into what the law provides for now, and what changes we can make to ensure fair compensation for the victims and accountability for those responsible for the devastation in the Gulf.

I look forward to hearing from our witnesses today as they help us understand these important issues.



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Mr. SMITH. Thank you, Mr. Chairman. Mr. Chairman, I appreciate your holding this hearing today on the liability issue related to the Gulf oil spill. I understand that it was announced just a few minutes ago that the top kill effort has been successful. So that is the best news we can probably get here today. So the most pressing need right now is to contain and remove the oil that has already been spilled.

As we move forward, it is equally important that we make sure that the parties responsible for this spill and not the American taxpayers pick up the bill. The cost of this bill goes beyond containing and removing spilled oil. Those responsible must also pay to remedy the effects of this on America's natural resources. Additionally, the responsible parties must compensate individuals, businesses, and governments for their losses. And I know that has already begun.

The Oil Pollution Act and our other environmental laws ensure that the responsible parties pay the full cost by holding them strictly liable for all removal costs, natural resources damages, and up to $75 million in economic damages. While this bill has already far exceeded the $75 million cap, it should not be an obstacle to obtaining more funds from responsible parties, since the Act has meaningful exceptions and does not apply to State law claims.

Moreover, British Petroleum repeatedly has called the liability cap irrelevant and is committed to pay all legitimate claims. However, I am concerned about some of the proposals to make changes to our oil pollution legal process. Following the Exxon Valdez spill, Congress worked for 15 months to carefully research the issue and ultimately write the Oil Pollution Act. But some Members did not even wait 15 days after this most recent spill to push legislation to change important provisions of that Act.

I understand that there is a temptation to punish BP for this tragedy, but proposals such as raising liability caps may create legal and financial burdens that force independent operators out of the oil exploration business altogether. We should not create a situation in which only the so-called super major oil companies and foreign state-owned companies are able to drill for oil offshore. It would be ironic if legislation aimed at punishing BP had the perverse effect of enabling only large companies like BP to drill for oil off America's coast.

I am also concerned that the Obama administration's response to the spill has been slow and insufficient. Louisiana Governor Bobby Jindal has characterized the government's response as a "disjointed effort to date that has too often meant too little to late to stop the oil from hitting our coast." Unfortunately, the Administration's response to this spill has, in large part, consisted of blaming BP and railing against big oil, while ignoring its own lack of preparation and slow reaction.

While our response should be swift and targeted to the problem at hand, we must be careful not to overreact. Just as after the Exxon Valdez spill, we did not stop shipping oil by tanker, we cannot stop drilling for oil off America's shores. If we banned every industry that had a tragic accident, we wouldn't drive, we wouldn't fly, we wouldn't take the train, or travel to the Moon. Instead, we have learned from our mistakes and made these industries safer for the future.

We must determine what caused this accident and take steps to ensure that it does not happen again. But those steps should not include a ban on drilling offshore. At a time when America needs to decrease our dependence on foreign oil, now is not the time to cut off our own sources of oil. Until we develop viable alternatives to fossil fuels, we must continue to drill for oil both on shore and

off. Our immediate goal should be to make sure all possible resources go toward settling claims, stopping the spill, cleaning up the mess, and protecting wildlife in the Gulf from future spills.

Thank you, Mr. Chairman. I yield back.

Mr. CONYERS. Are there any other Members that want to welcome our distinguished witnesses today or make an observation of extreme brevity?

Jerry Nadler.

Mr. NADLER. Thank you, Mr. Chairman. Thank you, Mr. Chairman, for holding this hearing on the legal liability issues. Virtually every aspect of the disaster involves different liability issues, which we will get to. I just want to make one observation, which I will be going into in the questions, and that is with respect to the use of chemical dispersants. We are treating chemicals with chemicals which don't actually remove or clean up the oil. They simply shift them to another part of the ecosystem while increasing the toxins in the Gulf, harming, contaminate the water, and threatening human life. There is no scientific evidence that dispersants can be effective in an oil spill of this magnitude. These chemicals make it harder to track how much oil and where it is going and thus to determine liability. They are good for public relations, but nobody can guarantee they are safe.

Already, we are hearing of people getting sick because of the use of these chemicals. In fact, there is already anecdotal evidence people are getting sick from the mixture of oil and toxic dispersants. We are basically airdropping this toxic stuff all over the Gulf. It reminds me of Agent Orange. And I am greatly concerned that during this cleanup we are conducting an uncontrolled experiment with all the marine and human life in the Gulf Coast region—an uncontrolled experiment that could result in thousands of people getting sick and dying as a result of the cleanup, not of the original disaster.

I will be going into questions on that during the question period. And I hope that we can prevent a repetition of some of the disasters that we have had before. This disaster is unprecedented in scope as it is, and I fear we are just going to make it worse.

Thank you. I yield back.

Mr. CONYERS. Howard Coble.

Mr. COBLE. Mr. Chairman, you and the distinguished Ranking Member have pretty well covered it. I won't go into any great detail at all. Mr. Chairman, I believe you used the word "disaster" to describe it. I think that is an apt descriptive term. It is, indeed, a disaster. I am glad to hear the news you shared with us, too, Lamar.

But I appreciate you all being here. I would like to associate myself with the remarks of the distinguished gentleman from Texas, when he declared that we should not abandon plans to drill simply because of this isolated disaster. We need to keep that on the table, it seems to me, Mr. Chairman.

And I thank you, Mr. Chairman, for having called the hearing. I thank the distinguished panel for being with us today. I yield back.

Mr. CONYERS. Bobby Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I opposed the oil drilling expansion for good reason. The Administration announced a few

weeks ago—and I didn't think the small gains for a few cents per gallon of gasoline saved in outyears is worth the risk. The number of jobs that the proponents argue might be created by offshore drilling in Virginia pale in comparison to the number of jobs we have already seen destroyed by this devastating spill. Devastation to sensitive wetland areas, tourism, the fishing industry, recreation in the Gulf, would not be any different than what would happen off the coast of Virginia, particularly when we are looking at the very sensitive Chesapeake Bay.

Thank you for calling the hearing to ascertain the extent of the losses already caused by the spill, and helping determine who will be legally liable for these damages. Thank you very much.

Mr. CONYERS. Darrell Issa.

Mr. ISSA. Thank you, Mr. Chairman. I thank our panel of witnesses for being here today. As the Chairman said, it is very clear that we have limited jurisdiction. Our jurisdiction in this Committee is clearly as to whether or not we change liability limitations and their interpretation. For the Chairman, I commend him for starting off this hearing by reminding us that, in fact, we do not control the Corps of Engineers that has failed to act to protect Louisiana. We do not control the EPA, who only recently discovered that these dispersants might or might not be available for this use after oil spill after oil spill have occurred from ships over the years. We only recently discovered that we really don't want to invoke the Stafford Act, even though it has been on the books and would have allowed the President to act—and act more assertively.

There are so many things that are not within the Committee's jurisdiction. As Ranking Member on Government Oversight, I am pleased to say those will be dealt with in other committees of jurisdiction. Today, we are only asked a fairly straightforward question: Are the limitations that currently are in place for acts which are not in violation of any regulation, including no misconduct, no wrongful acts, are the caps high enough at $75 million. Under the Oil Pollution Act, if there is so much as one regulatory failure, the caps are off.

So let's understand. All the cleanup is already the responsibility of the parties, in this case, British Petroleum as the leaseholder, to $75 million to be paid if no wrongful act is done whatsoever. Not so much as failing to dot the "i" on an administrative report that may have prevented it. I repeat: May have prevented it. If so much as one of those occurs, then everyone who says that they had a bad day as a result of this, that they lost economic advantage of any sort, and even potentially those who were traumatized would all have that opportunity. That is what we will be deciding here today.

I believe that we should consider whether those caps are high enough. We should consider within the body whether or not a fund that would exceed that should be in place so that smaller oil companies—smaller than BP, by definition is, everybody—would be able to continue to drill while the American people could be confident that the funds necessary not just for if you violate, but even if you don't violate, for the cleanup should be in place. Those are not within this Committee's primary jurisdiction.

So I do look forward to hearing the narrow question answered of: Is the current law for no misconduct whatsoever and the cap that

goes with it of $75 million sufficient, or is Congress in such a hurry that even before we know whether or not there was so much as one administrative violation, we want to change that cap?

I look forward to the testimony and I thank the Chairman and yield back.

Mr. CONYERS. Steve Cohen.

Mr. COHEN. Thank you, Mr. Chairman. I have got a statement that I will just turn in, and it goes through a litany of issues. Some may be more relevant than others. Mostly, it concerns the Bush-Cheney-Halliburton administration that is responsible for this; the lack of regulation; the lack of oversight; and the laissez faire, cowboy-type mentality that allowed all of this to happen. We have got to have regulations and government needs to act to be sure people and our environment and our world is safe. But the main thing I want to address is Mr. Jones. I want to express my condolences to you. To lose a child, and others have lost children, and parents. Eleven lives were lost. There is all kind of destruction and damage that pains me, to the Gulf Coast, which is close to Memphis. It is part of our worlds. But the lives that were lost. I just express my condolences to you.

[The prepared statement of Mr. Cohen follows:]

# Congressman Steve Cohen
# Opening Statement
# Judiciary Committee Hearing
# Liability in the BP Oil Spill
# May 27, 2010

- Mr. Chairman, thank you for holding this very important hearing.
- There are major questions about whether our laws are providing fairness for the people affected by this disaster.
- Even though oil continues to spread throughout the Gulf of Mexico, it's not too soon to consider issues of liability and accountability.
- Already, we've seen BP, Transocean, and Halliburton all point fingers at each other in a game of "liability hot potato."
- It's good to hear pledges from BP that they will pay all "legitimate claims," but we need to define precisely what those claims are and make sure the taxpayers are not on the hook for cleaning up this disaster.
- Going forward, we also need to determine whether it's appropriate to have any sort of cap on liability for future spills.
- After billions of dollars spent bailing out Wall Street and cleaning up the mess they made in our economy, I

don't think there are many people who think that taxpayers should ride to the rescue of the oil companies after they've made their mess in the Gulf.

- We also need to consider issues beyond the direct costs of cleaning up the spill.
- For example, who's responsible for repairing the damage done to the people whose livelihoods have been wrecked by this catastrophe, like the fisherman, the sailors, and other people of the Gulf Coast?
- Who is going to help rebuild their lives?
- And what about liability issues related to the cleanup itself?
- There are reports that the dispersant being used to clean up the oil is highly toxic and may even be making matters worse?
- Who bears the responsibility for any health consequences that result from the use of this material?
- Finally, we should look at issues of accountability in our own government.
- For years, regulators looked the other way and approved permits without any serious investigation of the health and safety risks they posed.
- Even more galling, we're still approving new offshore drilling projects, even as oil continues to gush into the Gulf.

- Mr. Chairman, so many questions have been raised as a result of this disaster.
- I appreciate this hearing today and the opportunity to begin getting some answers.
- Thank you, and I yield back the balance of my time.

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Mr. CONYERS. Sheila Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. I may be the only one on the panel that comes from oil country, at least as I can recognize who has lived in a community that has based its economic independence and contributions to this Nation on the energy industry. Maybe the only former oil and gas lawyer who worked for entities that range from oil to natural gas to pipeline and to larger multinational oil companies. But I have a heart.

Frankly, I first want to thank the Chairman for his quickness in moving forward on this hearing. Second, I want to say that $75 million is a joke. It is a sad state of affairs as we begin to listen to the testimony of which we will remain open-minded that we are in this dilemma. To all of the families that have lost their loved ones and those that remain injured, our deepest sympathy and our apology, for we are all in this together.

There are those of who believe there should be a seamless energy policy that includes fossil fuel. But we don't believe that the devastation that has appeared over this last month and 6 weeks. The failing of those who are here who are not victims was to be able to have the genius to do deepwater exploration but have no genius to be able to fix the consequences. It is the same story that happened with the Valdez in Alaska, I am told, driven by the same principles. We know how to move it but we don't know how to stop it. If that is the case, what I want to hear today, Mr. Chairman, is a full ownership on what happened and a full commitment to pay every single penny that is necessary to make the region whole and certainly the families whole.

I would conclude my remarks by saying that I think it is crucial that there is no longer the opportunity to play without the opportunity to pay. And if you are to engage in the deepwater drilling, as we are doing off the coast of Ghana, you have got to be able to respond to crises and emergencies like this; a gushing hole that cannot end. And maybe someone will tell me whether the last 24 hours have been successful. We have not been able to determine that.

I will say, Mr. Chairman, I think this hearing is about if you are going to play, you have got to pay. And $75 million is a disgrace.

I yield back.

Mr. CONYERS. Maxine Waters.

Ms. WATERS. Thank you, Mr. Chair. I would particularly like to thank you for the way you manage this Committee and the timeliness of the issues that you deal with. I am appreciative for this hearing today. At this hearing today we are focusing on organizing around the liability issues related to the BP Deepwater Horizon oil spill. BP estimated that the oil spill continues to gush over 5,000 barrels, that is 21,000 gallons of oil each day into the Gulf of Mexico. However, some independent estimates put the total as high as 75,000 barrels each day.

I hope these latest efforts to stop the leak are going to be successful, because everything else has failed. This disaster has already had a devastating impact on the economy of the Gulf Coast region and the way of life for many of its residents. Many of these residents are still trying to recover from Hurricane Katrina. And the BP disaster has doubled their sorrows. During a recent trip to New Orleans, I was particularly struck by the stories of the minor-

ity fishermen and small port business owners along the Gulf Coast. From week to week, fishermen don't know how long their jobs will be on hold. There are issues that currently exist that must be brought to light regarding the plight of minority fishermen related to the oil spill.

Byron Encalade is the President of the Louisiana Oysters Association and the President of the Parish Fishermen Association. I know there is something else that goes with that name. He knows firsthand the effect that the oil spill is having on fishermen who depend upon the waters for their very sustenance. He is here today. And I thank him for his participation in the hearing. I am sure this Committee will benefit from his story.

Fishermen have depended upon this season to be the opportunity to recover from the past. But this is not going to be the case. The oyster season was supposed to open up on May 1st and some fishermen prepared their boats and have been ready to go out for the first 2 or 3 days. They planned to bring their first haul of the season and pay bills. But of course that did not happen.

The National Oceanic and Atmospheric Administration,

NOAA, has already closed over 54,096 square miles of the Gulf of Mexico to commercial and recreational fishing in order to assure that seafood will remain safe for consumers. That is slightly more than 22 percent of the Federal waters in the Gulf of Mexico. A closure of this size is bound to have a devastating impact on the fisheries in the Gulf. Their commercial fishermen harvested more than 1 billion pounds of fish and shellfish in 2008.

On Monday, Secretary of Commerce Gary Locke determined that there had been a fishery disaster in the Gulf of Mexico due to the economic impact on commercial and recreation fisheries. The affected area includes the States of Louisiana, Mississippi, and Alabama. This determination allows the Federal Government to provide assistance to affected fishermen and local communities under the Magnuson-Stevens Fishery Conservation and Management Act. The Administration requests $15 million in supplemental appropriations to recover compensation under the Magnuson-Stevens Act, while emphasizing that these fund will only be used as a last resort.

Mr. CONYERS. The gentlelady's time has expired.

Ms. WATERS. I thank you very much. I am anxious to hear the people who are here to provide us with the information. Thank you. I yield back.

Mr. CONYERS. Hank Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman, for holding this very important hearing on the issue of legal liability issues surrounding the Gulf Coast oil disaster. First and foremost, I want to express my condolences. The April 20 fire and explosion that occurred on the Deepwater Horizon oil rig in the Gulf of Mexico resulted in the loss of 11 lives. Many more people were injured. My deepest sympathy goes out to the family, friends, and coworkers of the 11 individuals who lost their lives on that day.

This explosion and fire occurred on the Deepwater Horizon drilling rig that BP was leasing to drill an exploratory well in the Gulf of Mexico. Transocean, the world's largest offshore drilling company, owned and operated the rig. In the aftermath of the explo-

sion, the rig capsized and sank to the ocean floor, resulting in oil leaks. Millions of gallons of oil have spilled into the Gulf since this tragedy occurred.

What disturbs me most about this spill is that it could have been prevented. Recent reports are stating that BP missed several warning signs that led to the blowout and fire on the Deepwater oil rig. This is unacceptable for a company where the first quarter earnings for this year alone was $6.1 billion. As a result, lives were lost and the ecosytem and economy are at grave risk. The livelihoods of workers and families and the small businesses that rely on the Gulf remain in question.

The family, friends, and coworkers of the 11 people who lost their lives want answers and they need to be treated fairly. This Committee wants answers. This hearing will give us the opportunity to examine the liability issues stemming from the April 20 explosion. It will give us the opportunity to discuss how Congress could amend current laws such as the Death on the High Seas Act and the Oil Pollution Act to ensure that they are adequate and allow for punitive damages and nonpecuniary damages.

In this current disaster, BP is subject to a liability cap of $75 million under the Oil Pollution Act. Although BP has stated that it will disregard the cap and pay all the "legitimate claims," questions remain about who will determine the legitimacy of the claims and how those claims will be assessed and resolved. I am eager to hear from the witnesses about their thoughts on the current liability laws and what could be done to improve them. Most important, I am anxious to learn about what Congress can do to ensure that this does not happen again.

I thank the Chairman for holding this hearing, and I yield back the balance of my time.

Mr. CONYERS. Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman. I will be very brief. First, my condolences to the father of the young man that was lost. I think that is very important to say; to articulate. Please understand that it is heartfelt.

I guess before we approach the issue of should the cap be removed altogether, should it be recalculated, I think it is important for this Committee to examine where the $75 million figure came from initially. I heard the gentlelady from Texas describe that $75 million figure as absurd. I think that was her word. I concur and agree. How did that ever happen? It clearly wasn't in this session of Congress. It was in the aftermath of the Exxon Valdez. But what we learned from that particular disaster was the cost far exceeded $75 million. I wonder why there should be a cap at all. I think that is the question that we should pose to ourselves and to this panel.

In terms of the issue of punitive damages, there is going to be a series of hearings, multiple Committees, to examine how this happened, and why; what was the failure. In the criminal law, we have the concept of deterrence. I think it ought to be implicated in terms of disasters such as this that are clearly the result of failure somewhere along the line.

I dare say, Mr. Chairman, if punitive damage was implicated into the equation of assessing the responsible parties, it would make a difference. It would make a serious difference. Because any

CEO, any corporate board, any management, would be fully aware of the potential liability. So I think that is an important consideration.

I will conclude my remarks there and thank the Chair for calling this hearing. But I think those two questions that I just posed are important for us in our deliberations to examine. I yield back.

Mr. CONYERS. Thank you. Mike Quigley.

Mr. QUIGLEY. Thank you, Mr. Chairman. I recognize that we are a long panel, so I will just submit my statement for the record. But just very briefly, I know we are talking about oil today. But in the end, the larger picture is the cost of carbon, the cost of exploration, the cost of using fossil fuels. Today, it is oil, but we could also be talking about blowing the tops off of mountains, polluting streams for all time, making moonscapes out of whole tracts of land out West in areas like Wyoming. We need to recognize it is part of a larger picture that only be solved by conversation and by promoting and supporting renewable energy, and that, frankly, we sometimes don't like to hear this, but you can't have everything you want. There is a cost to driving the biggest car you can buy 80 miles an hour. We have to recognize that as Americans and have to recognize that conservation is the beginning of this and renewable energy is the end. Thank you.

[The prepared statement of Mr. Quigley follows:]

PREPARED STATEMENT OF THE HONORABLE MIKE QUIGLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS, AND MEMBER, COMMITTEE ON THE JUDICIARY

Mr. Chairman:

The corporate motto of Transocean, one of the many parties who had a hand in this tragic disaster, is "We're never out of our depth."

It strikes me today that this motto is both sadly ironic and strangely emblematic of the greater problem at hand when it comes to our nation's energy policies and how we confront major environmental challenges.

We are digging ourselves into a deeper and deeper hole, yet we seem to simply shrug our shoulders, forge ahead, and hope we strike gold, black gold that is.

We now know there were numerous red flags that something could go horribly wrong at Horizon. Among the red flags, reportedly, were several equipment readings suggesting that gas was bubbling into the well, a potential sign of an impending blowout.

Investigators also noted "other events in the 24 hours before the explosion that require further inquiry," including a critical decision to replace heavy mud in the pipe rising from the seabed with seawater, possibly increasing the risk of an explosion.

These findings make it impossible to fight back worries that we may be dealing with a similar, or far worse catastrophe at one of the additional deepwater rigs.

Will we use this tragedy to step back and take a global look at every drilling operation of this type to ensure every necessary safeguard is put in place? Or will we simply trust the "experts" word that lightning couldn't possible strike twice?

The cries to drill in the Arctic National Wildlife Refugee have grown more faint today, but they will surely grow loud again in the not-too-distant future.

How short will our memories be when they do? Will we maintain the courage of our convictions that wrong-headed proposals like that one bring us no closer to sustainable energy solutions?

When it comes to the environment, the cost of inaction far outweighs today's price tag. This country must set air, land and water standards that keep Americans healthy.

Otherwise, we all pay in early deaths, high rates of asthma and lung problems, sick animals, carbon-laden and acidic oceans and dying forests.

Americans see what is happening today because oil spilled across our beaches, prohibitions on oysters and the rising price of a barrel of oil are all very visual aspects of this harrowing event.

But, this oil spill – as awful and tragic as it all is – is a part of the larger crisis of global warming and our addiction to carbon.

The warning signs are all around us; the alarms bells are ringing. We have a climate change problem and we have an energy problem, and the two cannot be separated.

We need to address these challenges in a manner that favors honest dialogue over pithy slogans; and we need to employ policies that don't seek to merely get us through the day, but that seek to make our children proud of us tomorrow.

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Mr. CONYERS. We welcome all witnesses.

Mr. Tom Galligan; Mr. Vincent Foley; Mr. William Lemmer; Mr. James Ferguson; Ms. Rachel Clingman; Mr. Darryl Willis; the Attorney General of the State of Mississippi, Jim Hood; Mr. Byron Encalade; Mr. Stephen Stone; Mr. Douglas Harold Brown.

And our first witness is Keith Jones, the father of Gordon Jones, who died aboard the Deepwater Horizon on April 20, 2010. Mr. Jones is a Louisiana native and a practicing trial lawyer for over three decades. Born in Shreveport, he raised his family practice. And he is joined by his son, Christopher K. Jones, who is here

today. Would you stand up, sir? Thank you very much. He has worked with his father in preparation for this testimony today and has made himself available to the Committee for any questions that Members may have.

We will have all statements entered into the record. We invite you to begin our testimony, Mr. Jones.

**TESTIMONY OF KEITH D. JONES, BATON ROUGE, LA**

Mr. JONES. Chairman Conyers, Ranking Member Smith, and other Members of the Committee, it is an honor to be allowed to speak with you today. My name is Keith Jones. I am a lawyer from Baton Rouge, Louisiana. Seated behind me is my older son Chris, who is also a lawyer in Baton Rouge. Chris and I are appearing before you today, however, not as attorneys but as the father and brother of Gordon Jones, who was killed on the Transocean Deepwater Horizon. We are here for Gordon's wife, Michelle; sons, Stafford and Maxwell Gordon; for his mother, Missy; for his sister, Katie.

At the outset, I want you to know that just because I am here and addressing you today does not mean that I believe that Gordon's death was more tragic or more important than the other 10 men that day. I know their families grieve just as much as we do. But the only one of the victims I knew was Gordon.

He was 28. Our youngest child. He is survived by his widow Michelle and by his two sons Stafford, who is 2, and Maxwell Gordon, who was born 13 days ago. Gordon was a mud engineer for M-I Swaco, who had a contract with BP to provide that service. He received his bachelor of arts degree from LSU and then completed something called Mud School. After spending some time observing the work of those more experienced, Gordon began working as a mud engineer. As a relative newcomer, Gordon was sent to a different rig every 2 weeks, including the Transocean Deepwater Horizon. Gordon was good at what he did, as evidenced by fact that one of the mud engineers assigned to the Deepwater Horizon left, BP was offered a list of mud engineers who had worked at Horizon and from that list chose Gordon.

As you know by now, the Deepwater Horizon was a rig of considerable prestige. It was a very large rig that drilled in very deep water and found very large deposits of oil. Gordon was proud that he had been so successful so soon in his career. It allowed his wife Michelle to quit her job last year. With one son and another on the way, Michelle wanted to be a full-time mom. Gordon was chosen from that list not only for his skills as a mud engineer but also for his personality. Everybody liked Gordon. People who met him liked him—and the more they got to know him, the more they liked about.

Gordon was funny. He loved to laugh. He loved even more to make others laugh. To have a friend like Gordon was a special gift. To lose a friend like Gordon was, and always, will be a bitter loss.

Gordon even had the ability to make jokes at the expense of others, often me, and they would never get mad at him for it. It was a gift he had. And Gordon was a gift we had. We had a visitation at the oldest funeral home in Baton Rouge the day before Gordon's memorial. The line of people who came snaked through the funeral

home, out the front door, and down Government Street. The funeral director said he had never seen anything like it. Imagine. And that man for a man who had been with us for 28 years.

The first picture I would like to show you is my favorite. It was taken only a few days before Gordon's death. And I was standing right behind Michelle when she took it. Gordon was giving Stafford his first golf lesson. It was, of course, the last golf lesson he will get from his dad. I vividly remember driving away from that scene thinking they are so happy.

The next picture is of Gordon holding Stafford soon after Stafford's birth. I have had the pleasure of being with all three of my children when their first children came into the world but I can't say I ever saw a prouder parent than Gordon. You would have thought he was the first man ever to father a child. The next picture is of Michelle, Stafford and Maxwell Gordon 13 days ago. We are happy and grateful that mother and child are healthy, they are home, where together they will all have to learn how to live without Gordon.

The last picture depicts Gordon's presence in the delivery room. Gordon was a great father to Stafford. He was tireless. Any time Stafford wanted to play, Gordon was ready.

Perhaps the saddest story about Gordon's death, and there are many, is that Stafford is just too young to be able to remember anything about his dad in the years to come. Of course, Maxwell Gordon will never have been able to know his father. His knowledge of his dad will be limited to pictures and things that Michelle and friends tell him. We don't have to be psychologists to know that is not enough.

His body was cremated. Then the fireboats washed his ashes out to sea. I admit that having nothing to say goodbye to is much, much harder than I thought it would be. Call it closure or whatever, something is missing for us.

You may note that I haven't mentioned how much money Gordon made. There is a reason for that. The loss of Gordon's income is the last thing Michelle grieves for. When Michelle tells her boys about their dad, she is not going to show them a pay stub. But as I understand the present state of the law, that is all Michelle and Stafford will recover from those responsible for Gordon's death. We fear that because Maxwell Gordon was born after April 20, 2010, the defendants will argue that he is entitled to nothing.

Please believe me. No amount of money will ever compensate us for Gordon's loss. We know that. But the paying of damages by wrongdoers is the only means we have in this country to make things right. As time goes by, we learn more and more about whose fault it was that this blowout took our Gordon; whose fault it was that the accident happened. And whoever ultimately bears the blame for that will have to pay money to compensate the families of these 11 dead workers.

How much that will pay is up to you. But reckless acts by employees of corporations, performed to try to make the most money the fastest will never be deterred by the payment of mere compensatory damages. Payment of punitive damages by irresponsible wrongdoers is the only way they may learn.

These businesses are here to make money. Punishing them by making them pay some of that money to victims who suffer most is the only way to get their attention. If you want these companies, one of which has is headquarters in Great Britain and another in Switzerland, to make every effort to be sure their employees don't act as these did, putting American lives at risks, we must make certain they are exposed to pain in the only place they can feel it—in their bank accounts. As a friend recently said, make them hurt where their heart would be—if they had a heart.

I am an environmentalist. I worry about the Louisiana wetlands, the Florida beaches, all of our precious lands endangered by this oil spill. But I do hope and believe this: After much work, perhaps for years, this mess will be cleaned up. The wrongdoers here can pay enough money to those who have lost their ability to earn a living to make that right. And eventually the shrimp will be back. The oysters and crabs and fish will be back. And BP will be back.

We have heard over and over that the value of BP's stock has fallen. But BP is selling for about the same price it was a year ago today. So BP, Transocean, Halliburton, and any other company will be back because they have the infrastructure and economic might to make more money. But Gordon will never be back. Never. And neither will the 10 good men who died with him.

Now the future of those families is in your hands. I urge you to do the right thing. Thank you very much for listening. Chris and I will be happy to answer any questions you may have.

[The prepared statement of Keith Jones and Christopher Jones follows:]

PREPARED STATEMENT OF KEITH D. JONES

**Testimony**
**Before the Judiciary Committee**
**United States House of Representatives**
**May 27, 2010**

***Damage Caused by Transocean Deepwater Horizon Explosion – A Father's Statement***

**Keith D. Jones**

Chairman Conyers, Ranking Member Smith, and other members of the Committee, it is an honor to be allowed to speak with you today.

My name is Keith Jones. I am a lawyer from Baton Rouge, Louisiana. Seated behind me is my older son, Chris, who also practices law in Baton Rouge. Chris and I appear before you today not as attorneys, but as the father and brother of Gordon Jones, who was killed on the Transocean Deepwater Horizon. Gordon was a mud engineer for M-I Swaco, who had a contract with BP to provide that service. We're also here for Gordon's wife Michelle, for his sons Stafford and Maxwell Gordon, for his mother Missy, and for his sister Katie.

At the outset, I want you to know that just because I am addressing you today does not mean that I believe Gordon's death was more tragic or more important than the deaths of the other ten men that day. I'm certain their families grieve just as much as we do.

Those men were:

Jason Anderson was from Bay City, Texas and leaves behind two children.

Aaron Dale Burkeen was 37. He lived in Neshoba County near Philadelphia, Mississippi. He is survived by a wife and two children, both teenagers.

Donald Clark was 49 and lived in Newellton, Louisiana. He is survived by his wife, Sheila.

Stephen Curtis was 39 and is survived by two children. He lived in Georgetown, Louisiana.

Roy Emmett Kemp was 27 and left a wife and two very young daughters. He lived in Jonesville, Louisiana.

Karl Kleppinger lived in Natchez, Mississippi and left behind a wife and a 17 year old son. Mr. Kleppinger was 38.

Blair Manual was 56 and lived in Gonzales, Louisiana. He had three daughters and was engaged to be married.

Dewey Revette was from State Line, Mississippi. He was 48 and is survived by a wife and two daughters.

Shane Roshto was only 22 and lived in Franklin County, Mississippi. He left behind his wife, Natalie.

Adam Weise was just 24 and lived in Yorktown, Texas. He is survived by his mother.

I have to apologize to any survivors of these men who I didn't list. Quite frankly, the news coverage of them has been pretty sparse. But I know this: all of them left loving parents, children, uncles and aunts, cousins or in-laws. If I listed all the people who grieve for these men we would be here all day.

It is true, though, that neither the news media nor many public officials have spent much time talking about these men or their families. Please don't misunderstand; none of us are seeking to become public figures. But with the daily discussions of the leaking oil, the endangered coastline and the constant vain attempts by BP to stop polluting the gulf, we sometimes feel as though the victims who suffered and will suffer the most have become an afterthought.

The only one of the victims I knew, though, was Gordon. He was 28, our youngest child. Gordon is survived by his widow Michelle, and by his

two sons: Stafford, who is two, and Maxwell Gordon, who was born 13 days ago.

Gordon received his Bachelor of Arts degree from LSU. His degree was not in engineering. All the engineering a mud engineer needs to know is learned in Mud School, a course of education provided by his employer M-I Swaco that lasted about six months. After completing Mud School, Gordon worked for some time aboard a variety of rigs as a Compliance Officer, in which capacity he was able to watch and learn from experienced mud engineers.

Before long Gordon was working as a mud engineer himself. I remember when he went out for his first hitch as a mud engineer. He was nervous, not a condition I saw in Gordon very often. But he had been well trained, and he completed that hitch and the many that followed with no serious problems.

As a relative newcomer, Gordon was sent to a different rig every two weeks, filling in for one of that rig's regular mud engineers who was on vacation or unable to work for some other reason. It was in that capacity that Gordon first served aboard the Transocean Deepwater Horizon.

That Gordon was good at what he did was evidenced by the fact that when one of the mud engineers assigned to the Deepwater Horizon left, BP was offered a list of mud engineers who had worked aboard the Horizon and from that list chose Gordon.

As I am sure you have been made aware, the Deepwater Horizon was a rig of considerable prestige. It was a very large rig that drilled in very deep water and found very big deposits of oil. It was as successful an exploration rig as BP operated, I believe, and last year discovered the second largest deposit of oil in the history of the United States.

Gordon was proud of the fact that he had earned a spot on such a prestigious rig, but he never bragged about it. And he was proud that he had been so successful so soon in his career, allowing his wife Michelle to quit her job last year. With one young son and another on the way, Michelle wanted to be a full-time mom.

I have been told, and I certainly believe, that Gordon was chosen from that list not only for his skills as a mud engineer, but also for his personality. You see, everybody liked Gordon. People who met him liked him, and the more they got to know him, the more they liked about him. We've all known people like that, people whom everybody instinctively likes. I have no doubt that each of us would love to have that quality, especially those of us who run for elective office every two years.

Gordon was funny. He once joked that at his funeral he just wanted somebody to say he was "fat and funny." Gordon wasn't fat anymore though; he'd lost 80 pounds in the last year. But he was still funny. He loved to laugh and he loved to make others laugh even more. A day or so after Gordon died some friends came to Gordon and Michelle's house to sit outside and talk about the things Gordon said and did. So much laughter rang through the neighborhood into the wee hours of the morning that Michelle was afraid someone would call the police.

But when they weren't laughing Gordon's friends wept. To have a friend like Gordon was a special gift; to lose a friend like Gordon was, and will always be, a bitter loss.

We had a visitation at the oldest funeral home in Baton Rouge the day before Gordon's memorial service. The line of people who came to offer their condolences snaked through the funeral home, out the door and down Government Street. The funeral director said he had never seen anything like it. Imagine! And all for a man who had only been with us for 28 years.

Gordon was a very, very good golfer. At the time of his death his handicap was a one. In his junior year of high school he gave up baseball to play golf, and when he was a senior he was named Second Team All State. If Gordon had been serious about it he could have been very competitive in amateur tournaments. Instead, Gordon played for the fun of it. I played with him many times and at the end of the round I thought about a few wayward drives and missed putts and figured he'd shot 78 or 79. But when I added it up he'd have shot 73 or 74. I'd forgotten the two long putts he made for birdie and the time he holed it from the bunker. I'd forgotten it because he hadn't made a big deal about it; he was too busy making jokes (usually at my expense) or laughing at something someone else had said. And that was another thing about Gordon. He could make jokes at the

expense of others and they would never get mad at him for it. It was a gift he had.

And Gordon was a gift we had.

The first picture I'd like to share is my favorite because it was taken only a few days before his death and because I was standing right behind Michelle when she took it. Gordon was giving Stafford his first golf lesson. It was, of course, the last lesson he would get from his father. I remember driving away from that scene and thinking, "They are so happy!"

The next picture is of Gordon, Michelle and Stafford soon after Stafford's birth. I've had the pleasure of being with all three of my children when their first children came into the world. But I can't say I ever saw a prouder parent than Gordon. You'd have thought he was the first man ever to father a child.

The next picture is of Michelle and Maxwell Gordon, taken 13 days ago. Sadly, Gordon's presence is limited to his picture, taken with Michelle and Stafford last Easter.

Gordon was a great father to Stafford. He was tireless. Any time Stafford wanted to play his dad was ready. Perhaps the saddest story about Gordon's death, and there are many, is that Stafford is just too young to be able to remember his father in the years to come. Of course, Maxwell Gordon will never know his dad. His knowledge of his father will be limited to pictures and what Michelle and others tell him. We don't have to be psychologists to know that's not enough.

None of us will even be able to visit a cemetery where Gordon was laid to rest. To watch the videos of the fire was to know that Gordon's body was cremated. Then the fireboats washed his ashes out to sea. I must admit that having nothing to say goodbye to is much, much harder than I thought it would be. Call it closure or whatever, but something is missing for us.

You may note that I haven't mentioned how much Gordon made. There's a reason for that. The loss of Gordon's income is the last thing Michelle grieves for. When Michelle tells her boys about their dad, she's not going to show them a pay stub. She will tell them how much their father loved them, how much he loved to play with Stafford. She'll tell them how

much he loved her and what a happy marriage they had. When they're old enough she'll tell them how funny their father was and how much his friends loved to be with him. When they're older still she will explain how and why their father died. But she won't console her sons by telling them how much money their dad earned. And as I understand the present state of the law, that's all Michelle and her two sons can recover from those responsible for Gordon's death. In fact, because Maxwell Gordon had yet to be born on April 20, 2010, the law provides he is entitled to nothing.

I understand Professor Tom Galligan will later testify about the deplorable state of the law, in particular the Death on the High Seas Act, and what you will be asked to do about it. But I want to say how offensive it is when the law recognizes only pecuniary loss in cases like these eleven deaths. None of you could look Michelle in the eye and tell her she lost only income.

I am not a maritime lawyer. Neither is Chris. But I have practiced for many years in a system that compensates those who are injured and the families of those who are killed by the fault of others with money damages. Please believe me; no amount of money can ever compensate us for Gordon's death. We know that. But this is the only means available to begin to make things right.

As time goes by we learn more and more about whose fault it was that this blowout killed our Gordon. And whoever ultimately bears the greatest amount of blame will have to pay a lot of money to try to repair the environmental damage. They will have to pay money to compensate the families of these eleven dead workers. How much that will be is up to you. But reckless acts by employees of corporations, performed to try to make the most money the fastest, will never be deterred by the payment of mere compensatory damages. Payment of punitive damages by irresponsible wrongdoers is the only way they may learn. These businesses are there to make money. Punishing them by making them pay some of that money to victims who suffer most is the only way to get their attention. If you want these companies, one of which is headquartered in Great Britain and another in Switzerland, to make every effort to make sure their employees don't act as these did, putting American lives at risk, you must make certain that they are exposed to pain in the only place they can feel it—their bank accounts. As a friend recently said, "Make them hurt where their heart would be, if they had a heart."

I have been a lawyer long enough to know that no one will ever apologize for the damage they did. But I am nevertheless perplexed by the fact that none of the representatives of any of the companies who caused or might have caused this accident have expressed the slightest remorse over the loss of eleven lives.

I am an environmentalist. I worry about the Louisiana wetlands, the Florida beaches and all the other of our precious land endangered by this oil spill. I worry about the men and women who make their living providing shrimp, fish, oysters and crabs for American tables. But I do believe this: after much work, perhaps for many years, this mess will be cleaned up. The wrongdoers here can pay enough money to those who have lost their ability to make a living to make that right. And eventually the shrimp will be back. The oysters and crabs and fish will be back.

And BP will be back. We have heard over and over about the billions of dollars BP's stock has fallen. But the fact is, BP is selling for about the same price it was a year ago. So BP, Transocean, Halliburton and any other company will be back because they have the infrastructure and economic might to make more money.

But Gordon will never be back; never. And neither will any of the ten good men who died with him. The grief suffered by their families will never stop.

Now the future of those families is in your hands. The future of other families of workers on other rigs is in your hands. Only you have the power to take away the motivation to shortcut safety to increase profits. I urge you to do the right thing.

Thank you for listening. Either Chris or I will be happy to answer any questions you have.

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Mr. CONYERS. Douglas Harold Brown was chief mechanic and acting second engineer on Transocean's Deepwater Horizon and is a survivor of the April 20 explosion. He served in the U.S. Army for more than 11 years, began work with R&B Falcon, an offshore

oil drilling company that was bought by Transocean, and he became a Transocean employee and one of the original crew members of the Deepwater Horizon.

**TESTIMONY OF DOUGLAS HAROLD BROWN, EMPLOYEE, TRANSOCEAN, LTD., VANCOUVER, WA**

Mr. BROWN. Chairman Conyers, Ranking Member Smith, and Members of the Committee, thank you for inviting me to appear before you today. My name is Douglas Harold brown. I was the chief mechanic and acting second engineer on the Transocean's Deepwater Horizon. I am 50 years old, married, have a 10-year old stepdaughter, and live in Vancouver, Washington. I sailed the original voyage of the Deepwater Horizon from Korea to the Gulf of Mexico and I have worked

onboard the vessel until she exploded would around 10 p.m. On April 20, 2010. Since 2004, I worked in the engine control room. Here is what happened to me that night.

Shortly before 10 p.m., I was completing my shift and making my log entries in the engine control room where I heard a loud hissing noise followed by the sound of gas alarms going off. This was followed by the sound of engines ramping up very loudly. These engines provide power to the entire rig and are equipped with an electrical and mechanical trip. They are supposed to automatically shut the engines down if they exceed certain RPMs.

As the engines revved louder and louder, I kept expecting the trips to shut the engines down, but they never did. They just kept revving higher and higher. The one automatic trip that did work disconnected the generators from the control panel and plunged us into total darkness. But the engines kept revving. Nobody ever radioed the control room to inform us that there was a kickback or that mud and seawater was shooting into the air.

I was standing in front of the engine control panel waiting for the system to power back up when the first explosion blew me into the control panel and into a hole that was created in the floor. A short time later, a second explosion blew me to the floor again, the ceiling caved in, and debris fell on top of me. I could hear people screaming, calling out for help. I was terrified. I did not know what was happening, and feared I was going to die.

I followed two of my coworkers and we crawled out of the hatch in the back of the room which had been blown up by the blast. When I got to the main deck, I saw the fire on the floor shooting up through the derrick. The heat coming from the floor was like nothing I have ever felt. Mike Williams, the electrical technician, and I, made our way around the fire to bridge. When we got to the bridge, the captain sent us to the lifeboats to find the medic because Mike was bleeding badly from his head. When we got to the lifeboats, it was complete chaos and mayhem. People were screaming and crying that they did not want to die and we had to get off the rig. We stood next to the lifeboats and watched as the fire grew larger and larger. While I think we were only there for about 10 minutes, it seemed like forever.

Eventually, we were ordered to board the lifeboats and we were lowered to the water. We tied up to the Damon Bankston, which was a supply boat that had been taking on drilling fluid from the

rig before the explosion. We were offloaded onto the Bankston, and I was taken by helicopter to another rig and eventually to a hospital in Alabama.

I feel very fortunate that I survived this horrible tragedy. Eleven of my fellow crew members were not so fortunate and my heart goes out to their families and loved ones. I do not yet know the full extent of my injuries. I have been diagnosed with a fracture in my left leg and damage and bruising under my kneecap as well as ligament damage and nerve bruising. I have pain in my back and tail bone. I still walk with a cane. I am also having problems with my short-term memory, loss of fine motor skills, trouble sleeping, nightmares and flashbacks to that night. I have been diagnosed with PTSD.

I will never forget that night though; the loss of my friends and the effect this has had on so many people. It is important for Congress to understand what happened that day so it doesn't happen again. I think it is also important to understand how Transocean manning decisions changed over time. When we first went to work on the Deepwater Horizon, we had a fully manned engine room which consisted of six people: Chief engineer, first engineer, second engineer, third engineer, and two motormen. As the years went by, for reasons I do not understand, the flagging of the vessel changed from Panamanian to the Marshall Islands. Transocean eliminated positions so that we were only left with three people: Chief engineer, second engineer, and one motorman. Three people were left to do six people's job. While this often made it difficult to timely complete our daily preventive maintenance, we worked hard and did the best we have could. In October, 2009, they reinstated a first engineer back in the engine room. That still left us two people short compared to when the vessel was flagged under Panamanian law. Over the years after Transocean began lessening the crew, I and others complained that we need more help. They just kept telling us they would see what they could do.

I wish to thank you forgiving me the opportunity to testify before you today and I am happy to answer any questions I can for you.

[The prepared statement of Mr. Brown follows:]

PREPARED STATEMENT OF DOUGLAS HAROLD BROWN

Statement of Douglas Harold Brown

Chief Mechanic/Acting Second Engineer
of the Deepwater Horizon

on

Legal Liability Issues Surrounding the
Gulf Coast Oil Disaster

before the

House Judiciary Committee

May 27, 2010

## STATEMENT OF DOUGLAS HAROLD BROWN

### Introduction

Chairman Conyers, Ranking Member Smith and Members of the Committee, thank you for inviting me to appear before you today.

My name is Douglas Harold Brown. I was the Chief Mechanic and Acting Second Engineer on Transocean's *Deepwater Horizon*. I am 50 years old; married; have a 10 year old step daughter and live in Vancouver, Washington. I served in the United States Army from 1989 to 1998 when I was honorably discharged. I proudly served in Desert Storm. In January, 1999, I started working in the Gulf of Mexico for R & B Falcon, an offshore drilling company. I worked on a semi-submersible drilling rig known as the *C Kirk Reign*. After approximately a year and a half, I was transferred to the *Deepwater Pathfinder*, which is a drillship also in the Gulf of Mexico. In approximately 2000, Transocean purchased R&B Falcon and I was assigned to work aboard the semi-submersible *Deepwater Horizon*. I was one of the original crew members on the *Deepwater Horizon* when it came out of the shipyard where it was built in Ulsan, South Korea. I made the journey with her across the ocean to the Gulf of Mexico. I worked aboard the *Deepwater Horizon* in the engine room since at least 2002 and up until the time of the disaster on April 20, 2010.

### Manning Requirements on the *Deepwater Horizon*

The number of crew members in the engine room decreased significantly since I was originally signed to the vessel. This became a progressive problem. Initially the manning requirements onboard the *Deepwater Horizon* for the engine room included the following:

Chief Engineer
1st Engineer
2nd Engineer
3rd Engineer
Motorman
Motorman

Towards the end of 2002, Transocean eliminated the Third Engineer's position as well as one of the Motorman positions. Approximately nine (9) months later, the First Engineer's position was also eliminated. We were told that the reason for the elimination of these positions was that we were downsizing and there was no need for so many men in the Engineering Department.

From some time in 2003, the engine room was left with the following positions:

Chief Engineer
2nd Engineer
Motorman

In October 2009, the 1st Engineer was added back to the engine room. However, that was only for one shift. The other shift remained without a First Engineer until the vessel sank.

Because of the cuts in the number of engine room personnel, we were often days, weeks and even months behind in completing the necessary preventive maintenance (PM) requirements. This was documented in our lack of completion of the PM forms which were transmitted via electronic data to the mainland. I and other employees who worked in the Engineering Department complained to our supervisors and the Captain that we did not have enough manpower to keep up with the work and the preventive maintenance. We were always told "we will see what we can do".

When the *Deepwater Horizon* initially left Korea, I believe she was flagged Panamanian. Sometime thereafter, she switched to Marshall Islands flagging. Though I cannot testify to the exact Minimum Safe Manning Requirements of Panama, The Marshall Islands, or The United States, it is my belief, which is supported by discussion I have had with other crewmen, that the Minimum Safe Manning Requirements of the Marshall Islands is far less in number than the United States Coast Guard Requirements. Thus, my belief is that the reductions were due to cost saving measures.

I would strongly suggest that all submissions and applications by Transocean to the Marshall Islands be obtained to understand what manning agreements were reached regarding the *Deepwater Horizon*.

**My shift of April 20, 2010**

My work shift started at 1200 hrs (12:00 p.m.). I attended our pre-tour safety meeting. At that meeting, the Driller, Dewey Revette, was going over the work that the drilling crew would be performing during our 12 hour shift. While the Driller was giving the explanation, a BP representative stood up and interrupted the Driller. The BP representative said that there would be a change to the operations and that a different plan of action was going to be implemented. Because this involved drilling matters, I was not directly involved in the conversation. However, it was obvious that The Driller and the Offshore Installation Manager (OIM), Jimmy Harrell and the tool pusher Randy Ezell, all Transocean employees, were in disagreement with the BP representative's plan. To the best of my recollection and based on conversations with other crew members, the Driller said something to the effect of "well I guess when we get up there, we will come up with a game plan. The OIM, Jimmy Harrell said, in a last protective thought, "well, that's what they make them pinchers for", apparently referring to the annular.

Around 9:30 p.m., I began my end of shift duties entering data into my log book. Around 9:50 p.m. I heard a loud hissing noise like a large air hose springing a leak. We all looked around and we had no idea what it was or where it was coming from. Within a few minutes, we started hearing gas alarms. Those of us in the engine control room looked at each other with confusion as we did not know what was happening. No one ever communicated to us from the Bridge or the rig floor so we had no idea that a blowout was taking place. We did hear the captain make a radio call to the supply vessel, the *M/V Damon Bankston*, to detach the hose and move away from the rig.

Sometime soon after the hissing sound started, engine numbers 3 and 6 began increasing in rpms on their own. These engines are set to run at 720RPMs constant. These engines supply power to the ship's generators which supply electrical power to the *Deepwater Horizon*. I have no idea why these engines were increasing in revolutions but they increased way beyond anything I had ever heard before. I would estimate that they got as high as 1000RPMs. I waited for and expected the (trips) to shut the engines off. There are 4 trips that operate in the following manners:

(1) Mechanical Over speed – This should kill the engines if they reach around 800 RPMs but it did not work.
(2) Electrical Over speed – This should kill the engines if they reach around 790 RPMs but it did not work.
(3) The Rig Saver – This should have killed the engines upon over speed but it also did not work.
(4) The frequency trip monitors the hertz and it did work but it is not designed to kill the engines but only to disconnect the generators from the switchboard. Therefore, the engine room and all electronics went dark.

Just before the frequency trip engaged, I started to walk over to the control panel to see what was happening. Then, the lights went out and we lost all power in the control room when the frequency trip activated. I remember saying "we're dark". But the engines kept revving, faster and faster, louder and louder and then a massive, violent, concussive explosion picked me up and threw me into the control panel and into a hole which was created in the floor. The next thing I remember is being face down and kind of on my side. I could hear people screaming and shouting that they were hurt. I started to try to get up when the second explosion occurred caving in the ceiling. Debris and wreckage fell down on top of me. I was very scared, confused and starting to panic. I did not know if another explosion was coming. I heard more screams and people shouting they were injured. Suddenly, I realized that Mike Williams, the electronic technician, who had been in the electrical technician (ET) room, was now in the engine control room (ECR) next to me. He was on the floor crawling over the debris and wreckage and he was screaming that he was hurt and had to get out of there. He crawled passed me and was heading toward the back of the control room where the hatch was blown open and bent from the force of the explosion of the number 3 engine.

We could see light coming from the doorway. I noticed my Motorman, Willie Stoner, crawling toward the same hatch ahead of Mike. I began crawling behind Mike. Once outside on the back lifeboat deck, I heard Paul Meinhart, one of our new Motorman, calling out to us that he had found Brent Mansfield, the First Engineer, in the control room and that he was injured. Paul asked someone to help him with Brent. Willie went in to help Paul and I went with Mike Williams to the Bridge.

To get to the Bridge, we proceeded up the back steps to the main pipe deck on the aft end of the rig. The derrick was engulfed with flames over 200' high. The heat from the fire was incredibly hot on my body. We went to the port side of the rig so that we could get around the fire. We eventually made our way to the Bridge. Once on the bridge, Mike told the Captain that he was

hurt. The Captain told Mike and me to go find the medic who was probably at the lifeboats. Mike and I went to the forward life boats. When we arrived at the lifeboats, it was total mayhem and mass confusion. People were screaming that they had to get off the rig. People were crying and screaming that they did not want to die; there was confusion and panic everywhere. I tried to remain calm but I was very scared. I went to my designated life boat and reported in.

As I was boarding the life boat, Patrick Morgan, assistant Driller, who I have known for 9 years was checking names off the list as we boarded. Patrick looked straight at me and asked me my last name. He had a blank stare on his face and was obviously in shock.

We stood watching the fire on the rig and up through the derrick and waited for more crew members to arrive. People were screaming "why can't we leave now"... "I don't want to die". The fire was growing. We waited and watched for approximately 10 minutes.

The command was given to board the life boats. It was around this time that I realized something was wrong with my leg. Initially, the Coxswain in charge of the boat could not get the engine started in the lifeboat. Once started, the life boat was lowered to the water. Once we hit the water, the Coxswain wanted verification that the lowering hooks had disengaged from the life boat. I and another person opened the back hatch and confirmed that we were disengaged. When I opened the back hatch, I noticed that the boat was drifting or being sucked back under the rig where the water and the rig were on fire; I told the Coxswain we were disengaged and needed to get away because we were drifting towards the fire; he throttled forward and we pulled away from the rig. The Coxswain could not see out of the lifeboat because the windows were covered with soot and mud which had shot out of the hole and was all over the rig floor; we tied up with the other life boat at the *M/V Damon Bankston*.

We boarded the *M/V Damon Bankston* and they began taking a count of who was present. We remained on the deck of the M/V *Damon Bankston* watching the rig burn and wondering who did not make it off the rig. The USCG helicopter showed up approximately an hour later. They lowered a basket and I was raised up into the helicopter and taken to the BP *Na Kika* rig. I was offloaded and carried to a room that was set up for triage; I was then transported by helicopter to The University of Southern Alabama Hospital where I was treated for injuries to my left leg.

While in the hospital, two representatives from Shuman Consulting Company, showed up as representatives from Transocean. One of the Shuman employees drove me and Paul Meinhart to the Crown Plaza Hotel in New Orleans. Upon arriving at the hotel, I was exhausted and still shaken up. I was provided with some clean clothes and then met with the Coast Guard. Rather than being allowed to go to a room and rest, I was then immediately taken to a room and interrogated by two lawyers from Transocean in front of a court reporter.

**My injuries**

I feel very fortunate to have survived this horrible tragedy. Eleven of my fellow crew members did not and my heart goes out to their families and loved ones.

I do not yet know the full extent of my injuries. I have been diagnosed with a fracture in my left leg and damage and bruising under my knee cap as well as ligament damage and nerve bruising; I have low back as well as pain in my tailbone.

I have a head injury and am suffering from PTSD. I am having memory problems, trouble sleeping, nightmares and flashbacks to that night.

I will never forget this night, the loss of my friends and the effect this has had on so many people.

It's important for Congress to understand what happened that day so that it doesn't happen again. I wish to thank you for giving me the opportunity to testify before you today.

Douglas Harold Brown

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Mr. CONYERS. Stephen Stone was working for Transocean aboard Deepwater Horizon and was injured in the April 20, 2010 explosion.

**TESTIMONY OF STEPHEN LANE STONE, EMPLOYEE, TRANSOCEAN, LTD., KATY, TX**

Mr. STONE. Thank you. Chairman Conyers, Ranking Member Smith, and Members of the House Judiciary Committee. Thank you for the opportunity to speak with you today. My name is Steven Stone. I have worked for Transocean since February of 2008, as a roustabout, which is a general laborer on an oil rig. I was onboard Transocean's Deepwater Horizon rig on the night it exploded, killing 11 of my crew members and injuring many more. I am here today to tell my story not only about the disaster of April 20, but also about the events that led to that disaster. It is my hope that armed with this information, this Committee and the country can prevent another tragedy like this one from ever happening again.

Like many people, I have been following the congressional testimony of the executives from Transocean, BP and Halliburton blaming each other for the blowout of the well. When these companies put their savings over our safety, they gamble with our lives. They gambled with my life, that gambled with the lives of 11 of my crew members who will never see their families or loved ones again.

The blowout of this well was hardly the first thing to go wrong. I was working up on deck, helping to pump drilling mud down into the wellbore hole. However, we kept losing drilling mud, either because the underground formation was unstable or because drilling too quickly caused the formation to crack.

Either way, about four separate times in the spate of 20 days, we had to stop pumping drill mud and pump down a heavy duty seal compound instead to seal the cracks in the formation that was causing us to lose mud.

On the night of April 20, 2010, I was asleep in my cabin two decks below the surface deck on the Deepwater Horizon. About 10:00, I woke up to the sound of an explosion. I didn't know what the sound was, so I waited for a few seconds to see what was happening. And then another explosion went off. The force of it ripped through my body and collapsed the upper decks of the rig.

Somehow I opened the door to my cabin, and people were running up and down the halls screaming we had to get out. I ran through the door of my cabin toward the stairwell to the lifeboat deck, but it had collapsed. I ran back to my room to get my life jacket, my shoes, and my wedding ring. I then followed my crane operator Eugene Moss, who was running another way to the other end of the living quarters and used another stairwell.

Once on that deck, one deck below the surface, we ran through more living quarters to get to the lifeboat deck. The ceiling above the life boat deck had collapsed by the galley. The air was smoky and gritty with debris. Eugene and I picked our way through the rubble to the lifeboat deck outside.

Once we were outside, I turned and looked at the derrick, which was completely engulfed in flames so bright it seemed like daylight. I remember people just staring at the flames. Someone was trying to muster, which means to get everyone assembled and to get a head count. Some people were getting into lifeboats, and some were just in such shock, they just stood there unable to move. Suddenly, the flames on the derrick intensified, and that is when people started to panic and scramble for the lifeboats.

I got into life boat number two, strapped myself in, and waited for what seemed like hours. Some people were getting back out of the lifeboat, and another person was still trying to muster and get a head count. I was pretty certain I was going to die, so I just sat there and waited for something to happen, for the derrick to fall down, and take the life boat out.

Finally, the life boat filled up with smoke. Someone made the call to lower our boat into the water. We unlatched from the rig's cables and motored toward the Damon B. Bankston, a nearby supply vessel. The rig medic there tended to the injured until the Coast Guard arrived about 30 minutes later. The Coast Guard retrieved the injured from the boat by helicopter, which took them about 2 hours, until about 12:30 a.m.

At 8 a.m., the Damon B. Bankston was finally released to start heading back to land. Four hours later, and 14 hours after the explosion, we pulled up to a platform full of Coast Guard investigators about noon on April 21. We were told we had to give a written statement before we could leave the boat. After that was done, we pulled up to another platform to pick up some paramedics to ride back to land with us. At 1:30 a.m., 20 hours after explosion, we finally made it back to land.

However, before we were allowed to leave, we were lined up and made to take a drug test. It was only then, 28 hours after the explosion, that I was given access to a phone and was allowed to call my wife and tell her I was okay.

At last, they arranged to have us all driven to the Crown Plaza Hotel in New Orleans where our families were waiting. Another 3 hours later, we finally made it to the hotel and to our families; 31 hours after explosion, at 5 am, on April 22nd, I was given a hotel room and allowed to rest. I was lucky enough not to suffer any injury that required paramedic treatment, but to say I was not injured isn't true. I breathed in lots of thick, dark smoke from the fire and the explosion and will need to see a doctor for smoke inhalation.

Like many other crew members I am suffering from post-traumatic stress disorder and have had trouble sleeping, memory loss, nightmares, and flashbacks to the explosion. Since the explosion, I have also developed a nervous twitch in my eyes, and my doctor said that this was probably caused by stress, too.

A Transocean representative asked me to sign a document stating I was not injured in order to get $5,000 for the loss of my personal possessions in general. This happened 10 days after the explosion in a Denny's restaurant without my lawyer present. I wouldn't sign the part saying I had suffered no injury.

My attorney, Brent Coon, handled the 2005 BP refinery explosion in Texas. I was sad to learn after the fact about BP's shockingly bad safety record in North America. Also I never would have expected from my company, Transocean, to treat me like a criminal after I had survived such a disaster by making me submit to drug test and then try to attempt to trick me into giving up my legal rights by signing forms without a lawyer present. If I had known any of these things, I might have thought twice before setting foot on the Deepwater Horizon.

Members of the Committee, you cannot allow BP and Transocean to continue to conduct business this way.

And I hope that my testimony here today leads to changes that make drilling rigs safer places to work so that a tragedy like this never happens again. Thank you.

[The prepared statement of Mr. Stone follows:]

PREPARED STATEMENT OF STEPHEN STONE

STEPHEN STONE - STATEMENT FOR HOUSE JUDICIARY COMMITTEE

Chairman Conyers, Ranking Member Smith and Members of the House Judiciary Committee, thank you for the opportunity to speak with you today.

My name is Stephen Lane Stone. I have worked for Transocean since February of 2008 as a roustabout, which is a general laborer on an oil rig. I was on board Transocean's *Deepwater Horizon* rig on the night it exploded, killing 11 of my fellow crew members and injuring many more. I'm here today to tell my story not only about the disaster of April 20, 2010, but also about the events that led to that disaster. It is my hope that armed with this information, this Committee and this country can prevent another tragedy like this one from ever happening again.

Like many people, I have been following the congressional testimony of the executives from Transocean, BP, and Halliburton, and I have watched their endless finger-pointing blaming each other for the blowout of the well. In fact, this event was set in motion years ago by these companies needlessly rushing to make money faster, while cutting corners to save money. When these companies put their savings over our safety, they gambled with our lives. They gambled with *my* life. They gambled with the lives of 11 of my crew members who will never see their families or loved ones again.

The blowout of this well was hardly the first thing to go wrong. I was working up on deck, helping to pump drilling mud down into the wellbore hole. However, we kept losing drilling mud, either because the underground formation was unstable, or because drilling too quickly caused the formation to crack. Either way, about 4 separate times in the space of 20 days, we had to stop pumping drilling mud and pump down a heavy-duty sealant compound instead, to seal the cracks in the formation that were causing us to lose mud.

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Once we were outside, I turned and looked at the derrick, which was completely engulfed in flames so bright, it seemed like daytime. I remember seeing people just staring at the flames. Someone was trying to "muster," which means to get everyone assembled, and to get a headcount. Some people were getting into the lifeboats. And some people were in such shock that they just stood there, staring, unable to move.

Suddenly, the flames on the derrick intensified, and that was when people started to panic and scramble for the lifeboats. I got into Lifeboat Number 2, strapped myself in, and waited for what seemed like hours. Some people were getting back out of the lifeboat, and another person was still trying to "muster" and get a headcount. I was certain I was going to die, so I just sat there and waited for something to happen - for the derrick to fall down and take out the lifeboat, maybe.

Finally, as the lifeboat filled up with smoke, someone made the call to lower our boat into the water. We unlatched from the rig's cables and motored toward the *Damon B. Bankston*, a nearby supply vessel. The rig medic there tended to the injured until the Coast Guard arrived, about 30 minutes later. The Coast Guard retrieved the injured from the boat by helicopter, which took them about two hours, until about 12:30 a.m. At 8:00 a.m., the *Damon B. Bankston* was finally released to start heading back to land.

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At 1:30 a.m., 28 hours after the explosion, we finally made it back to land. However, before we were allowed to leave, we were lined up and made to take a drug test. It was only then, 28 hours after the explosion, that I was given access to a phone, and was allowed to call my wife and tell her I was okay. At last, they arranged to have us all driven to the Crowne Plaza Hotel in New Orleans where our families were waiting. Another three hours later, we finally made it to the hotel and to our families. 31 hours after the explosion, at 5:00 a.m. on April 22, I was given a hotel room and allowed to rest.

I was lucky enough to not suffer any injury that required paramedic treatment, but to say that I was not injured isn't true, either. I breathed in lots of thick, dark smoke from the fire and the explosion, and will need to see a doctor for smoke inhalation. Like many other crew members, I am suffering from post-traumatic stress disorder, and have had trouble sleeping, memory loss, nightmares, and flashbacks to the explosion. Since the explosion, I have also developed a nervous twitch in my eye, and my doctor said this was probably caused by stress, too. A Transocean representative even asked me to sign a document stating I was not injured in order to get $5000 for the loss of my personal possessions in general. This happened 10 days after the explosion, in a Denny's restaurant without my lawyer present. I wouldn't sign the part saying I had "suffered no injury."

I decided to hire my current attorney, Brent Coon, because of his firm's experience handling the 2005 BP refinery explosion in Texas. It was sad to learn after the fact about BP's shockingly bad safety record in North America. Also, I never would have expected for my company, Transocean, to treat me like a criminal after I had survived such a disaster by making me submit to a drug test, and then try to tempt or trick me into giving up my legal rights by signing forms without a lawyer present. If I had known <u>*any*</u> of these things, I might have thought

twice before setting foot on the *Deepwater Horizon*.

Members of the Committee, you cannot allow BP and Transocean to continue to conduct business this way. I hope that my testimony here today leads to changes that make drilling rigs safer places to work, so that a tragedy like this never happens again. Thank you.



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Mr. CONYERS. Byron Encalade is the president of the Louisiana Oysters Association.

He has a business at East Pointe and has fished for his entire life in the Gulf of Mexico.

**TESTIMONY OF BYRON ENCALADE, PRESIDENT, LOUISIANA OYSTERS ASSOCIATION**

Mr. ENCALADE. Mr. Chairman and other representatives of the Committee, I want to thank you for giving me the opportunity to tell our story.

My name is Byron Encalade. I am a third-generation oyster fisherman from East Pointe A'La Hache, Louisiana. I currently serve as the president of Plaquemines Parish United Fisheries Cooperative and Louisiana Oyster Association.

Pointe A'La Hache is a small fishing village in Plaquemines Parish, Louisiana, with approximately 300 people. It is primarily an African American community with seafood being its primary industry.

Our family fisheries engage in harvesting oysters and shrimps which we transport across Gulf States. As the president of our family fisheries and trucking company, I employ eight people; my brother, my two nephews, and five cousins.

Black oyster fishermen have not been able to amass wealth to sustain our community. Therefore, a hurricane, such as Hurricane Katrina, and the oil spill have caused us stress and uncertainty for our already underserved community. We thought 2010 was the year to finally recover from Hurricane Katrina. We have invested moneys in our boats and company infrastructure.

This oil spill will be devastating for Plaquemines Parish, but it will be extremely difficult these next few months for fishermen who depend on this livelihood as a source of income and food source.

Once again, we find ourselves crippled by a disaster we did not create. And as in the aftermath of the 2005 hurricane season, it has been said that the total cleanup and recovery will take months if not years to complete.

On the eve of 2010 hurricane season, which may only make this problem worse, I can tell you we do not have that kind of time.

We need your help. We need congressional oversight on the funds distributed by BP and the Federal Government. We in Louisiana have learned hard lessons about the need for transparency in recovery, and call upon this Committee to closely monitor the recovery activities.

Louisiana is a provider of shrimp, oysters, and crabs, and crawfish in the United States, providing about one-third of the seafood consumed in our Nation and also approximately $2.4 billion a year to the State of economy. Our request is as follows:

The Federal Government to ensure immediate compensation is paid to the fisherman to provide for income replacement and family living expense.

The lack of Federal and State income returns must not preclude any fisherman from receiving compensation.

The claims compensation protocol must include a system of classification of claimants.

Immediate compensation for 6 months of lost income that is equivalent to at least an annual income of $24,000 per year. Fishermen who can substantiate higher annual income from fishing will receive higher payments.

And at 6 months, somewhere in the period of November, time period of November, a sum equal to one-half of a year's lost earnings,

and no less than $12,000 per worker, shall be paid to every fisherman remaining out of work as a result of this disaster.

Within 12 months, of the initial payment, the Federal Government must make a final assessment of full damages for the lost earnings to be made to fishermen. This determination should include evaluation of other long-term losses beyond losses of earnings, such as damage to boats, equipment, damage to other oyster beds, and fishing grounds, and other long-term losses.

Mr. Chairman, I would like to thank you and give a profound thanks to Ms. Waters, if I can, and the fishermen, of course, are really pleased that she came down and opened our heart and extended the welcome to us up here.

And you have been very, very kind to us in the fishing community, and we thank you from the bottom of our heart.

If anybody has any questions, I will be glad to answer.

[The prepared statement of Mr. Encalade follows:]

PREPARED STATEMENT OF BYRON ENCALADE

**Page 1**

5/27/10

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**Pointe A'La Hache is a small fishing village in Plaquemines Parish, LA with an approximately 300 people. It's primarily African American with Seafood being its primary industry.**

**Our family fisheries engage in harvesting oysters and shrimp, which we transport across all Gulf Coast states. As the President of our family fisheries and trucking company I employ eight people: my brother, two nephews and five cousins.**

**Page 2**

**Black oyster fishermen have not been able to amass wealth to sustain our community; therefore, occurrences such as Hurricane Katrina and the Oil Spill have caused distress and uncertainty for this already underserved community. We thought 2010 was the year to finally recover from Hurricane Katrina. We have invested monies in our boats and company infrastructure. This oil spill has will be devastating for Pointe A'La Hache, but it will be extremely difficult these next few months for fisherman who depended on this livelihood as source of income and also a food source.**

**Once again we find ourselves crippled by a disaster we did not create. And as in the aftermath of the 2005 hurricane season, it has been said that the total clean up and recovery will take months if not years to complete. On the eve of the 2010 hurricane season, which may only make this problem worse, I can tell you: We do not have that kind of time. We need your help!**

**We need Congressional Oversight on the funds distributed by BP and the Federal government. We in Louisiana have learned hard lessons about the need for transparency in recovery and call upon this committee to closely monitor the recovery activities.**

**Page 3**

**Louisiana is the No. 1 provider of shrimp, oysters, crab and crawfish in the United States, providing about a third of the seafood consumed in nation and $2.4 billion a year to the state economy.**

**Our request is as follows:**

**The federal government ensures immediate compensation is paid to fisherman, to provide for income replacement and family livings expenses. The lack of federal or state income returns must not preclude any fisherman, from receiving compensation. The claims compensation protocol must include:**

1. **A system for classification of claimants**
2. **Immediate compensation for six (6) months of lost income that is equivalent to at least an annual income of $24,000. Fishermen who can substantiate higher annual income from fishing will receive higher payments.**
3. **In 6 months(November 2010) a sum equal to one half of one year's lost earnings (and no less than $12,000 per worker) shall be paid to every fisherman remaining out of work as a result of this disaster.**
4. **Within 12 months of the initial payment the Federal government must make a final assessment of full damages for the lost earnings to be made to fishermen. This determination should include evaluation of other long term losses beyond loss of earnings such as damage to boats and equipment, damage to oyster beds and fishing grounds and other long term losses.**

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Mr. CONYERS. We are pleased to have the Attorney General of the State of Mississippi, Jim Hood, here.

The attorney general graduated from the University of Mississippi, served as a clerk with the Supreme Court of that State, and Assistant Attorney General for 5 years, District Attorney for 8 years, tried numerous cases and prosecuted successfully the 1964 murders of three civil rights workers.

We welcome you to our hearing today.

**TESTIMONY OF THE HONORABLE JIM HOOD, ATTORNEY GENERAL, STATE OF MISSISSIPPI**

Mr. HOOD. Thank you, Mr. Chairman, thank you for that kind introduction.

And Members of the Committee, I won't go through what we have accomplished as attorneys general. Our five coastal attorneys general have been working with British Petroleum. I have a letter attached as appendix C in which have we made several demands.

BP has come forward on most of them. However, there is one that creates a problem for the States, and that is why I ask that this Committee consider amending some Federal legislation to allow our States to recover the full amount of our damages. We are still working with BP in hopes that they will waive the right to try to remove our State court actions to Federal Court. They will not agree to that thus far.

The difference between the Exxon Valdez case going on over 20 years and the tobacco litigation, which was filed by my predecessor Mike Moore as attorney general of the State of Mississippi—I was the assistant AG when the tobacco wars were started and ended. And I am familiar with that litigation. And the reason, do you know why, that it was settled? Because it was in State court. The tobacco industry was about to have to walk into a courtroom down on our coast in Pascagoula, Mississippi. That case was settled because we were in State court. The Exxon Valdez case went on for 20 years because they were in Federal Court.

As a result of some of the tobacco litigation, there were amendments made here in Congress that have allowed corporations to draw in States into multidistrict, multi-State litigation, and that is a problem for the States. You see, even though you may have put good language in OPA, for example, that says that there can be a concurrent State action and the State actions will be recognized, well, that doesn't mean that a Federal judge is going to follow what you said. And in fact, a Federal judge in the State of Louisiana has said that, under OPA, that your case can be removed from State court to Federal Court.

And the problem with that is that my colleagues here at the table, British Petroleum and Transocean have already started a sucking sound coming out of Houston, Texas, by two actions that they filed before friendly Federal judges in Houston, Texas.

One of those was filed by Transocean, a limiting action in which they try to pull in everybody to a judge in Houston, Texas. BP has done the same thing with a consolidation action.

And the problem for the States is, we don't need to be pulled into some type of a huge class action where we are just treated like another plaintiff out there, and there is no respect for a separate sovereign. In fact, I won't be able to plead in our State litigation, if it occurs, hopefully these companies will come forward, and we are trying every way to work with them, and they have worked with us, but if there is going to be a fight, I want it to be in our State court.

We are not going to recover a dime more than we are entitled. We don't want a dime more than what we are entitled in State court. But what happens in Federal Court is that these Federal judges get these huge mass actions and all their duty is, is just to

beat people into submission, and that includes States and people don't recover what they are entitled to.

I won't be able to plead a claim under OPA because I know what is going to happen. They are going to take that Federal District Judge's case out of Louisiana and try to suck Mississippi into Federal district litigation.

That happened in the insurance litigation. If you recall, after Katrina, I was the attorney general that filed a suit against most of the insurance industry. That is what they did. They drug us off into Federal Court on a motion to remove, and it sat there and lingered in Federal Court for 15 months. Finally, it was remanded back to State court. We reached a settlement with the insurance industry, but we carried forth that issue to our State supreme court to make a decision on *Wind v. Water Liability.* Well, it took 4 years to get to a State supreme court. Everybody settled. It was a hollow victory. I won 9-zero.

But what happened is the Fifth District didn't defer to the State as it should have under—it is a contract law. It is a State issue. The Fifth Circuit didn't defer to the State court, and they got it all wrong. It is too late to back up.

So we don't want to wind up before Federal Court where they are going to drag us in with another group and treat us like any other plaintiff.

Secondly, the Class Action Fairness Act was passed by Congress, and in that, on all the comments from the Senators on the floor, oh, well, the States won't be included in this, the States won't be sucked into a class action fairness action. Well, guess what? The Fifth Circuit said—actually a district judge in Louisiana said that, yes, the States belong into it. In a case called *Caldwell v. Allstate,* the court, the Fifth Circuit held that, yes, the States are subject to CAFA, the Class Action Fairness Act, in which we get jerked into all this multidistrict litigation. And it creates such a problem that the States are beaten into submission.

The Federal judge in Alaska case beat—there was a State court judge making parallel rulings at the time just ignored the State completely, didn't even accept the separate sovereign, beat those fishermen and plaintiffs into submission, and I suspect the State and Federal Government as well.

I do not want to see that happen, and therefore, I have submitted to this Committee several changes that I believe will allow the States to seek our damages in State court and protect our citizens.

Lastly, the parens patriae authority of attorney general is as one recognized by our United States Supreme Court as a supreme duty of an attorney general. It means protect those who cannot protect themselves. Parens patriae is the Latin term for that.

I will not be able to plead parens patriae claims. The reason for that is because of that Caldwell case, the Fifth Circuit will say, oh, you are just a mass action, you are bringing that on behalf of your citizens and trying to drag us into Federal Court.

And that is where we do not want to be. We want our decision made in State court so we can quickly resolve our issues, if there are any, and we will not be subject to a lot of the other problems that the Limitations of Liability Act can bring States in forward.

Thank you for the opportunity for being here, and I will be glad to try to answer any questions afterwards.

[The prepared statement of Mr. Hood follows:]

PREPARED STATEMENT OF THE HONORABLE JIM HOOD

**STATE OF MISSISSIPPI**

**OFFICE OF THE ATTORNEY GENERAL**

**JIM HOOD**
**ATTORNEY GENERAL**

Prepared Statement of Jim Hood
Attorney General of the State of Mississippi

Hearing before the United States House of Representatives
Committee on the Judiciary

on

Liability Issues Surrounding the Gulf Coast Oil Disaster
Thursday, May 27, 2010

Chairman Conyers and Members of the Committee:

Thank you for inviting me to speak to you regarding legal liability issues related to the Gulf Oil Spill. It is an honor to appear before you and to share my thoughts regarding these critical matters. The threat posed by this devastating event to our shared natural resources and to the economic livelihood of both private citizens and local and state government entities is enormous. I am gratified to see the joint efforts at the federal, state, and local levels thus far in working toward the common goal of recovery from this disaster and am pleased to be a part of those endeavors. I also appreciate BP's spirit of cooperation to date with the State Attorneys General and expect to see those shared efforts continue as we move forward.

I. Potential State Claims Arising From the Oil Spill

As the Attorney General of the State of Mississippi, it is my duty to protect the public interest of the state, including management of litigation of statewide interest. It is everyone's hope that liability issues may be resolved and that recovery of clean-up costs, natural resource damages, lost revenues, and all other damages related to the oil spill may be accomplished without the need for litigation. However, as part of my duty, it is incumbent on me to look ahead and prepare for the possibility of having to pursue relief in the courts on behalf of the state. Toward that end, my office has begun the process of reviewing all potential legal claims on behalf of the state arising out of the oil spill incident. Those

claims fall into four basic categories: state statutory claims, state common law claims, federal statutory claims, and federal common law claims.

A. Mississippi Statutory Law

While several states have adopted their own oil spill legislation, Mississippi has not done so. Accordingly, the Mississippi statutory law applicable to an oil spill comes in the form of the Mississippi Air and Water Pollution Control Law and the Coastal Wetlands Protection Act.

The Mississippi Air and Water Pollution Control Law makes it unlawful to cause pollution of any of the state's waters and declares any such action to be a public nuisance. The law provides for recovery for wildlife replenishing and remediation costs as a result of pollution, and authorizes civil actions for injunctive relief, civil penalties, removal costs, remedial costs and the costs of restocking state waters with fish and wildlife.

The Coastal Wetlands Protection Act imposes civil liability on persons for wetland destruction, including killing or materially damaging any plants or animals on or in any coastal wetlands, and for removal of sunken vessels. Persons held in violation of the Act are liable for the restoration of all affected coastal wetlands to their previous condition, insofar as is possible, and for any and all damages to the wetlands. The Act also provides for discretionary imposition of punitive damages. In addition, the Act expressly reserves other statutory and common law remedies allowable by law.

B. Mississippi Common Law Claims

The public trust doctrine vests states with the duty to hold and preserve certain resources, including wildlife and fisheries, for the benefit of its citizens. As a practical matter, the public trust doctrine provides standing to a state attorney general to pursue legal action for these claims. Attorneys General may then utilize several alternative and complementary common law theories of recovery, including public nuisance, strict liability, negligence, and trespass.

C. Federal Common Law

Prior to the adoption of the Oil Pollution Act of 1990 ("OPA 90"), general maritime law governed claims arising from damages caused by oil spills on navigable waters. However, it seems clear that OPA 90 preempts the general maritime law (at least in part), leaving OPA 90 and state law as the sole sources for claims arising out of oil spills.

D. The Oil Pollution Act of 1990

As this Committee is aware, OPA 90 is a strict liability scheme in which a "responsible party" owes a variety of damages to any eligible claimant, including a sovereign state. States can recover: removal costs, losses of government revenue, costs of increased public services, and natural resource damages. Importantly, OPA 90 contains a non-preemption provision which expressly allows a state to establish "additional liability requirements" for damages arising in oil spills and grants jurisdiction to state courts to hear claims arising under OPA 90.

Despite this grant of concurrent jurisdiction, at least one federal district court in Louisiana has found that OPA 90 claims do give rise to federal question jurisdiction sufficient to sustain the removal of claims from state to federal court. *Tanguis v. M/V WESTCHESTER*, 153 F.Supp.2d 859 (E.D. La. 2001).

II. Needed Legislative Assistance

In anticipating any potential litigation arising out of this oil spill, the threat of removal to federal court will be a hindrance to the pursuit of legitimate claims by victims, including the states. This concern is compounded by the possibility that thousands of claims will be consolidated once removed. The result is that parties rightfully entitled to compensation will forgo assertion of certain valid claims for fear of being dragged into lengthy federal litigation. At a time when those impacted require immediate resolution and recovery, they instead will be subjected to the endless morass of protracted lawsuits. This is exactly what happened in the Exxon Valdez litigation, and it is exactly what I ask this Committee to work toward preventing now. *See* William B. Hirsch, "The Exxon Valdez Litigation Justice Delayed: Seven Years Later and No End in Sight" (1996) (attached hereto as Appendix A).

As a veteran of the insurance wars following Hurricane Katrina, I have experienced first-hand the frustration of unnecessary postponement of the judicial process caused by dilatory defense tactics, including imprudent removal to federal court. The American constitutional order is a federal system requiring a

strong role for both the federal government and the governments of the states. Respect for this fundamental concept of federalism extends to the states' legal systems. When companies are allowed to remove to federal court every action brought against them in state court, as is routinely practiced, it causes a breakdown in the system due to overloaded federal dockets. When it is a state itself who is the plaintiff party in interest, this encroachment on state sovereignty is a particular insult.

In this light, I propose a handful of legislative changes that should serve to reduce the unfair stalling tactics commonly employed by corporate wrongdoers in litigation brought by a state. My first suggestion is that Congress simply pass plainly-worded legislation which would prohibit the removal to federal court of any action initiated on behalf of a state. *See* Proposed Legislative Amendments, Section I (attached hereto as Appendix B). In connection with the current situation, OPA 90 should be amended to prohibit removal to federal court of claims filed on behalf of a State in state court. *See* Appendix B, Section II. OPA 90 does contain a non-preemption provision which expressly allows a state to establish "additional liability requirements" for damages resulting from oil spills and grants jurisdiction to state courts to hear claims arising under OPA 90. However, the statute should be amended to specifically prohibit removal to federal court of any such claims filed on behalf of a State. *See* Appendix B, Section II. Similarly, it has become far too commonplace for defendants to seek

removal of actions instituted by a state on the basis that the action implicates federal issues. State and local governments have experienced this delay tactic far too often in recent years. *See, e.g., Hood v. Ortho-McNeil-Janssen Pharm., Inc.*, Civ. Action No. 1:08CV166-SA-JAD, 2009 WL 561575 (N.D. Miss. Mar. 4, 2009). I ask that Congress amend 28 U.S.C. § 1445 to explicitly prohibit this practice *See* Appendix B, Section I. Allowing the states to pursue their claims in a state forum would revive the Eleventh Amendment's assurance of state sovereignty, a right which has been severely eroded over the last decade.

Secondly, I urge Congress to amend 28 U.S.C. § 1447, governing the procedure following removal, in order to establish a fixed deadline for federal courts to rule on motions to remand and to impose penalties on party defendants who file frivolous notices of removal. *See* Appendix B, Section III. Having experienced lengthy delays in important state litigation while cases languished in federal court before overloaded federal judges, I feel very strongly that change is needed to deter companies from abusing the system to delay justice and deny injured parties of their rightful day in court. Justice delayed is justice denied.

Thirdly, I propose that the Anti-Injunction Act be amended to specify that no federal court may enjoin parallel litigation pursued by a state in its own courts. *See* Appendix B, Section IV. The All Writs Act, 28 U.S.C. § 1651, as limited by the Anti-Injunction Act, 28 U.S.C. § 2283, grants a federal court authority to enjoin state court litigation if the federal court determines an injunction is "necessary in

aid of its jurisdiction" or "to protect or effectuate its judgments." In recent years, federal multi-district litigation courts have utilized this grant of authority in a wide range of circumstances. In fact, BP has already filed a motion pursuant to 28 U.S.C. § 1407, seeking to consolidate cases related to the Deepwater Horizon incident in the Southern District of Texas. *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179 (currently pending on motion to transfer). I am deeply concerned that, without such an amendment to the Anti-Injunction Act, the parties responsible for this disaster may seek to utilize the ambiguous grant of authority provided by the Act to hinder my efforts to obtain full and complete justice for the citizens of Mississippi.

Finally, Congress should amend the Limitation of Liability Act, 46 U.S.C. §§ 30501 to 30512, and Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, to exempt sovereign states from the procedural and substantive rights granted vessel owners. *See* Appendix B, Section V. As we have already witnessed with Transocean's recent filing in a Houston, Texas federal court, limitation of liability actions are sometimes commenced by a vessel owner without legal justification for the purpose of delaying and defeating the rights of damaged claimants, including states. This practice must stop.

III. Expedient Claims Resolution Procedure

In the aftermath of Hurricane Katrina, I learned that it was in everyone's interest for property owners' claims to be evaluated and paid through an expedited, equitable, and transparent process to facilitate the recovery process. We need such a claims process on the Gulf Coast now to remedy the harm caused by the oil spill before it is compounded by delay. Steps have already been taken in a coordinated effort between the Gulf Coast State Attorneys General and BP to establish such a claims process to assist victims. It is critical that this process be implemented to provide immediate relief to our Gulf Coast residents, businesses, and local governments. Endorsement of the procedure by the State Attorneys General would encourage greater participation in it, thereby reducing the need for future prolonged litigation. However, I and my colleagues cannot embrace any claims review process unless we receive adequate assurances of its fairness. Among those assurances are the need for an elimination of any overall or aggregate caps or maximum individual payments, and the retention of each claimant's right to pursue legal action in the future. I have attached a letter listing other demands on BP. *See* Appendix C. Although BP individually has informally made these commitments to us, anything that this Committee can do to encourage cooperation among all of the companies would go a long way toward recovery.

Thank you again for the opportunity to address you today. I look forward to working with you to ensure that all individuals, private companies, and governmental entities are fully compensated for all losses associated with this devastating event.

Thank you to Mary Jo Woods, Special Assistant Attorney General, for assisting in the preparation of these materials. Copies are available upon request via e-mail to mwood@ago.state.ms.us.

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# EXXON VALDEZ OIL DISASTER AND CLASS ACTION LAWSUIT

**ARTICLE**

**THE EXXON VALDEZ LITIGATION JUSTICE DELAYED: SEVEN YEARS LATER AND NO END IN SIGHT (1996)**

**by William B. Hirsch**

**Introduction**

Five years after the Exxon Valdez crashed into Bligh Island, triggering the greatest environmental disaster in history, twelve jurors looked out on an overflowing courtroom and began a four and a half month odyssey that culminated in a $5 billion punitive damages award against Exxon Corporation.

Now, more than seven years after the spill and nearly two years after the jury verdict, no final judgment on the jury verdict has been entered by the federal court, the agonizingly long appeals process has not yet begun, and the ten thousand fishermen who won at trial face years of additional litigation and delay. Moreover, thousands of other victims of the spill have helplessly watched the federal court dismiss their claims on technical legal grounds, leaving these individuals with appellate rights but little else.

Exxon can afford to stall, and actually benefits from delay, but the commercial fishermen and others injured by the oil spill have not yet recovered, financially or emotionally. Perhaps a decade after the oil spill -- maybe in 1999 -- this case will end. More likely, the gloating prediction of Exxon's chief strategist will turn out true, and the case will stretch into the 21st century.

And even if plaintiffs are ultimately successful, they will have paid twice: once for the spill, which devastated their communities and left many in financial ruin, and again for daring to demand justice, which has already consumed their time, energy and hopes for seven years. Meanwhile, Exxon has continued to make record profits, spent hundreds of millions of dollars to defeat the injured victims and their lawyers, and nurtured a public image that is directly contradicted by the approach and strategy it has pursued throughout the litigation.

Newspapers in Alaska recently carried articles about the "spillionaires," victims of the oil spill who stand to make a million dollars or more if the $5 billion punitive damage award stands up. It is true -- some of the victims may end up rich. But none chose this path, and few, if any, would wish to relive the last seven years, whatever their potential recovery may be. Indeed, if justice comes, it will be hard to recognize.

In the following pages, we will explain how the litigation has developed over the last seven years, and what is likely to happen in the future. In the process, we will see how Exxon has skillfully used the judge, the law, and its own vast resources to ensure that the litigation will continue into the 21st century, even though the whole world knows -- and Exxon admits -- that it is responsible for the greatest environmental disaster in history.

Unlike many toxic or environmental disasters, there is no doubt about what happened here. At its simplest, Exxon's largest ship, the *Exxon Valdez*, ran into Bligh Island, and spilled 11 million gallons of oil into prime fishing grounds in Prince William Sound ("PWS") and beyond. The thick messy oil spread throughout PWS, washed up on beaches and land, and killed thousands of fish, otters, whales, birds and other wildlife. The ownership of the *Exxon Valdez* and its cargo was never in dispute, and Exxon's liability seemed obvious, especially since Lawrence Rawls, Exxon's Chairman, announced on national television a week after the spill (*Face the Nation*) that Captain Joseph Hazelwood was drunk at the time and that it was "gross error" and "bad judgment...in a going-in basis" on Exxon's part to return Hazelwood to his position as captain given his history of alcohol abuse. In a public letter published in newspapers across the company a few days after the spill, Rawls said that Exxon would "meet our obligations to all those who suffered damage from the spill."

Immediately after the spill, Exxon sent teams of public relations specialists to the area, and conducted many public meetings where it again proclaimed, in the words of one of its most ardent spokesmen:

APPENDIX A

"You are lucky. You have got Exxon. We take care of our problems." Within weeks of the spill, Exxon set up a "claims program" to provide fishermen and others with immediate relief and to pay for the damages they suffered. Many other fishermen and other local residents were hired by Exxon for spill clean-up and were well-paid for their boats, equipment and time. All told, Exxon claims that it spent $3.5 billion cleaning up the spill, without coercion from the government or the courts.

Exxon's clean-up effort, however, was inadequate. Alyeska Pipeline Service Company, which was formed by Exxon and the other oil companies, and which was responsible for creating an emergency response plan and responding to an oil spill, was similarly unable to cope with an oil spill of this magnitude. Perhaps 15% of the oil was picked up. Much of it still lies beneath the sand and beaches of PWS.

Moreover, the claims payments paid by Exxon did not fully compensate the victims for their losses. For many, like the fishermen, these losses stretched for years into the future. For others, their losses were not covered by the claims program.

Most of all, amidst the environmental destruction and the agony suffered in towns and villages throughout PWS, Kodiak Island, and Cook Inlet, everyone wanted to know how this happened. How could Exxon let a known alcoholic with a long history of alcohol abuse captain a supertanker carrying 55 million gallons of crude oil in precarious and environmentally sensitive waters, endangering a wonderfully rich and diverse ecosystem and exposing the local communities and their residents to financial ruin? Who was going to pay for the real damage, the long-term damage caused by this senseless tragedy? And what could be done to make sure nothing like this ever happened again?

So, despite Exxon's promise to take responsibility for the spill and to compensate the victims, individual and class action lawsuits were filed almost immediately. And from the beginning, it was clear that the *Exxon Valdez* case would not be just about liability and compensatory damages. It was and always has been about punitive or exemplary damages. That is the real question, and the driving force behind the litigation.

Plaintiffs filed class and direct action lawsuits in both federal and state court. This is permissible under our federal form of government, which in many areas of the law (including maritime claims) grants overlapping jurisdiction to the federal and state courts.

In both courts, claims were made by commercial fishermen, natives, native corporations, land owners, area businesses, municipalities, tenderers, cannery workers, processors, recreational users and others. The primary defendants were Exxon and Alyeska.

From the beginning, Exxon pursued a complicated and sophisticated legal strategy. In the early stages of the litigation, Exxon, with the assistance of Alyeska, vigorously fought efforts by the plaintiffs to treat the case as a class action and sought to dismiss the claims of large numbers of injured parties on technical legal grounds. When it became apparent that the federal judge, the Honorable H. Russel Holland, was generally sympathetic to Exxon's position and more likely to rule in its favor on major issues than the state judge, the Honorable Brian Shortell, Exxon managed to transfer the bulk of the state cases to federal court, where they were dismissed by Judge Holland.

Finally, nearly five years after plaintiffs filed their original motion seeking class action treatment, Exxon changed its earlier position and persuaded Judge Holland to certify a "mandatory punitive damages class," thus stripping Judge Shortell of his authority to try punitive damages in his courtroom and limiting Exxon's exposure to a single punitive damages trial. Prior to trial, Exxon's strategy to narrow and limit the case worked according to plan.

**Narrowing The Claims**

Plaintiffs sued Exxon and Alyeska under various legal theories, including common law negligence, nuisance, and misrepresentation. Plaintiffs also brought claims in federal court for strict liability under the Trans-Alaska Pipeline Authorization Act ("TAPAA"); in state court, the strict liability claim was brought under the Alaska Environmental Conservation Act (the "Alaska Act").

Typically, common law claims are based on state law. However, the Constitution establishes that the federal judicial power extends to "all cases of admiralty and maritime law." Once admiralty jurisdiction is established, the substantive law of admiralty is applied.

Early on in this litigation, both the federal and state courts were asked to decide whether maritime law applied to the case, whether it preempted state common law, and whether, under maritime law, certain types of claims were precluded. These questions were of critical importance: the answer would

determine which groups of injured plaintiffs would be legally entitled to bring claims.

In February 1991, nearly two years after the catastrophe, the federal court gave its answer. In Order No. 38, Judge Holland first ruled that the oil spill was a "maritime tort" since it satisfied the "locality" and "maritime nexus" tests, which together are used to determine whether maritime jurisdiction is invoked. Judge Holland then ruled that maritime jurisdiction applied not only to injuries suffered at sea, but also to injuries that occurred on land, so long as they were proximately caused by a vessel at sea. Thus, for example, owners of a restaurant, a boatyard, and a marine supply company, whose businesses were damaged by the spill, were swept within the jurisdiction of maritime law.

The next step in Judge Holland's analysis was crucial. Applying what has become known as the *Robins Dry Dock* rule, Judge Holland concluded that, in the absence of physical injury to person or property, a party may not recover for pecuniary or economic losses suffered as a result of a maritime tort. In other words, liability is limited to those physically touched by the oil. While the justification for this rule is usually couched in terms of public policy (the need to limit claims in order to prevent an endless chain of recoverable economic harm), the reality is grounded in commercial policy: the *Robins Dry Dock* rule limits the liability of the shipping industry in order to enhance business. Indeed, this judicial liability limitation is inconsistent with, and contradicted by, the legal standard applied to similar incidents occurring on land.

Finally, Judge Holland ruled that maritime law preempted all state common law. In other words, the Court held that an injured plaintiff was only permitted to seek redress under maritime law, and could not also pursue claims under state law. This was the key, for claims for negligence under state law permit an injured plaintiff to recover for all damages that are "proximately caused" by the wrongful act. Under a traditional proximate cause analysis, there is no prohibition against recovering for economic loss, even in the absence of physical injury.

The significance of this ruling cannot be overemphasized. Order No. 38 became the law of the case, and led to a number of rulings just before trial dismissing the claims of the following groups of plaintiffs: processors, cannery workers, tenderers, area businesses, and municipalities. Judge Holland also dismissed the claims of "unoiled" property owners for devaluation of their property, and the Alaska Natives' claims for injury to their subsistence culture.

The only group to escape under this ruling were the commercial fishermen, and only because of a 1974 ruling by the Ninth Circuit Court of Appeals creating a commercial fishermen exception to the Robins Dry Dock rule. And even as to this exception, Judge Holland took a narrow view, ruling that other groups that lived off of the sea -- such as tenderers (those who take the fish from the fishermen at sea, weigh the fish, and deliver the fish to the seafood processors) -- could not pursue claims under Robins Dry Dock, even though there was no principled distinction between them and commercial fishermen. Moreover, even as to the commercial fishermen, Judge Holland ruled that they were not permitted to recover for the devaluation of their boats or fishing permits, because such damages, unlike lost harvests, were not directly related to fishing. Judge Holland also dismissed the fishermen's claims for "hedonic" damages (damages for loss of the quality and enjoyment of life), on the grounds that the Oppen exception does not apply to fishermen's non-economic injuries.

An ironic and important twist in this case is that Judge Shortell disagreed with Judge Holland, and ruled in plaintiffs' favor on these issues. Judge Shortell held that state law was not preempted by maritime law, and that a long line of Supreme Court cases permitted states to supplement rights of recovery provided by maritime law, especially where the state was exercising its right to provide remedies for oil pollution within its own territorial waters. Thus, it appeared for a time that claims that were disallowed in federal court were still viable in state court, providing plaintiffs with an alternate avenue for recovery.

However, as will be discussed more fully below, after it became clear that Judge Holland was more sympathetic to Exxon's positions than Judge Shortell, Exxon concocted a number of legal theories designed to remove cases from state court to federal court, effectively diminishing the role of Judge Shortell. Ultimately, most plaintiffs were forced into federal court, where claims that were viable under the rulings of Judge Shortell were dismissed by Judge Holland.

The end result was that Exxon, after publicly and loudly proclaiming that it would compensate all victims of the spill, relied on esoteric legal rulings and a sympathetic judge to avoid compensating thousands of individuals for the economic injuries inflicted upon them by the Exxon Valdez oil spill.

Within days if not hours of the spill, seemingly hundreds of lawyers descended on small towns and villages throughout Alaska. Lawyers from Alaska, mostly untrained in complex litigation and

unprepared to mount the huge financial, logistical, and strategic effort necessary to battle a major corporation such as Exxon in a case such as this, were joined by lawyers from every part of the country, most of whom had no knowledge of Alaska, oil or commercial fishing.

These lawyers fell into two groups. One group, the "direct action" lawyers, sought to represent individual fishermen and other victims of the spill in the traditional manner. These lawyers were hired by and entered into contracts with their clients, and eventually brought suits on behalf of the individuals who engaged them. Some of these lawyers sued on behalf of hundreds of individuals, with a few representing more than a thousand plaintiffs.

The other group of lawyers were "class action" lawyers. In a class action, a small group of individuals bring a lawsuit on behalf of a larger group who have suffered similar injuries in a similar way. However, to proceed as a class action, the case must be "certified" as a class action: that is, a court must determine that the class action criteria set forth in Rule 23 of the Federal Rules of Civil Procedure have been met. The court must make that determination "as soon as practicable after the commencement of the action."

Rule 23 has two prongs. The first prong (Rule 23(a)) has four requirements, commonly referred to as numerosity, commonality, adequacy, and typicality. Each of these elements must be satisfied in every class action. The second prong (Rule 23(b)) has three parts. If any one of these three conditions is satisfied, the court may certify the class.

A class certified under Rule 23(b)(3) is distinct from a class certified under Rule 23(b) (1) or (2) in one important way. If a Rule 23(b)(3) class is certified, "notice" of the class action must be sent to class members and an opportunity to "opt out" of the class must be provided. Any potential class member who opts out is not bound by any legal determinations made in the case, or by the results at trial, but is also not entitled to participate in any monetary recovery that may be obtained on behalf of the class. In contrast, a class certified under Rule 23(b)(1) or (2) is "mandatory," notice is not required, and no class member may opt out.

In this case, class actions were brought on behalf of commercial fishermen, Alaskan natives, local governments, property owners, area businesses, cannery workers, and recreational users. Initially, most of these plaintiffs sought to have their classes certified under Rule 23(b)(3).

The main arguments for and against class certification were not substantially different here than in most mass tort cases. Plaintiffs argued that Exxon and the other defendants engaged in a common course of conduct that did not vary from plaintiff to plaintiff, ensuring that common questions of law and fact would predominate over questions regarding individual damages and causation. Plaintiffs also argued that a class action would be superior to other methods of adjudicating the claims because it would be more efficient and economical, and enable the court to more effectively manage the litigation. As the Sixth Circuit observed in a similar type of case:

> In mass tort accidents, the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next. No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action.

In contrast, Exxon and the other defendants argued that questions regarding individual damages and causation would predominate over the common questions and that a class action would not be superior to the claims program and other administrative procedures available to resolve the claims. Some of the direct action plaintiffs also joined Exxon in opposing class certification, arguing that they had been engaged by a large number of individuals, all of whom would opt out, and that a class action therefore would not be superior to other methods of adjudicating the claims.

The same arguments were played out in both federal and state court. However, once again, Judge Holland and Judge Shortell ruled differently. On December 14, 1990, Judge Holland denied class certification, while on the same day Judge Shortell certified a class of cannery workers and, two months later, four additional classes (commercial fishing, area business, Alaska Native, and property owner classes). This provided yet another reason for Exxon to seek a way to divest Judge Shortell of jurisdiction.

By late 1991, it was clear that both Exxon and Alyeska preferred to be in federal court. The problem was how to get the cases out of state court and into federal court, and keep them there.

On November 8, 1991, Judge Shortell issued a pretrial order setting an April 1993 trial date for both compensatory and punitive damages. This apparently brought the matter to a head, for a few days later, Exxon began "removing" cases to federal court.

A defendant can "remove" (transfer) any case from state to federal court by filing a petition asserting that the state court case raises a federal issue. Once a case is removed, it may be "remanded" (sent back) to state court on the grounds that the removal was improper. However, the decision to remand must be made by the federal court.

The first case Exxon removed to federal court in November 1991 was the consolidated class action. At the beginning of the case, Judge Shortell had ordered the class plaintiffs to join all of their complaints into a single consolidated complaint, with each class separately asserting its own claims. As explained above, Judge Shortell certified several of the classes, but not others. After Exxon removed all of the cases joined in the consolidated complaint to federal court, Judge Holland refused to send any of the cases back to state court, employing a complicated and highly attenuated analysis.

In essence, Judge Holland held that one group of plaintiffs (a group of environmental organizations) had raised a "federal question" in a brief they had filed solely on their own behalf in support of their motion for class certification, thus justifying removal to federal court. Judge Holland further ruled that the commercial fishermen class, the native class, and every other plaintiff class that Judge Shortell had certified had also properly been brought into federal court, because they, along with the environmental plaintiffs, had been part of the consolidated complaint.

The lawsuits brought by many of the direct action plaintiffs were also removed to federal court (this time by Alyeska, not Exxon), and kept there by Judge Holland. The justification, however, was different. Alyeska argued, and Judge Holland ruled, that certain direct action plaintiffs were properly removed to federal court based on a 50 page document they filed in state court listing factual issues that they intended to prove at trial. On page 9, plaintiffs stated that one factual issue was whether Exxon was reckless because the Exxon Valdez was a single hull, not a double hull, tanker, and thus more likely to spill great quantities of oil in the event the hull was damaged.

At the time that the Alaska pipeline was built, the state of Alaska passed a law requiring that tankers be equipped with double hulls. In 1978, in a case called *Chevron U.S.A. v. Alaska*, the Alaska federal court ruled that this state statute was preempted by federal law, thus stripping the state of the power to impose this requirement on oil companies. Fifteen years later, Judge Holland held that certain direct action plaintiffs had "collaterally attacked" this ruling by stating that the use of a single hull tanker was reckless, thus raising a federal question and justifying the removal of all of these claims to federal court. Judge Holland made this ruling even though no plaintiff in this case was a party in *Chevron*, no claim in this case is based on or mentions *Chevron*, and *Chevron* did not purport to bind private litigants.

Not surprisingly, plaintiffs appealed these rulings to the Ninth Circuit Court of Appeals, which has jurisdiction over claims filed in federal court in Alaska. The Ninth Circuit accepted the appeal, and oral argument was held in July 1993, with the promise of an early determination. The Ninth Circuit, however, did not rule until May of 1994, after the federal trial had begun. And the Ninth Circuit's one page ruling appeared confused and poorly thought out. In essence, it ordered Judge Holland to remand the direct action cases (but not the class action cases) back to state court.

However, by this time, plaintiffs and Exxon had already agreed to a federal trial plan which would resolve the claims of all salmon and herring fishermen on an aggregate basis. This would be impossible to do in the federal trial if the claims of some fishermen were remanded, and at best would cause delay and confusion. Since no one wanted to try the same claims twice, the parties agreed, prior to the Ninth Circuit's ruling, to be bound by the federal verdict regarding these claims. In the event that either the class or direct action cases were remanded, thus resurrecting certain types of claims dismissed by Judge Holland but not Judge Shortell (*e.g.*, permit devaluation claims), these would subsequently be tried in state court in a separate trial.

Ultimately, after Exxon filed a motion for reconsideration, the Ninth Circuit issued an order requiring Judge Holland to remand the direct action cases, unless there was some other basis for federal jurisdiction. Exxon responded by resurrecting a declaratory relief action that it had filed before it began its removal campaign, and which Judge Holland had stayed. Known as *Airport Depot Diner*, this action sought to invest the federal court with jurisdiction over all claims. Exxon argued that federal jurisdiction was necessary to protect the uniformity of federal maritime law, because the state court intended to apply state law, not federal maritime law, to the claims before it.

In 1995, Judge Holland clung to this theory to keep the direct action cases in federal court, and then dismissed them under *Robins Dry Dock*. However, by this time, plaintiffs were of a mixed mind, since remand would mean a separate trial and appeal of these claims, and would possibly prolong the federal litigation. Since plaintiffs are satisfied with the jury award in the federal case, most believe that

their primary task is holding on to the jury award, not augmenting it and subjecting the case to yet another round of litigation and appeals.

In July 1993, Alyeska settled with all plaintiffs for $98 million, forever changing the dynamics of the litigation. Alyeska had reluctantly joined hands with Exxon, forging a united front in the litigation even though its members were critical of Exxon's scorched earth tactics. The Alyeska settlement caught Exxon by surprise, and was kept secret from it until the last minute. The reason: this was a fundamental break in ranks. It was a public repudiation of Exxon and its handling of the spill, the cleanup, and the litigation.

The groundwork for the settlement was laid six months earlier, in San Diego. There, for the first time, plaintiffs' counsel began the arduous task of analyzing their own case and putting themselves in position to settle all claims on a global basis. San Diego was a watershed because plaintiffs as a group recognized that there could be, and would be, no resolution of their collective claims unless all of the different groups of claimants agreed on a common method to allocate any recovery among themselves.

Plaintiffs had originally joined forces to conduct discovery and litigate the case, but the San Diego conference was the first time that plaintiffs explicitly set forth the conditions for forging an all-inclusive alliance to settle the case. Until San Diego, plaintiffs could not, or would not, join hands because of the perceived opportunity to settle with Exxon piecemeal; either by group of claimants (*e.g.*, Alaska natives) or, more likely, by an individual lawyer on behalf of all of his clients. However, when plaintiffs finally realized that Exxon was not interested in settling with any one group, on any terms, plaintiffs decided that no settlement would ever be possible unless they could present a unified front, and the prospect of a global resolution of all claims.

In San Diego, plaintiffs' counsel started with a rudimentary evaluation and comparison of the damages suffered by all groups of plaintiffs, and unleashed a process that, except during trial, would consume much of their time and energy for the next three years. The idea was simple: build a damage "matrix" from the ground up. This was done by identifying each respective group of claimants, including a breakdown of the commercial fishermen by species, area and gear type (*e.g.*, PWS salmon seine), and using expert reports to "objectively" determine each group's damages. By adding up the damages of each group, a total damage figure could be ascertained, and each group's percentage share could be determined. Using this matrix as a base, each group could then calculate what any particular settlement offer was worth to it.

The matrix was further refined since it divided each group of claimants into "class" and "non-class" segments. For non-class claimants, each group was further divided according to the attorney representing each plaintiff. This enabled every group and sub-group of plaintiffs, and every attorney, to determine their shares of any settlement.

At the time of the Alyeska settlement, this damage matrix was still in a rudimentary stage of development. Over the next two and a half years, counsel for plaintiffs would refine the expert reports, undergo extensive and often tense negotiations, and make adjustments based on additional information obtained from the working groups formed to analyze the matrix. Crude as it was, the original damage matrix enabled the plaintiffs to settle with Alyeska, because it provided a mechanism to allocate the gross settlement of $98 million among the different groups of plaintiffs.

Unlike settlements in individual cases, class action settlements require notice to the class members and the approval of the court. Normally, proposed class action settlements involve a three step approval process: (1) the proposed settlement is presented to the court for preliminary approval; (2) after preliminary approval, notice of the settlement is sent to the class members, with an opportunity to object; and (3) final approval is granted (or denied) by the court, after a formal and open hearing. This process ensures that the court is able to perform its role as the guardian of the interests of the class, by enabling the court to scrutinize a settlement and approve it only if it is a "fundamentally fair, adequate and reasonable" compromise of class claims.

Convincing plaintiffs that the settlement was in their interest and should be approved required class counsel to confer with their clients and spend considerable time explaining the benefits of the settlement and the matrix. Counsel organized mass meetings in towns throughout PWS, Kodiak and Cook Inlet, and met and talked with hundreds of individuals outside of these meetings. The talks were not easy. While $98 million is a lot of money, the damage matrix was based on total damages of approximately $2 billion. To many of the plaintiffs, Alyeska was no less a villain than Exxon, for they believed that Alyeska was not properly prepared for a major emergency, and that the contingency plans it had routinely filed with the state were fundamentally flawed and inadequate to cope with a

major spill.

However, emotion aside, the settlement made sense. It eliminated a significant but nevertheless subsidiary defendant, allowing plaintiffs to focus on Exxon for trial. It provided a small but welcome source of recovery for plaintiffs, helping them through yet another weak fishing season. It provided a war chest for the litigation, helping to alleviate the strain on plaintiffs' counsel, who were funding the litigation out of their own pockets and on a pure contingency basis.

The parties conditioned the settlement on the issuance of a court order barring Exxon from seeking "contribution" or "indemnity" from Alyeska in the event Exxon lost at trial. Such a "contribution bar order" is a standard part of any settlement where there are multiple defendants, for it is the mechanism that ensures that the settling defendant (here, Alyeska) buys "total peace." However, as the non-settling defendants are entitled to offset the settlement against any trial award they are required to pay, a court must determine whether the amount of the settlement will be offset against an adverse judgment pro tanto (dollar for dollar) or on the basis of "proportionate fault." To ensure that the settlement would not diminish the ultimate recovery against Exxon, plaintiffs agreed to proceed with the settlement only if the offset was *pro tanto*.

Exxon, however, wanted to tie up the settlement in court, and delay its implementation and the distribution of money to plaintiffs. Exxon therefore devised a very clever strategy. First, Exxon agreed that the offset should be *pro tanto*, but it insisted that a "good faith" hearing would be necessary. Such a hearing, however, would negate many of the advantages of the settlement, since it would require a full evidentiary hearing on each of the parties' relative culpability. From the plaintiffs' perspective, such a hearing would have been interesting, for it would have pitted the two defendants against each other. However, Judge Holland ruled that a separate good faith hearing was not necessary to determine that the settlement was fair.

Exxon next argued that the contribution bar order should be reciprocal, but that it did not apply to either party's contractual rights for indemnity. Judge Holland agreed. However, since Alyeska was unwilling to go forward with the settlement on these terms because it wanted to seek contractual indemnification from Exxon for the costs of the clean-up, the settlement was stalled. Faced with the prospect of trying a case against "an empty chair" at trial, the parties finally agreed that Exxon would be entitled to additional offsets based on plaintiffs' recovery.

The effect of Exxon's maneuvers was to delay distribution of the Alyeska money for over a year, placing further pressure on plaintiffs as they went to trial.

The last significant legal development before trial was Judge Holland's certification of a "mandatory punitive damages class" in March 1994. The class action plaintiffs had originally sought to have such a class certified by Judge Shortell in 1990, but Judge Shortell did not do so, in the face of vehement opposition from Exxon, Alyeska, and certain of the plaintiffs. However, once the cases were removed to federal court, and trial was imminent, Exxon brought its own motion, before Judge Holland, to certify a mandatory punitive damage class.

Under Rule 23(b)(1)(B), a court may certify a mandatory class (no opt outs) if there is a risk that the resolution of the claims of some plaintiffs would be "dispositive of the interests" of other class members or would "substantially impair or impede their ability to protect their interests." Courts have interpreted this to mean that a mandatory class is appropriate in circumstances where there is a "limited fund" available to compensate victims. This may occur, for example, when a company does not have sufficient resources to satisfy the claims against it, or the only money available is in the form of an insurance policy which is not large enough to pay all of the victims in full. To avoid a race to the courthouse, where the first plaintiff to get a judgment gets the money, leaving nothing (or much less) for other equally deserving plaintiffs, all plaintiffs with the same type of claim can be placed in a mandatory class. This ensures that the available funds for recovery are divided equitably.

In this case, such a theory seems absurd, given the fact that Exxon has revenues of over $100 billion a year, average net profits of $5 billion a year, and equity of approximately $35 billion. Even on a bad day, Exxon appears capable of paying any conceivable judgment. However, Judge Holland, at Exxon's urging, nevertheless certified a mandatory punitive damage class on a limited fund theory.

In essence, Judge Holland based his ruling on Supreme Court precedent establishing that any punitive damage award should be no greater "than reasonably necessary to punish and deter" and that the "Due Process Clause of the Fourteenth Amendment imposes substantive limits beyond which penalties may not go." While the Supreme Court has resisted drawing a bright line marking the acceptable ratio, it has insisted that in each particular case, punitive damages cannot be so great as to

be disproportionate to the value of the actual damages suffered. Since this test establishes some outside limit on the amount of punitive damages that may be awarded, Judge Holland reasoned that there was a limited fund:

> ...it is apparent that a defendant's assets are not the only consideration which may limit a punitive damages award. Substantive due process also limits punitive damages by placing reasonable limits on punishment. A defendant with tremendous assets, such as Exxon, does not face unlimited punitive damages. Rather, due process places a limit on punitive damages and, in substance, creates a limited fund from which punitive damages may be awarded.

To ensure that the limited fund is equitably divided among all potential claimants, and not exhausted before all plaintiffs have had their day in court, Judge Holland certified a punitive damages class consisting of "all persons or entities who possess or who have asserted claims for punitive damages against Exxon...which arise from or relate in any way to the grounding of the EXXON VALDEZ or the resulting oil spill."

Many plaintiffs' attorneys opposed certification of a mandatory punitive damages class, and viewed it as another ploy by Exxon to divest Judge Shortell of his authority. By prohibiting Judge Shortell from trying punitive damages as part of the claims of those few plaintiffs that were still in his court, Exxon sought to hold the punitive damage trial in a favorable courtroom with a favorable judge. Plaintiffs, of course, had the same perception, and were concerned that Judge Holland would, in essence, minimize the risk to Exxon by setting up a trial stacked in Exxon's favor and, if necessary, protecting Exxon if the jury imposed a large punitive damage judgement against Exxon. In contrast, if Exxon faced a punitive damage trial in state court, where its risks were greater, some plaintiffs' attorneys were convinced that Exxon would come to the bargaining table.

For these reasons, those plaintiffs still in state court and scheduled to begin trial in June 1994, a month after the federal trial was scheduled to begin, sought Ninth Circuit "interlocutory review" of Judge Holland's order. These plaintiffs argued that Judge Holland's order violated the Anti-Injunction Act. This act, which was designed to ensure that federal courts do not unnecessarily infringe on the jurisdiction of state courts, prohibits federal courts from enjoining state court actions except in a narrow set of circumstances, including where it is "necessary in aid of its jurisdiction."

The Ninth Circuit heard the petition for review on an expedited basis, within days of receiving the petition and in a hearing held by telephone (since all the parties were in Alaska, preparing for trial). In ruling on the petition, the Ninth Circuit did not reach Exxon's argument that the order was necessary to aid the jurisdiction of the federal court, an argument that plaintiffs contended was spurious. Instead, the Ninth Circuit affirmed Judge Holland's order on the grounds that it did not even implicate the Anti-Injunction Act. According to the Ninth Circuit, Judge Holland did not explicitly prohibit Judge Shortell from permitting plaintiffs to try their claim for punitive damages, but simply "requested" that Judge Shortell voluntarily comply with the order as a matter of "comity" and common sense.

Although in a technical, legal sense Judge Shortell voluntarily complied with Judge Holland's request, there was no doubt that he had no real alternative, without risking open warfare with a federal judge and inviting further direct orders from Judge Holland. However, the Ninth Circuit (with one dissenting voice) took the easy way out, and determined that, since Judge Shortell had not been formally enjoined to comply with the order, the Anti-Injunction Act was not at issue.

In the end, none of this mattered. Exxon's legal strategy prevailed -- there was a single punitive damage trial before Judge Holland. And Judge Holland provided Exxon with almost all of the procedural protections it sought. However, the jury still decided that a punitive damage award of $5 billion was necessary to deter and punish Exxon, and Judge Holland has consistently refused to disturb the jury's award.

Discovery in a mass tort or environmental case is usually expensive, time-consuming, and exhaustive. The issues concerning liability, causation and damages are difficult, and often involved complex legal as well as factual questions. Millions of pages of documents must be produced and reviewed, witnesses must be deposed, and experts must be hired to conduct studies and submit reports.

During discovery, the parties figure out the case, and their angle on the facts. From the perspective of the plaintiffs' attorneys, discovery is the vehicle that travels inside the company and into the corporate boardroom, allowing plaintiffs an opportunity to figure out what defendants knew and when, and what they did, or did not do. During discovery, defendants start to look past their indignation at being sued, and analyze the risks they face.

In this case, discovery took almost five years, and was conducted during the same time that the legal issues discussed above were hashed out. The defendants collectively produced millions of pages of documents. Plaintiffs took over a thousand depositions. Exxon took the deposition of thousands of plaintiffs, including virtually every fishermen, native and anyone else who brought an individual case, and required these plaintiffs to produce tax returns, business records, and other documents related to their damages. In addition, plaintiffs and Exxon each designated over a hundred individuals as expert witnesses. Most of these produced expert reports, collectively costing tens of millions of dollars, and were deposed, often for several days.

Plaintiffs conducted discovery on two fronts: liability and damages. As to liability, no one could contest that the *Exxon Valdez* crashed into the rocks, sending millions of gallons of oil into prize fishing grounds and onto the beaches and land bordering Prince William Sound. However, there were questions as to what caused the crash (Hazelwood's drunkenness, or crew fatigue) and the legal cause of the damages (were there intervening causes, such as a faulty steering mechanism or inadequate emergency clean-up plans). And of course, the key question for punitive damages, if not liability itself, was whether Exxon was reckless, not merely negligent. This turned in large part on Exxon's internal policies, its monitoring of Captain Hazelwood after he was released from an alcohol treatment center in 1985, and its response to warning signals and problems in the weeks and days proceeding the spill. While much of this discovery involved documents and fact witnesses, experts were engaged by both sides to analyze each of these issues.

The other front was damages, a field primarily for experts. These experts analyzed the impact of the spill on the environment, the fishing grounds, the communities and the different classes of plaintiffs. There were scientists, economists, sociologists, and individuals involved in the fishing industry. For example, experts studied the impact of the spill on the salmon and fishing harvests for 1989 and beyond, the price of fish in the market (the "taint" effect), and the value of fishing permits and fishing boats. There were also other experts analyzing the impact of the spill on property values, native culture, and the local communities. Studies were also conducted to assess the social and psychological impacts of the spill.

**The Battle Over Privileged Documents**

Discovery is also characterized by disputes: what documents are privileged, what documents are relevant, whether responses to interrogatories (written questions) are adequate. Here, the battle over privileged documents illustrates how a party can use discovery as a tactical weapon, causing delay and increasing the burden and expense on another party.

Typically, a party must produce all documents which are admissible at trial or likely to lead to admissible evidence. This standard is broader than the relevance standard used at trial, for discovery is just that, a time for exploration, within reasonable limits. Nonetheless, a party may withhold all privileged documents and all documents protected by the "work product doctrine." The law has established certain privileges, including the attorney-client privilege and the psychotherapist-client privilege. Any document not produced on the grounds of privilege or work product must be listed on a "privilege log," in which the author, recipients, subject matter and the claimed privilege of each document must be listed. A party may challenge the claim of privilege and, if necessary, file a motion with the court compelling the other party to produce the document.

Here, Exxon produced a series of privilege logs, on which it listed over 12,000 documents. However, plaintiffs were not able to evaluate the privilege claim based on the information contained in the privilege logs. Although plaintiffs tried to force Exxon to file more complete privilege logs, the parties, at Exxon's request, were ultimately ordered by the court to follow a "protocol" setting forth the rules and procedures for "challenging" documents claimed to be privileged. This process was enormously time-consuming. The end result was that plaintiffs were only able to challenge 3,000 of the 12,000 documents on Exxon's privilege log. While Exxon eventually produced over 90% of the challenged documents, over 9,000 documents were never challenged, even though it is likely that many of them were not privileged and should have been produced. Whether important but unprivileged documents were thus "hidden" on the privilege log will never be known.

By the time the trial started in May 1994, nearly everyone in the country remembered the sickening pictures of oil drenched animals and thousands of dying otters, birds and fish. Most, however, thought the case was over, that Exxon had long ago admitted responsibility and paid the victims for their losses. Of course, Exxon had widely publicized its clean-up efforts after the spill and its $900 million settlement (consent decree) in 1991 with the state and federal governments for damage to the environment. And by the time the lawyers gave their opening statements in May of 1994, the criminal

trial and acquittal of Captain Joseph Hazelwood was long over.

So, when the trial against Exxon began, many were surprised. Plaintiffs were also surprised, for few thought that Exxon would actually permit a jury to sit in judgment. After all, a jury is perhaps the only institution beyond the control of a corporation like Exxon – a corporation that dwarfs most countries and stands as the 26th largest organization (including the major industrial nations) in the world.

Yet, Exxon had successfully shaped and limited the case before trial, and the trial was conducted according to rules favoring Exxon. Most evidence that Exxon found objectionable or "prejudicial" was excluded from the trial, and the jury instructions ultimately delivered were, at least in plaintiffs' view, tilted in Exxon's favor. And perhaps even more important from Exxon's perspective, Anchorage, Alaska was probably the best forum in the country to try this case. After all, the major industry in Alaska is oil, many Alaskans migrated to Alaska because of the great economic boom fueled by the Alyeska pipeline in the 1970s, and Alaska's 500,000 residents do not pay state taxes because the taxes collected from the oil industry are sufficient to finance government activities at the state level. Even more ominous for plaintiffs, commercial fishermen are not beloved throughout the state, and many residents consider them to be greedy, spoiled and selfish.

If nothing else, Exxon has been consistent. At no time before (or after) trial has Exxon expressed an interest in serious settlement negotiations. Perhaps Exxon thought it would defeat plaintiffs' claim for punitive damages. Perhaps it thought that Judge Holland would bail them out if the amount awarded was too large. Or perhaps Exxon was simply prepared to take its best shot and, if it lost, it was further prepared to delay the day of reckoning for several more years.

Prior to trial, the parties agreed on a four-phase trial plan. Phases I-III were to be tried before the same jury, and would determine: (1) in Phase I, whether Exxon was reckless (not merely negligent), thus entitling plaintiffs' to punitive damages; (2) in Phase II, the amount of compensatory damages to be paid to the commercial fishermen for salmon and herring losses; and (3) in Phase III, the amount of punitive damages, if plaintiffs prevailed in Phase I.

Phase IV, to be conducted at some later time before another jury, would determine compensatory damages for any plaintiffs whose claims were not tried in Phase II, including other types of fishermen (e.g., crab, shrimp), certain property owners whose land was touched by the spilled oil, and aquacultural associations.

In Phase I, the jury determined liability. For tactical reasons, Exxon stipulated before trial that it was negligent (what else could it say and maintain its credibility?). However, as punitive damages cannot be awarded based on negligent conduct, the question was whether Exxon's conduct was reckless.

Phase II of the trial plan was designed to try the claims of all commercial fishermen on an aggregate basis. This was possible because their claims for economic damages were based on lost fishing harvests for the years 1989-1994, and diminishment of fish prices due to the fact that salmon and herring from PWS and other areas were "tainted" in the market because of the spill. The jury was not asked to determine the damages suffered by any one fisherman, but it did determine damages suffered by fishermen, broken down by area (e.g. PWS, Kodiak, Cook Inlet), year, and species of fish.

In many "mass tort" class actions, such a trial structure would not be viable. For example, while liability can be determined on a classwide basis, damages for personal injuries caused by a toxic spill or a defective product are individual in nature. There is no total damage figure, since damages are based on personal injuries that can not be aggregated. Here, however, there are only so many fish, and the question of which fishermen would have caught them does not affect the total damages caused by the spill. This simple fact allowed the parties to try the case without requiring every plaintiff to come into court and prove his or her damages.

**Motions To Exclude Evidence At Trial**

Motions "in limine" are filed prior to trial. They have two purposes: (1) to prevent the other side from introducing potentially prejudicial or irrelevant evidence at the trial and (2) to establish a grounds for appeal, should the evidence be admitted. For these reasons, motions in limine have great tactical, as well as practical, significance. For example, a party may file a motion in limine seeking to exclude certain evidence, hoping or expecting to lose the motion, in order to create an issue for appeal if it loses at trial. Or a party may oppose a motion in limine, even though it has no intention of introducing the evidence, to create an issue for appeal if it loses at trial. Or a party confident of victory at trial may decide that it does not want to introduce certain evidence, even if permitted to do so, for fear of creating an issue on appeal. At the same time, victory is never certain, and failure to introduce

important evidence, even if it creates an appealable issue, can backfire.

Exxon's strategy was to exclude as much potentially damaging evidence as possible. For weeks before the trial, and before Phases II and III, Exxon filed motion after motion seeking to exclude evidence. With very few exceptions, Judge Holland ruled in Exxon's favor. Thus, the Court excluded evidence of other groundings and oils spills for which Exxon was responsible, evidence regarding the full extent of Captain Hazelwood's drinking history and alcohol abuse, evidence of damages to natural resources and the environment, evidence that at least $700 million of the money Exxon claims it spent on the spill was actually borne by others, and evidence that Exxon could pay $1 billion a year for ten years without incurring any "material affect" on its business strategies, operation or financial condition. Judge Holland also excluded evidence of the psychological, emotional and social impacts of the spill, on the grounds that such evidence did not relate to the economic injuries that were suffered. The Court even excluded evidence that would impeach testimony that Exxon and Hazelwood introduced. For example, plaintiffs were precluded from introducing testimony contradicting Hazelwood's testimony that he had not had a drink since the night of the spill.

It is ironic that losing motions in limine is a blessing, if one wins at trial. While plaintiffs' legal team at trial was at times discouraged and battered by what seemed like a string of defeats, victory at trial left them grateful for the result. Indeed, Exxon's great success in excluding evidence has significantly reduced the issues it can raise on appeal.

In the American legal system, judges decide legal issues and juries decide factual issues. The factual issues, however, cannot be decided in the abstract. The law determines which factual issues must be decided, which factors may be considered, and the applicable standard of proof. The judge has the job of instructing the jury on the law, after the evidence has been heard and before the jury meets to discuss and decide the factual issues. However, before the judge instructs the jury, each party submits proposed jury instructions to the judge, supported by legal arguments and case authority. This is a very important part of the case, and sets up issues for appeal, because a party cannot argue on appeal that a jury instruction misstated the law unless that issue is first raised with the court prior to the issuance of the jury instructions.

Here, Judge Holland, as requested by Exxon, went well-beyond what the Supreme Court recently held were sufficient jury instructions regarding punitive damages. For example, the jury was told that it could not focus on Exxon's gross assets or earnings, and that it could consider the impact punitive damages would have on shareholders. Judge Holland also imposed an additional threshold on the decision to award punitive damages, instructing the jury that punitive damages should not be award unless the jury determined that Exxon's conduct was sufficiently "reprehensible," even though the jury had decided in Phase I that the plaintiffs were entitled to punitive damages because Exxon's conduct was reckless. The jury was further told that, as mitigating factors, it could consider Exxon's post-spill remedial acts and whether the wrongful conduct was conducted by low-level employees and violated Exxon's policies. None of this was mandated by the Supreme Court.

In fact, in its post-trial motions, discussed below, Exxon did not challenge any of the Phase III jury instructions, and only three Phase I instructions. Since over 35 of the Phase I and III jury instructions were disputed before trial, it is clear that Exxon prevailed most of the time.

The trial lasted four and a half months. It began on May 2, 1994 when lawyers for both sides gave "mini" opening statements to all potential members of the jury. It ended on September 16, 1994 when the jury returned its Phase III verdict against Exxon for $5 billion. Each side had victories, both perceived and real. The jury listened to hundreds of witnesses, and sat through months of both entertaining and riveting testimony, as well as highly technical scientific evidence. By the end, everyone was exhausted.

Each side spent months preparing for trial. Thousands of exhibits were reviewed and selected, and every deposition was scrutinized for useful testimony. Witnesses were interviewed and selected, and experts were prepped. Mock trials were conducted, jury consultants were hired, and charts, graphs and other demonstrative evidence was prepared. Every exhibit was bar coded, and could be instantly called up on a large video screen in the courtroom. Trial outlines were drafted, direct examinations were rehearsed, and cross-examination questions were choreographed so that any "wrong" answer could be readily impeached by prior inconsistent testimony or exhibits. And each day and night, final preparations were made for the next day.

At trial, Exxon had lawyers from two large national law firms and a famous trial attorney from Tennessee, and Captain Hazelwood had a lawyer of his own. It was often difficult to figure out who was calling the shots. In contrast, plaintiffs had a clear lead attorney at trial; only one other attorney

played a significant role in the courtroom.

In Phase I, plaintiffs put on evidence demonstrating that Exxon was aware of the risks involved in transporting crude oil in PWS and of the risk of assigning a master with an alcohol abuse problem to captain its supertankers; that Exxon ignored the risk of having a known relapsed alcoholic captain a supertanker; that Exxon was reckless in returning Hazelwood to sea without effectively monitoring or supervising his activities; and that Hazelwood had abused alcohol on the night of the grounding, was impaired at the time of the grounding, and was reckless in leaving the bridge and turning the ship over to an inexperienced, unqualified and fatigued third mate. Exxon denied that Hazelwood was drunk, claimed that Hazelwood was the "most carefully watched man in the fleet," and that others (the Coast Guard, the third mate) were responsible for the spill. Exxon also defended its internal policies and procedures, claiming that they were sufficient and that they were followed.

On the morning of June 13, 1994, after eight days of deliberation, the jury returned its verdict. This was the most important day of the trial, for there would be no Phase III if the jury found in Exxon's favor. It did not. Plaintiffs and their lawyers celebrated, ecstatic that their years of hard work had paid off.

In Phase II, the parties put on evidence of damages to commercial fishermen. Plaintiffs wanted to present a tight, hard-hitting case which maximized the total damages awarded, without regard to the particular damages of any one group of fishermen. Therefore, to ensure that there was a joint and cooperative effort, to maximize the total recovery, and to minimize the risks facing any particular group, plaintiffs' counsel entered into a "Joint Prosecution, Settlement, and Damages Allocation Agreement" that set the percentage of the total recovery that would be allocated to each group, regardless of the outcome at trial. These percentages were based on a refined version of the Alyeska damage matrix. It also included shares for other groups of claimants, who were not part of the Phase II trial, with discounts applied to their share to account for their chance of success on appeal. The goal was to ensure that each group would receive its fair share of any recovery, based on its damages as quantified by plaintiffs themselves.

Plaintiffs asked for total Phase II damages in the neighborhood of $900 million, based on lost harvests and diminished prices due to the spill. Most of the evidence concerned salmon and herring harvests since 1989 and beyond, the impact of the spill on the fisheries, and global environmental factors affecting salmon and herring runs.

However, from a monetary perspective, the most important evidence concerned the impact of the spill on salmon and herring prices, which precipitously dropped after the spill and never recovered, after hitting an all-time high in 1988, the year before the spill. Plaintiffs put on evidence that the drop in price was due to the "taint effect" of the spill, which caused Alaskan sockeye salmon (and other species) to lose their premium position in the world market and especially in Japan. Plaintiffs claimed that there was a taint effect in 1989, 1990 and 1991, based on econometric studies demonstrating that no other market factors could account for the drop in price. Exxon argued that the drop in price was due to increased competition from "farmed salmon" from Norway, Chile and other places, which began flooding the market in 1989; high salmon inventories at the time of the spill; increased supplies of canned salmon; decreased consumer demand; and other non-spill related factors.

This time, Exxon won. After 16 days of deliberation, the jury returned a verdict of $287 million, well below what plaintiffs had requested. The jury had been required to answer nearly 80 special interrogatories on the verdict form, setting damages for each species of salmon and herring, for each year, for each geographical area. The jury rejected claims for price diminishment after 1989 (a claim valued at about $430 million) and lost harvest damages for every year after 1989, except PWS salmon in 1992-93 and PWS herring in 1993. When Judge Holland read the verdict, the courtroom was very quiet.

Phase III was very short, lasting just a few days. The Supreme Court has set forth a set of criteria that should be considered by a jury that is deciding on the amount of punitive damages to award. These criteria include the defendant's conduct, the harm caused or likely to be caused by such conduct, and the defendant's financial position.

Prior to the Phase III trial, the parties stipulated to the harm caused by the spill, in addition to the damages ascertained in Phase II. The parties stipulated because the punitive damage award applies to all members of the punitive damage class; this included all plaintiffs with a potential claim against Exxon, not just the commercial fishermen who tried their compensatory damages claims in Phase II. The stipulated amounts were read to the jury, with the caveat that Exxon admitted that there was some loss, but contended that the loss was lower than the stated amount.

In addition, plaintiffs put on evidence of Exxon's financial condition, to show what it would take to "send a message" to Exxon, the largest and most powerful corporation in the world, with staggering resources. Although plaintiffs did not ask for a specific amount in punitive damages, plaintiffs used various financial indicators to suggest what it would take to deter and punish Exxon. Thus, for example, plaintiffs showed that Exxon had annual average net profits of $5 billion a year since the spill, had annual average cash flow of $10-12 billion since the spill, had paid dividends of over $17 billion since the spill, and had watched its stock increase in value by nearly $20 billion in the years after the spill. Plaintiffs also showed that Exxon rewarded its top corporate executives after the spill with huge bonuses, stock options, and salary increases, and took no action against any individual except Captain Hazelwood.

In response, Exxon put on evidence showing that it was a "good corporate citizen," and that it had "voluntarily" spent $2.7 billion after the spill, to clean up the oil, provide injured plaintiffs with emergency money, and otherwise remedy its mistake. Exxon also trumpeted the remedial measures it had taken since the spill, and countered the financial information by showing that Exxon's profits from operations in the United States and especially in Alaska were not substantial.

The jury again deliberated for a long time. Most of the attorneys working on the case went home, or on vacation, and those who stayed packed boxes. After 13 days of deliberation, the jury returned a verdict of $5 billion. Ironically, Exxon's stock went up the next day, for the market had expected an even higher award.

**POST-TRIAL STRATEGY AND MOTIONS**

After the jury verdict, plaintiffs had one goal: get Judge Holland to enter a "final judgment" so that the "interest clock" would start running on the punitive damage award and so that the appeals process would begin. Nearly two years later, plaintiffs are still waiting. Every day, plaintiffs lose more than $700,000 in interest.

Immediately after the jury verdict was announced, plaintiffs requested and Judge Holland entered a final judgment in the case. However, Exxon soon filed a motion to vacate the entry of judgment, on the grounds that final judgment could not be entered until all post-trial motions regarding Phases I-III had been decided and Phase IV had concluded. Judge Holland vacated his prior order.

A month after the jury announced its Phase III verdict, Exxon filed eleven post-trial motions asking for judgment as a matter of law on various issues or, in the alternative, for a new trial. In five of these motions, Exxon attacked the Phase I and III verdicts, and in the other six motions, Exxon challenged the Phase II verdict. In both types of motions, Exxon faced a strict standard of proof.

In January 1995, Judge Holland denied each of the eleven motions. He ruled that the jury had a reasonable basis for every one of its findings, and he refused to second guess the jury or re-weigh the evidence. Judge Holland specifically refused to reduce or throw out the punitive damage award, stating that "the oil spill was the greatest environmental disaster in American history [and] disrupted the lives of tens of thousands of people." Judge Holland concluded:

> The jury received conservative and comprehensive instructions on the purpose of punitive damages and the manner in which they were to be assessed. The comprehensive instructions insured that the jury was not left to whim, conjecture, or speculation....The jury did not vote precipitously...This verdict and the amount awarded were not the result of passion or prejudice against Exxon.

In the end, Judge Holland provided Exxon with every conceivable procedural safeguard at trial, but he stood by the jury and the jury system. Had Judge Holland done anything else, he would have admitted failure.

Prior to trial, the parties agreed to try the Phase II compensatory claims in the aggregate, and submit proposed adjustments to the verdict to Judge Holland prior to entry of final judgment. Specifically, the parties agreed to adjust the Phase II verdict because of payments made to plaintiffs through the Exxon claims program, the Alyeska settlement, and the TAPLF fund, and because of opt-outs, dismissed plaintiffs, and released claims.

After trial, however, Exxon claimed that it was entitled to other adjustments, not specifically agreed upon, based on general language in these agreements referring to "other offsets or adjustments." Using this language as a lever, Exxon made a demand on plaintiffs for adjustments that according to Judge Holland amounted to "a massive assault on the jury determinations." For months, Exxon stretched out negotiations with the plaintiffs to resolve these issues, in effect making demands that

would have left plaintiffs owing Exxon money. The strategy was to delay entry of final judgment (and payment of interest), and force plaintiffs to agree to reduce the Phase II verdict as the price of entry of final judgment.

Ultimately, the parties filed motions to adjust the Phase II verdicts because they could not agree on the amount of the stipulated adjustments, or on the additional adjustments requested by Exxon. With respect to additional adjustments, Exxon not only sought to reduce the verdict by arguing that the jury failed to make certain findings or consider certain evidence, it also asked Judge Holland to reduce the Phase II verdict because, by spilling the oil, it argued that it had enabled plaintiffs to avoid certain costs or enjoy certain benefits. Judge Holland rejected all such arguments, concluding that "it is specious for Exxon to argue that it conferred a benefit on commercial fishermen by spilling oil."

However, as a result of the offset motion, the Phase II verdict was reduced from $287 million, to $118 million. Eventually, it was further reduced to $20 million, plus interest. These orders, however, were not issued until September 1995, a year after the trial ended.

The last issue preventing entry of final judgment is the resolution of Phase IV. Phase IV was designed to try the compensatory damage claims of all plaintiffs who did not try their claims in Phase II. This included commercial fishing claims for species other than salmon and herring, opt-out natives, oiled landowners, certain Native Corporations, oiled aquacultural associations, and a collection of other claims, many unique, including some for personal injury. The prospect of trying these claims was daunting: it would be complex, time-consuming and expensive. Most important, it would delay bringing the action to a close and entry of a final judgment on the punitive damages awarded by the jury.

Therefore, after months of negotiations, plaintiffs finally agreed to settle the Phase IV claims for a relative pittance ($3.5 million, none of which will be paid due to offsets), because the cost of delay was much greater than the possible value of the Phase IV claims. This was true, even if the true value of the Phase IV claims was set at $100 million, or $200 million, or higher. For Exxon, driving down the settlement of the Phase IV claims will not only reduce the amount it must pay, but, more significantly, it will permit Exxon to argue on appeal that the stipulation read to the jury regarding Phase IV damages was grossly overstated, thus calling into question the amount of punitive damages awarded by the jury.

The settlement, however, does not stand alone. In order to induce the Phase IV plaintiffs to agree, and to protect their right to claim a fair portion of the punitive damage award (as members of the punitive damage class) the settlement was conditioned on court approval of a "Plan of Allocation." The Plan of Allocation sets forth, on a percentage share formula, the amount each category of plaintiffs will recover on all claims, regardless of the source of recovery (*e.g.*, compensatory damages in state and federal trials, Alyeska settlement, punitive damages).

Under the Plan of Allocation, the Phase IV plaintiffs in effect trade off the risk and delay inherent in a Phase IV trial, for the right to participate in all recoveries, including the punitive damage award if it is sustained on appeal. All other plaintiffs also benefit, as settlement of Phase IV permits entry of final judgment, which will in turn expedite appellate resolution of the punitive damage award, with interest running as of the date the judgment is entered.

The genesis of the Plan of Allocation was the Joint Prosecution Agreement, which formalized the agreement amongst plaintiffs' counsel to proceed against Exxon on a collective basis and share any recovery in accordance with an allocation matrix. After trial, that allocation matrix was further refined, and adjustments were made as more information was gathered and further negotiations were conducted between representatives of each category of plaintiffs. The Plan of Allocation is thus based on extensive analysis of the damages incurred by each group, with discounts applied to those whose claims have been dismissed by Judge Holland pursuant to *Robins Dry Dock*. It is the culmination of years of efforts by plaintiffs and their counsel to find a just, fair and equitable basis to distribute any recovery against Exxon amongst the victims of the spill.

Very few plaintiffs objected to the Plan of Allocation. After notice was sent to approximately 30,000 potential class members, the only objectors were a handful of individuals, a few Native Corporations, and a group of large corporate seafood processors known as the Seattle Seven. The Native Corporations objected to the Plan on the grounds that the share allocated to them (3%) was too small. The Seattle Seven objected to the Plan on the grounds that they had not been included in the Plan at all, and were entitled to approximately 14.9% ($745 million) of the punitive damage award, based on their pre-trial settlement of their claims against Exxon.

The saga of the Seattle Seven is perhaps the most remarkable part of this entire case. In January 1991, the Seattle Seven settled their claims against Exxon for $63 million and withdrew from the case.

Thus, plaintiffs did not include them in the Plan of Allocation. However, the terms of the settlement were kept secret until the Seattle Seven filed their objections to the Plan of Allocation in March 1996. Then, for the first time, the Seattle Seven disclosed that they had in fact agreed entered into a joint venture with Exxon to seek to reduce any punitive damage award granted against Exxon.

Such a joint venture appears to be unprecedented. In a typical settlement, a party will release all of its claims, including any claim it has for punitive damages. Here, in addition to releasing their claims, including "all claims whatsoever for punitive damages," the Seattle Seven agreed to "assist Exxon recapture or obtain a credit or offset for any punitive damage award," to participate, at Exxon's request and at Exxon's expense, in any action against Exxon for punitive damages, and to ensure that, if they ever obtained a right or interest in any punitive damage award against Exxon, it "inured" to Exxon's benefit. Thus, while the Seattle Seven settled and dismissed their claims against Exxon, they were secretly aligned with Exxon and obligated to help Exxon reduce any punitive damage award obtained by other plaintiffs who had not settled with Exxon.

In January 1996, sixteen months after the $5 billion punitive damage award was announced and just days before the Court granted preliminary approval to the Plan of Allocation (pending notice to the class and final approval), Exxon and the Seattle Seven "amended" the January 1991 agreement. Under the amended agreement, Exxon paid the Seattle Seven $6 million to object to the Plan of Allocation, with a promised bonus payment of another $12 million if the objection successfully reduces the amount of punitive damages Exxon is required to pay. Exxon also agreed to pay the Seattle Seven's attorneys for filing the objection, and to indemnify the Seattle Seven for any liability they may incur as a result of their participation in these efforts.

Plaintiffs did not hesitate to condemn these actions as a fraud on the Court and a legal sham, and contrary to the public policy of punishing and deterring wrongful conduct. If such a scheme was countenanced by the Court, it would permit and encourage manipulation of the judicial system to reduce liability for punitive damages. Indeed, it would invite defendants like Exxon to pay off plaintiffs with weak claims and little chance of recovery, in order to reduce their exposure to a punitive damage award for egregious conduct. And it could be done without disclosing the deal to the court, the plaintiffs or the jury.

On June 11, 1996, Judge Holland granted final approval to the Phase IV Settlement and the Plan of Allocation, and rejected the Seattle Seven's objection to the Plan. Judge Holland held that Exxon had misled the court and the jury at trial, and that Exxon's secret agreements with the Seattle Seven were "such pernicious and flagrant violations of public policy as to render unenforceable their requirements that the Seattle Seven seek punitive damages on behalf of Exxon." Judge Holland further stated that he was "shocked and disappointed that Exxon had entered into such a repugnant agreement with the Seattle Seven" and held that "public policy will not allow Exxon to use a secret deal to undercut the jury system, the court's numerous orders upholding the punitive verdict, and society's goal in punishing Exxon's recklessness."

Still, final judgment has not been entered, because Exxon filed a motion asking Judge Holland to reconsider his order. In its motion, Exxon argues that the agreements with the Seattle Seven did not violate public policy and that Exxon and its attorneys acted in an ethical and appropriate manner. Whatever the outcome, the entry of final judgment was once again delayed.

Exxon will undoubtedly appeal the final judgment, as soon as it is entered. The grounds for the appeal will be in large part based on the post-trial motions Exxon filed and lost, and will include the jury instructions that it opposed, the motions in limine that it lost, and the argument that the Phase II jury verdicts were not supported by the evidence. The most important grounds of appeal, however, will be that the evidence did not support the Phase III punitive damage award, and that the punitive damage award was excessive as a matter of law.

Exxon's strategy of delay may pay off. On May 20, 1996, in a case entitled BMW v. Gore, the Supreme Court issued an opinion on punitive damages that went beyond its previous opinions and reversed a punitive damage award as "grossly excessive." The Supreme Court did not change its earlier position that there must be a reasonable relationship between the compensatory damages and the punitive damages awarded, but it more clearly articulated the grounds upon which a punitive damage award may be considered "grossly excessive" and thus violative of the Due Process Clause of the Fourteenth Amendment. In essence, the Supreme Court held that a punitive damage award must be measured by the "degree of reprehensibility" of the conduct, the ratio between the actual harm and the punitive damage award, and the civil and criminal sanctions that could be imposed for comparable conduct. The Supreme Court did not draw "a mathematical bright line" determining the ratio for constitutionally acceptable awards, but in holding that the award was "too big," it substituted its version of fairness for

that of the jury and the state court.

It is impossible to predict whether the Ninth Circuit, or ultimately the Supreme Court, will determine that the punitive damages award in this case is "grossly excessive," but Exxon will certainly highlight the BMW case in any appeal it pursues. Even if plaintiffs win, however, the outcome will not be final for years. After final judgment is entered, Exxon will have 60 days to appeal. A briefing schedule will then be established, briefs and the court record will be submitted, and oral argument will be scheduled. Typically, the Ninth Circuit decides cases within two to three years, but there is no guarantee. And if plaintiffs lose, everything will begin anew, with a new trial and appeal looming.

**CONCLUSION**

Mass torts are part of the modern litigation landscape. The *Exxon Valdez* litigation and trial provides a case study of the perils of such litigation, and the myriad issues that can complicate and prolong such litigation. Courts continue to struggle to manage these massive cases, seeking to use the legal tools at hand. Powerful and well-funded defendants do not lack imagination or incentive to pose innumerable legal barriers, and aggressively assert their legal rights and otherwise use the law, the courts and the judicial system to serve their interests. Plaintiffs who sustain injuries must be prepared for years of litigation, during which time the laws may change, their resources may be exhausted, and their lives must continue.

Here, the battle has lasted for seven years. Procedural and substantive victories have faded in importance, as new legal and factual issues suddenly appear. Exxon has the time and resources to fight every battle, and its grand strategy may yet turn defeat into victory. But even now, only one thing is certain: more than seven years after the spill, and more than two years after the trial began, there is still no end in sight.

**ENDNOTES**

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**About Lieff Cabraser**

Lieff Cabraser Heimann & Bernstein, LLP is a sixty-plus attorney law firm that has represented plaintiffs nationwide since 1972. We have offices in San Francisco, New York and Nashville. We represent plaintiffs in class and group actions and in individual lawsuits in cases involving substantial losses. For the last seven years, *The National Law Journal* has selected Lieff Cabraser as one of the top plaintiffs' law firms in the nation.

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## Proposed Legislative Amendments To Protect States

### I. Prohibit Removal to Federal Court of Actions filed by States

### A. 28 U.S.C. § 1445 Nonremovable actions

(e) A civil action filed in state court by or on behalf of a State, regardless of whether the claims arise under state or federal law, and notwithstanding any other provision of law.

### B. Class Action Fairness Act ("CAFA") 28 U.S.C. §§ 1332(d), 1453, and 1711-1715

No action filed in state court on behalf of a state may be removed to federal court under 28 U.S.C. Sections 1332(d), 1453, and 1711-1715 or any other provision of federal law. A party who improperly removes an action to federal court shall be liable for all costs and attorneys fees to the state.

### II. Prohibit Removal to Federal Court of OPA 90 Claims by States 33 U.S.C. § 2717(c)

(c) State court jurisdiction

A State trial court of competent jurisdiction over claims for removal costs or damages, as defined under this Act, may consider claims under this Act or State law and any final judgment of such court (when no longer subject to ordinary forms of review) shall be recognized, valid, and enforceable for all purposes of this Act. Any such action filed on behalf of any State shall not be subject to removal to federal court, absent express consent of the State.

### III. Impose Deadline and Sanctions Related to Remand Proceedings 28 U.S.C. § 1447(c)

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). Not later than 30 days after the date on which a motion to remand is filed, the district court shall complete all action on the motion. If no action is taken by the district court within the 30-day period, the case shall be automatically remanded. If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. ~~An order remanding the case may require~~ In all cases remanded, whether by order or by automatic remand, the removing party or parties shall be responsible for payment

of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

**IV. Prohibit Injunctions of Actions Brought By or on Behalf of a State 28 U.S.C. § 2283**

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. Notwithstanding these exceptions, a court of the United States may not under any circumstance grant an injunction to stay proceedings brought by a State in its own State court.

**V. Exempt States from the Procedural and Substantive Rights Granted Vessel Owners**

**A. Rule F, Supplemental Rules for Admiralty or Maritime Claims, Federal Rules of Civil Procedure**

(3) Claims Against Owner; Injunction. Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action. Notwithstanding the compliance of the owner with subdivision (1) of this rule and any application of the plaintiff to enjoin further action or proceeding, no vessel owner or plaintiff may utilize this rule to enjoin any action or proceeding brought by a state.

. . .

(10) Claims Made By a State. Any action or proceeding initiated by a state against a vessel owner in a state forum shall remain in that forum. No action, proceeding or claim of a state against a vessel owner shall be subject to this rule.

**B. General Limit of Liability, 46 U.S.C. § 30505**

(a) In general. Except as provided in section 30506 of this title [46 USCS § 30506], the liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and pending freight. If the vessel has more than one owner, the proportionate share of the liability of any one owner shall not exceed that owner's proportionate interest in the vessel and pending freight.

(b) Claims subject to limitation. Unless otherwise excluded by law, claims, debts, and liabilities subject to limitation under subsection (a) are those arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner.

(c) Wages. Subsection (a) does not apply to a claim for wages.

(d) Claims by a State. Subsections (a) and(b) do not apply to claims made by a state. A vessel owner shall not be entitled to limit its liability to a state for costs, losses or damages incurred by the state.

STATE OF MISSISSIPPI

JIM HOOD
ATTORNEY GENERAL

May 11, 2010

Mr. John E. (Jack) Lynch Jr.
Global Exploration and Production
Global Supply and Trading
US General Counsel
501 WestLake Park Boulevard
Houston, TX 77079

Re: Request for Additional Assurances

Dear Mr. Lynch:

Thank you for your prompt letter of May 10, 2010, in response to the joint letter from the Gulf Coast Attorneys General dated May 5, 2010. In it, you state that BP will not raise the caps under the Oil Pollution Act against individuals or states and that no claimant against the BP fund will waive its right to file or join a suit later. If my interpretation of your letter is not correct, please send me a letter or email advising me otherwise.

As a veteran of the insurance litigation after Katrina, I learned it is in everyone's interest that claims be paid quickly through a transparent claims process with no caps and no waivers. As I told you during our meeting, the people affected by the oil disaster will be looking to their attorneys general to assess the fairness of the BP claims process. During our meeting I explained that I would need more information and written assurances before I try to explain the BP claims process to our citizens.

In order for me to fully embrace the BP claims process and recommend it to the affected Mississippians, I must have written commitments from BP that it will do the following: (1) establish a website with a link on BP's homepage on which claimants may file claims electronically; (2) accept an independent monitor of the claims process; (3) provide my office with a claims manual describing the claims process with same being made available on your website and at your claims centers; (4) assure that any waivers signed by claimants or boat owners are effectively revoked, and submit to me a list of all of the claimants in Mississippi who signed these waivers and their contact information; and (5) disclose to me the maximum number of barrels per day that the well is capable of emitting.

As I explained to you in our meeting, any assertion by BP of federal preemption of potential state claims or removal by BP to federal court and consolidation of these claims would be viewed with disdain by the states. Consequently, the final assurance I need before agreeing to endorse the BP claims process is BP's written agreement that it will not assert

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federal preemption and will not remove to federal court or attempt to consolidate claims asserted by the states.

Pursuant to your request, I hereby designate my assistant, Melanie Webb, to receive the daily updates for the State of Mississippi on the claims handling process. Please email daily the number of claims pending, the type of claims, how many have been paid, and the total amount of payments to date for each affected state to mwebb@ago.state.ms.us.

Please let me know when I can expect a response from you regarding these critical questions. I look forward to hearing from you and to working with BP to ensure that all individuals, private companies, and governmental entities are fully compensated for all losses associated with this event.

Sincerely yours,

Jim Hood

Jim Hood
Attorney General

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Mr. CONYERS. Darryl Willis, vice president of resources at BP.

On April 29, 2010, he accepted the role of overseeing BP's claims process.

Born in Louisiana, undergraduate Northwestern State University in Louisiana, master's degree in geology and geophysics in Louisiana State University, MBA from Stanford University, and he has been with BP since 1996 when he started as the lead operations geoscientist for BP North American gas.

**TESTIMONY OF DARRYL WILLIS, VICE PRESIDENT, RESOURCES, BP AMERICA**

Mr. WILLIS. Chairman Conyers, Ranking Member Smith, Members of the Committee, I'm Darryl Willis, vice president of resources for BP America.

On April 29, 2010, I accepted the role of overseeing BP's claims process, which was established in the wake of the explosion and fire aboard the Deepwater Horizon drilling rig and the ensuing oil spill. I'm here to share information with you about the claims process.

This horrendous incident, which killed 11 workers and injured 17 others, has profoundly touched all of us. There has been tremendous shock that such an accident could have happened and great sorrow for the lives lost and the injuries sustained.

I would like to make one thing very clear. BP will not rest until the well is under control and we discover what happened and why in order to ensure that it never happens again.

As a responsible party, under the Oil Pollution Act of 1990, we will carry out our obligations to mitigate the environmental and economic impact of this incident.

I would also like to underscore that the causes of the accident remain under investigation, both by the Federal Government and by BP itself. So I'm prepared today to answer your questions regarding the claims process.

I cannot, however, respond to inquiries about the incident itself or the investigation.

Above all, I want to emphasize that the BP claims process is integral to our commitment to do the right thing. We will be fair and expeditious in responding to claims. We have already paid out more than 35—$37 million in claims.

We understand how important it is to get this right for the residents and businesses as well as for the State and local governments. To that end, we have established 24 walk-in claims offices operating in Louisiana, Mississippi, Alabama, and Florida. And we have a call center that is operating 24 hours a day, 7 days a week. We have also established an online claims filing system to further expand and expedite our capacity to respond to potential claimants.

All together, we have nearly 700 people handling claims with over 400 experienced claims adjusters on the ground working in the impacted communities. We will continue adding people, offices, and resources as required and are committing the full resources of BP to making this process work for the people across the Gulf Coast.

Our focus is on individuals and small businesses whose livelihoods have been directly impacted by the spill and who are temporarily unable to work. These are fishermen, the crabbers, the oyster harvesters and shrimpers with the greatest immediate financial need. BP is providing expedited interim payments to those whose

income has been interrupted. Approximately 13,500 claims have already been paid totaling, as I said, $37 million to date.

The claims process was established to fulfill obligations as a designated responsible party under the Oil Pollution Act of 1990, OPA. Thus we are guided by the provisions of OPA 90 as well as the U.S. Coast Guard regulations when assessing claims.

I am not an attorney and therefore cannot speak to particular legal interpretations or applications of OPA 90. I can, however, reiterate that BP does not intend to use the $75 million cap in the OPA 90 statute to limit our obligation to pay these claims. We expect to exceed it, and we will not seek reimbursement from the oil spill liability trust fund.

In closing, I would like to add a personal note. My ties to the Gulf Coast run deep. I was born and raised in Louisiana. I went to high school there, college there and graduate school there.

My family spent many, many summers vacationing along the Gulf Coast. My mother lost her home of 45 years in Hurricane Katrina, and the recovery process was time-consuming and at many times incredibly frustrating. I know firsthand that the people in this region cannot afford lengthy delays in addressing economic losses caused by this spill.

I volunteered for this assignment because I am passionate about the Gulf Coast. It is the place I call home, and I want to be part of the solution.

Finally, as we respectfully informed the Committee, I have been asked to testify at a hearing chaired by Senator Landrieu of Louisiana this afternoon. Therefore, I may need to excuse myself if this hearing runs past 2:30 p.m.

If that happens, I will be pleased to answer any additional questions from this Committee in writing.

And with that, I welcome your questions.

[The prepared statement of Mr. Willis follows:]

PREPARED STATEMENT OF DARRYL WILLIS

**United States House of Representatives**

**Committee on the Judiciary**

**Darryl Willis**

**Vice President, Resources, BP America**

**May 27, 2010**[1]

Chairman Conyers, Ranking Member Smith, members of the committee. I am Darryl Willis, Vice President, Resources, BP America.

On April 29, 2010, I accepted the role of overseeing BP's claims process, which was established in the wake of the explosion and fire aboard the Transocean Deepwater Horizon drilling rig and the ensuing oil spill. I am here to share information with you about that claims process.

This horrendous accident, which killed 11 workers and injured 17 others, has profoundly touched all of us. There has been tremendous shock that such an accident could have happened, and great sorrow for the lives lost and the injuries sustained.

I would like to make one thing very clear: BP will not rest until the well is under control and we discover what happened and why, in order to ensure that it never happens again. As a responsible party under the Oil Pollution Act of 1990, we will carry out our responsibilities to mitigate the environmental and economic impact of this incident.

I would also like to underscore that the causes of the accident remain under investigation, both by the federal government and by BP itself. I am not involved in the investigation process and have no independent knowledge of it. I thus am not in a position to answer questions about the incident itself or the investigation.

The BP claims process is integral to our commitment to do the right thing. We will be fair and expeditious in responding to claims. We have already paid out nearly $30 million in claims, and we will continue to operate the claims process for as long as economic losses caused by the oil spill continue. We understand how important it is to get this right for individuals and businesses, as well as for state and local governments.

Before describing our process to you, however, I'd like to add a personal note. My ties this Gulf Coast run deep. I was born and raised in Louisiana, and I went to college and graduate school there. At age 70, my mother lost her home of 50 years in Hurricane Katrina, and the recovery process was time-consuming and sometimes frustrating. I know firsthand that people in this region cannot afford lengthy delays in addressing economic losses caused by this spill. BP is committed to ensuring that they do not experience them.

[1] The data described throughout this testimony is accurate to the best of my knowledge as of 9 a.m., Wednesday, May 26, 2010 when this testimony was prepared. The information that we have continues to develop as our response to the incident continues.

Over the last few weeks, I have been traveling to communities affected by the spill. I have been to the parishes along the Gulf Coast in Louisiana and I have been in Mississippi and Alabama. I have participated in town halls, talked to people impacted by the spill, and fielded numerous inquiries about the claims process. I wish circumstances were different, but it has been a privilege to live and work again among the residents of the Gulf Coast.

**Establishing the claims process**

Let me now tell you about our claims process.

The explosion occurred late on April 20, and the Transocean Deepwater Horizon rig sank late on the morning of April 22. BP initiated the claims process on April 24 and had a toll-free call center in place on April 25. As noted, I personally became involved on April 29.

On that day, I traveled to Venice, Louisiana, a coastal community on the front lines. I spoke with local fishermen and shrimpers. Although BP had two claims offices open by that time, we did not yet have an office in Venice. I committed to stay in Venice until a BP claims office was opened.

On Saturday, May 1, at 8 a.m., we opened the doors to our new Venice claims office. We had approximately 100 claimants come through that same day, and have had a total of about 1000 since.

That we were able to stand up a Venice claims center so quickly, I think, illustrates the tone and standard for our operations going forward: we will expand our claims process as expeditiously as possible and avoid any unnecessary delay. The pace and scale of our claims effort is unprecedented. It is larger and has grown more quickly than any before or since the passage of the Oil Pollution Act of 1990.

Even before this event, BP had a relationship with a company called ESIS – they are trained to respond quickly and professionally to significant events. Organized in 1953, ESIS is part of the ACE Group, headed by ACE Limited. The ESIS Claims team assisting BP was developed in 1995 and has extensive experience. ESIS has handled over 200 incidents, both small and large. The company is well known as a leader in its field. Speaking personally, I have been impressed by the professionalism and dedication of our ESIS colleagues in providing the backbone of our claims process.

**Claims operations**

We now have a call center operating 24 hours a day, seven days a week. Potential claimants can call 1-800-440-0858 for instructions on documentation needed to support a claim and to receive an in-person appointment time at one of our claims office. We now have nearly 700 people assigned to handle claims, with over 400 experienced claims adjusters on the ground working in the impacted communities.

Twenty four walk-in claims offices are operating in Louisiana, Mississippi, Alabama and Florida. They are located in:

**Alabama:** Bayou La Batre; Foley; Orange Beach.

**Florida:** Apalachicola; Crawfordville; Fort Walton Beach; Gulf Breeze; Panama City Beach; Pensacola; Port St. Joe; Santa Rosa Beach;

**Louisiana:** Belle Chasse; Cut Off; Grand Isle; Hammond; Houma; New Orleans; Pointe-a-La-Hache; St. Bernard; Slidell; Venice;

**Mississippi:** Bay St. Louis; Biloxi, Pascagoula.

Spanish and Vietnamese translators are available in several offices.

We have also established an on-line claims filing system to further expand and expedite our capacity to respond to potential claimants. It is available at www.bp.com/claims.

We will continue adding people, offices and resources as required and are committing the full resources of BP to making this process work for the people of the Gulf Coast states.

**Lost income claims**

Our early focus was on the individuals and small businesses whose livelihoods have been directly impacted by the spill and who are temporarily unable to work because of it. These are the fishermen and shrimpers with the greatest immediate financial need – they often have minimal savings and rely on their monthly income to pay bills and feed their families.

BP is providing expedited interim payments to those whose income has been interrupted. Within 48 hours of receiving supporting documentation, the claim will be evaluated, and the claimant will be notified if an advance payment will be provided.

The interim payment is intended to replace roughly one month's lost income, based on the documentation provided by the claimant. This interim payment will be adjusted based on additional documentation. The check for the advance payment will be available at the nearest BP Claims Center, the location of which will be communicated to the claimant. Alternative arrangements can be made if this method of check delivery is not feasible.

Claimants will continue receiving income replacement for as long as they are unable to earn a living as a result of injury to natural resources caused by the spill. Subsequent checks will be generated automatically and mailed in a manner similar to a payroll system. So a claimant receiving income replacement need only go through the claims process at the beginning, and will not need to return to the claims center to get subsequent checks.

Over 26,000 claims have been filed and approximately 12,000 have been paid, totaling over $36 million, mostly in the form of lost income interim payments. We intend to continue replacing this lost income for those impacted for as long as the situation prevents them from returning to their work.

Of course, these interim lost income payments are just one element of the economic loss for which we are taking responsibility. I would now like to address other types of claims that BP will pay and how we will assess them.

**Guiding principles**

We have stated clearly and repeatedly that BP will pay all "legitimate" claims. Members of Congress and the general public have been asking what that means. I'd like now to outline the guiding principles around assessing a legitimate claim.

The claims process was established to fulfill our obligations as a designated "responsible party" under the Oil Pollution Act of 1990 ("OPA"). Thus, we are guided by the provisions of OPA '90 — as well as by US Coast Guard regulations — when assessing claims.

I am not an attorney and therefore cannot speak to particular legal interpretations or applications of OPA '90. I can, however, reiterate that BP does not believe that the $75 million cap in the OPA '90 statute is relevant. We expect to exceed it, and we will not seek reimbursement from the Oil Spill Liability Trust Fund.

BP's obligations are not, however, limitless. The law defines the types of claims that a "responsible party" must cover. Under OPA '90, BP must pay specific categories of damages caused by the spill:

- Removal and cleanup costs;
- Property damage;
- Subsistence use of natural resources;
- Net lost government revenue due to injury, destruction or loss of property or natural resources;
- Lost profits/earnings due to injury, destruction or loss of property or natural resources;
- Increased or additional public services.

The Coast Guard has a significant role in overseeing our claims process, in addition to being responsible for the National Pollution Fund. The Coast Guard has nearly 20 years' experience in deciding OPA claims, and it has developed detailed specific guidance for determining whether a claim is legitimate under OPA. We will rely on its

experience and guidance in determining which claims are legitimate. But throughout, our intent is to be efficient, practical and fair.

**Documentation**

Some have also asked about the documentation we require as part of the claims process.

The documents we ask for are not onerous, and we are not requesting them in order to delay paying legitimate claims. We think the public will understand that we need documentation to prevent fraudulent claims and to substantiate the amount of money owed for a given claim.

The majority of our claims paid to date have related to lost income. For these claims, we have generally requested the previous year's tax returns to estimate lost income – without question this is the most reliable verification of income. If that documentation is not available, we have accepted other forms of documentation that should be reasonably available, such as a fishing license, boat registration (in the case of a boat owner), trip tickets or some other proof of income.

Obviously, as claims become more complex, documentation requirements will increase. But larger businesses and state and local governments should be have the ability to satisfy enhanced documentary requirements.

We are trying to make sure that people with legitimate claims are paid quickly.

We have not required and will not require any claimant to waive any legal rights where we make an interim payment on a claim. That is, where we make an interim payment for a claim pursuant to OPA, we will not require or request a release or any other waiver of liability.

**Independence of the process**

Questions have been raised about the independence of our process.

As I mentioned before, the entire process is overseen by the Coast Guard, as required by law. In addition, OPA provides for the National Pollution Fund, also overseen by the Coast Guard.

Any claim that we deny or that a claimant believes has been underpaid can be submitted to the federal Oil Spill Liability Trust Fund (the "NPF"). If the Coast Guard determines that the claim should be paid, the Coast Guard will pay the claimant out of the NPF — and the Coast Guard will then have a right to seek reimbursement from BP.

Second, claimants do not give up any rights to pursue litigation or participate in litigation against BP. While we hope to avoid such outcomes, this option also serves as an independent check on our process.

I have personally received extensive positive responses about our claims process. It is not a perfect process and likely never will be perfect. But we are committed to improving it, in response to reasonable suggestions, and we will continue to do so.

**Conclusion**

In closing, let me make clear once more our intention to do the right thing. This is a very difficult situation – I volunteered for this assignment because I'm passionate about Gulf Coast. It's my home and I want to be part of the solution. No one is more invested than I am in making sure that we respond to claims in a fair, reasonable, and expeditious manner.

The residents, businesses, and state and local governments in the Gulf are key to our operations.

Moreover, the eyes of the world are upon us. President Obama and members of his Cabinet have visited the Gulf region and made clear their expectations of BP. So have members of Congress, as well as the general public.

We know that we will be judged by our response to this crisis, and our claims process is a critical aspect of this. I am confident that we will meet this challenge. As our senior management has made clear, the entire resources of the company are behind us.

Thank you, and I look forward to taking your questions.



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Mr. CONYERS. Thank you. But if we need you for additional questions, we will want you to be present.

Attorney Rachel Clingman, acting general counsel for Transocean, partner in charge of Sutherland's Houston office who specializes in energy, transportation and commercial litigation,

graduate of Rice University, University of Texas Law School, and has been honored regionally and nationally for legal excellence.

**TESTIMONY OF RACHEL G. CLINGMAN, ACTING GENERAL COUNSEL, TRANSOCEAN, LTD.**

Ms. CLINGMAN. Thank you, Chairman.

Chairman Conyers, Ranking Member Smith and other Members of the Committee, thank you for the opportunity to speak with you today. I am a partner with Sutherland Asbill & Brennan, but at present, I am working at Transocean, helping to address the legal issues related to the Deepwater Horizon incident.

The last few weeks have been a time of great loss, sadness and frustration for many, including all of us at Transocean. Our hearts and prayers are with the widows, children and families of the 11 lives who were lost, nine of whom were Transocean employees. Our hearts are with those who were injured and with those who evacuated and survived. We and I offer our deepest sympathies.

We are committed to protecting the memory of those who were lost and to providing for their families.

I am here today to report to the Committee on various legal issues facing Transocean. First and foremost, Transocean is fully prepared to meet all of its legal obligations arising from the Deepwater Horizon accident. I want to assure the Committee and those represented here today that addressing and resolving the claims of Transocean employees who were injured and the families who lost loved ones is a top company priority. Those discussions are beginning now, and it is our hope that we can resolve these claims fairly, quickly and amicably.

The Deepwater Horizon accident has resulted in many legal challenges for the courts and the companies and the families and claimants represented here. These involve class-action lawsuits as well as claims under the two frameworks of the Oil Pollution Act and general maritime law, including the Jones Act.

As you know, this Congress enacted OPA, the Oil Pollution Act, in 1990 to compensate on a no-fault basis people and businesses for damages caused by oil spills and contamination. The statute establishes a claims process that enables anyone damaged by an oil spill to obtain compensation from a responsible party. In this case, the Coast Guard designated BP as the responsible party for oil and gas flowing from the subsea well. As you have heard again today, BP accepted that designation and has testified that it will pay all legitimate claims regardless of the statutory $75 million cap.

As we understand, BP has established that process and paid a substantial number of claims to date.

The U.S. Coast Guard designated Transocean as a responsible party under OPA, and we have accepted that responsibility for any contamination from the mobile work space, the rig. There has been no indication thus far of any contamination from the rig itself. However, we stand ready to meet any legal obligation that arises from that status.

The OPA claims process allows someone to file a lawsuit only if and when BP has denied a claim or not reached a claim to the claimant's satisfaction. Nonetheless, as you know, a great number of lawsuits have already been filed, including approximately 135

against Transocean across eight States. Most of these are class actions in which small business interests and other commercial interests claim a current or potential future loss of business in the aftermath of the spill.

There is substantial overlap in the lawsuits. Florida property owners, for example, are included in the proposed class of at least three lawsuits today. Louisiana residents who derive income from the coastal zone are claimants in at least four class actions. And overarching all of these suits are class actions on behalf of all persons damaged in the Gulf of Mexico.

These multiple and duplicative lawsuits create confusion. They strain judicial resources and could lead to disparate treatment for litigants who are similarly situated. For these reasons, both plaintiffs and defendants have filed motions asking to establish a multidistrict litigation or MDL proceeding to bring all of these lawsuits together in one court and consolidate those claims.

The second category of claims as I indicated are not the class actions but personal injury and death claims covered by general maritime law, as mentioned by Chairman Conyers.

These include the Jones Act, which provide seamen

the right to sue and which create favorable presumptions that ease their path to recovery. This maritime body of law applies to the crew members of the rig.

At the same time that that law enacted by Congress makes it easier for seamen to pursue and recover claims, it also provides limitation actions on total damages for such claims.

Under the maritime law, Transocean has filed a maritime limitation of liability action in the United States district Court for the Southern District of Texas. This law, recently reviewed and recodified by Congress in 2006, allows ship owners to consolidate actions and define their liability in a situation like this. We have filed the action. We have requested consolidation, and we have indicated an initial proposed limitation of liability based on the statutory calculation at just under $27 million.

The ultimate amount and what will be included will be left to the court governing that action.

I want to stress that limitation does not apply to claims asserted against Transocean under the Oil Pollution Act. Transocean has asked the limitations court to clarify the existing order to make that clear, and that order has been so amended.

Transocean filed this limitation action for several reasons. We believe it is important to have a central venue for these actions to maintain some continuity and consistency that will not be possible if lawsuits proceed in various States and Federal courts.

In addition, our underwriters instructed us to file the limitation action, and we did so to avoid losing any insurance coverage that will help pay claims.

Overridingly, however, Transocean is committed to resolving all of the interrelated legal matters diligently expeditiously and fairly.

Our overriding mission in connection with BP, the unified command, government officials and other contractors is to stopping the leak, containing contamination, and determine the cause of explosion.

And my heart is lightened to hear Chairman Conyers say that the top kill, kill-shot method may have been successful.

I thank you again for the opportunity to speak with you today, and I look forward to answering any of the questions you may have.

[The prepared statement of Ms. Clingman follows:]

PREPARED STATEMENT OF RACHEL G. CLINGMAN

Testimony Before The Committee on the Judiciary

United States House of Representatives

May 27, 2010

Liability Issues Surrounding the Gulf Coast Oil Disaster

Rachel Giesber Clingman,
Acting Co-General Counsel, Transocean (in re Horizon Incident)

Chairman Conyers, Ranking Member Smith and other members of the Committee, thank you for the opportunity to speak with you today. I am Rachel Clingman, and I am a partner in the law firm of Sutherland Asbill & Brennan. At present, I am working at Transocean to assist with the legal issues arising out of the April 20 accident. Transocean has only a small number of U.S. lawyers. Given the investigations, inquiries and litigation that ensued in the aftermath of the *Deepwater Horizon* accident, I was asked to manage Transocean's response. We have assembled a team to assure Transocean's full cooperation with the congressional and Coast Guard investigations into the accident and to represent Transocean in related litigation.

The last few weeks have been a time of great loss, sadness and frustration for all of us associated with Transocean. We feel anguish and compassion for the widows, parents and children of the 11 crew members – including 9 Transocean employees – who died in the explosion aboard the *Deepwater Horizon* and for those who were injured; and we feel the pain of those who evacuated and survived. The Company is committed to preserving the memory of those who were lost and to providing for their families. We are also making every effort to ensure that all of the needs of the survivors and their families are being met.

This Tuesday, Transocean held a memorial service at the Jackson Convention Complex in Jackson, Mississippi, bringing together the *Deepwater Horizon* crew members, their families and friends, colleagues, and many others who were affected by this tragedy. The grieving process for our employees and the families of those lost on April 20 will doubtless endure, but it is our hope that the service, and other efforts that we extend in the future, will aid the healing process.

I am here today to report to this Committee on the various legal issues facing Transocean.

First and foremost, Transocean is fully prepared to meet all of its legal obligations arising from the *Deepwater Horizon* accident. Most importantly, I want to assure the Committee that addressing and resolving the claims of Transocean employees who were injured – and those of the families who lost loved ones – is a top priority. We made a conscious decision to wait until after the memorial service to start discussions to avoid prematurely intruding into a critical period in each family's grieving process. Those discussions are now beginning, and it is our hope that we can resolve these claims fairly, amicably and quickly.

The *Deepwater Horizon* accident has resulted in myriad legal challenges for the both the courts and the companies and families represented here today. The litigation facing Transocean falls under the dual frameworks of both the Oil Pollution Act of 1990 ("OPA") and General Maritime

Law – including the Jones Act, which creates favorable presumptions for seamen like the workers on the rig.

As an overview, the OPA defines a responsible party and creates an efficient structure for all claims to be made against the responsible party. The General Maritime Law provides a framework for the claims of seaman and also provides a mechanism to limit damages in instances where a vessel is lost.

I will briefly address each and outline the steps Transocean is taking to meet its obligations.

**OPA.** As you know, in 1990 Congress enacted the OPA and created a mandatory and streamlined administrative process to compensate people and businesses for damages caused by oil spills and contamination. The OPA claims process enables anyone damaged by an oil spill to obtain compensation from a "responsible party." Compensable claims include property damage, boat damage, loss of profits, loss of earning capacity and loss of subsistence.

Under this law, the United States Coast Guard designated BP as the "responsible party" under the OPA for the oil and gas flowing from the subsea well. BP accepted this designation and has testified that it will fund and pay all legitimate claims asserted in the administrative process and will do so regardless of the $75 million limit. Based on media reports, BP has established the process and a fund and has started paying claims as received.

The U.S. Coast Guard designated Transocean as a "responsible party" under the OPA for any contamination from its mobile work space – the rig – on or above the surface of the water. Transocean accepts that designation, and while there has been no indication thus far of any contamination from the rig, Transocean stands ready to meet any legal obligations that arise from that status.

Because of the claims process established by Congress in response to prior oil incidents, it is unnecessary for individuals and businesses to file lawsuits. The Oil Pollution Act allows and requires each person or business to assert an administrative claim directly against the fund, and there is a well-publicized method to make such a claim. In fact, this congressionally mandated process allows someone to file a lawsuit only if and when BP either denies his or her claim or fails to settle it to the claimant's satisfaction within a 90-day period. If a claimant is dissatisfied with the amount of compensation he or she is ultimately offered by BP under the OPA, then the law preserves their right to file a lawsuit at that point.

**Class Actions.** The great majority of the lawsuits filed against Transocean over the last three weeks are not personal injury suits. Of the approximately 120 lawsuits, more than 80 filed against Transocean are class actions in which individuals and businesses seek payment for financial losses covered by the Oil Spill Pollution Act. Generally, the claimants in these lawsuits are fishermen, hotel operators, landowners, rental companies, restaurants and seafood processors, who claim a current or potential future loss of business in the aftermath of the oil spill. Many of these 80 lawsuits overlap, with lawyers seeking to represent the same classes of people. Florida property owners, for example, are included in the proposed class of at least three class actions lawsuits to date:

- *Nobles v. Transocean* (beachfront state of Florida property);
- *Douglass v. Transocean* (Pensacola private property owners); and

- *Dewey v. Transocean* ("All Florida residents").

Louisiana residents who derive income from the coastal zone are similarly claimants in at least four duplicative class actions:

- *Alexie v. Transocean* ("Louisiana residents who live or work in, or derive income from the Louisiana Coastal Zone");
- *Ivic v. Transocean* ("Louisiana residents who live or work in, or derive income from the Louisiana Coastal Zone");
- *NOVA Affiliated v. Transocean* ("Louisiana residents who live or work in, or derive income from the Louisiana Coastal Zone"); and
- *Robin Seafood v. Transocean* ("Louisiana residents who live or work in, or derive income from the Louisiana "Coastal Zone").

And overarching all, the class asserted by counsel in *Wilkerson v. Transocean* covers "All fishermen, oystermen, crabbers, shrimpers, and seafood processors who derive income and profits from the natural resources in the Gulf of Mexico and have sustained any loss or damages."

The presence of many and various classes confuses the legal landscape and threatens to result in different treatment for litigants who are similarly situated. Multiple motions have been filed by both plaintiffs and defendants before the Judicial Panel on Multidistrict Litigation ("MDL Panel") to establish a multidistrict litigation ("MDL") proceeding to coordinate these claims.

**Jones Act.** General Maritime Law and the Jones Act provide seamen a right to sue and provides favorable presumptions. This applies to the crew members of the rig. There have been a number of Jones Act claims filed.

**Limitation Action.** In the meantime, as you know, Transocean has filed a maritime limitation of liability action in the U.S. District Court for the Southern District of Texas. This suit is based on the Limitation of Liability Act, last amended by Congress in 2006, that allows shipowners to define their liability in a situation like this to the post-accident value of the ship and its cargo. Based on our estimate of the value of the vessel, Transocean has requested an initial limitation of liability at just under $27 million. The Limitation does not apply to claims asserted against Transocean under the Oil Pollution Act, 33 U.S.C. § 2701, *et seq*. Transocean has asked the Limitations Court to clarify the existing order to confirm that the Limitation does not apply to claims allowed under the OPA.

Transocean filed the Limitation action for several reasons. First, we believe that it is important to have a central venue for these actions and to maintain a degree of continuity and consistency in awards to plaintiffs that would not be possible if lawsuits go forward in courts throughout five states in various state and federal courts. For the same reasons, Transocean will urge the MDL Panel to establish an MDL proceeding in federal court in Houston, Texas, where the limitation action was filed. If all the lawsuits are in one place and adjudicated by one court that is fully apprised of all the relevant information, that will help ensure that damages are fairly and evenly awarded to plaintiffs who sustained similar injuries. Second, Transocean carries third-party

liability insurance with various deductibles applicable to claims following the *Deepwater Horizon* incident. Our underwriters instructed us to file such an action, and failure to do so could have resulted in the loss of insurance coverage to help pay claims.

**Our priority.** Transocean is committed to resolving handling all of these various, interrelated legal matters diligently, expeditiously and fairly. While we work to collect and preserve information and address claims and liabilities, we have foremost in mind our obligation to make sure that the demands of litigation do not divert attention from Transocean's overriding mission, in conjunction with BP, the Coast Guard unified command, government officials and other contractors involved, of stopping the leak; determining the cause of the April 20 explosion; and taking steps with you and the industry to make sure that this does not happen again.

Again, thank you for the opportunity to speak with you today. I look forward to the discussion and am happy to answer any questions you may have.



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Mr. CONYERS. Attorney James Ferguson, senior vice president and deputy general counsel for Halliburton.

Included in his responsibilities are litigation, environmental employment law activities in the company's law department. He began in 1988, assumed the deputy general counsel position in

2007, and served as director of risk management and assistant general counsel for Halliburton.

**TESTIMONY OF JAMES W. FERGUSON, SENIOR VICE PRESIDENT AND DEPUTY GENERAL COUNSEL, HALLIBURTON**

Mr. FERGUSON. Chairman Conyers, Ranking Member Smith Members of the Committee, I thank you for the ability to appear here today and the opportunity to share Halliburton's perspective as you review the legal issues related to the Deepwater Horizon catastrophe.

Halliburton looks forward to continuing to work with the Congress, the Administration, and now the Presidential commission to understand what happened and what we can do to ensure that oil and gas production is undertaken in the safest and most environmentally responsible manner.

The catastrophic blow out and the spread of oil in the Gulf of Mexico are tragic events for everyone. Halliburton extends its deepest sympathy to the family, to the friends and the colleagues of the 11 people who lost their lives and to those workers that were injured in this tragedy.

Halliburton has and will continue to fully support and cooperate with the ongoing investigations into how and why this tragic event happened. We will continue to make our personnel available, and we have produced approximately 50,000 pages of documents.

As you can no doubt appreciate, there has already been an immense amount of litigation filed in connection with the blow out. As of May 23, Halliburton, has been named in 112 suits involving pollution damage claims and four suits bringing personal injury claims. With current investigations underway, it is still premature for Halliburton to offer theories about what happened. Thus I will not be addressing technical and operational issues, which, in any event, are not within my expertise, but instead will focus on the issues that you posed in your invitation to testify.

Mr. Chairman, you ask that we discuss legal liability issues surrounding the Gulf Coast disaster. In addition, you have expressed concern about waivers individuals were asked to sign as they returned to shore from the Deepwater Horizon. With respect to the waivers, Halliburton did not ask any of our four employees to sign a waiver or any other document as they returned to shore. Our employee assistance personnel were already in contact with their families and provided whatever aid and support the employees needed.

Since then, we have reached a settlement with one employee which did involve a release by the employee.

As you consider broader liability questions, it is important to understand the structure of the oil and gas exploration and production business and, in particular, the roles and responsibilities of the various parties involved in drilling a deepwater well. In the Gulf of Mexico, an oil company obtains a lease from the government with rights to explore for and produce hydrocarbons. After meeting applicable regulatory requirements, the oil company, as the well owner, will engage a drilling contractor and many other service and equipment companies to work on that well.

The construction of a deepwater well is a complex operation involving the performance of numerous tasks by multiple parties led

by the well owner's representative, who has the ultimate authority for decisions on how and when various activities are conducted.

With respect to the Mississippi Canyon 252 Well, Halliburton was contracted by the well owner to perform a variety of services on the rig. That included certain aspects of the cementing process, but contrary to some press reports, Halliburton did not provide and hold equipment such as casing wellheads, seal assemblies, float equipment.

Halliburton is a service provider to the well owner who is contractually bound to comply with the well owner's instructions on all matters relating to the performance of all work-related activities. That does not extend however to acts that would create an imminent safety hazard. Our employees are authorized to stop work in such situations.

Over the years, certain industry practices have developed with respect to the allocation of potential liabilities. Since it is the well owner that is entering into agreements with the drilling contractor and with the various other contractors and suppliers, the well owner will often establish a system of reciprocal indemnity obligations through these contracts. Also, it is customary for the well owner to take responsibility for certain potentially catastrophic events, including loss of control of the well and pollution emanating from the well.

Accordingly, the well owner assumes the obligation to indemnify the contractors for liability arising from such occurrences.

The terms of the applicable Halliburton contract are consistent with this common liability allocation arrangement. Therefore, Halliburton is obligated to indemnify and hold the water well owner and the other contractors harmless with respect to claims by our employees and with respect to loss or damage to our equipment.

In like manner, the well owner and each of the other contractors are bound to hold Halliburton harmless against claims by their employees and for loss or damage to their property.

Finally, the well owner has assumed the obligation to hold Halliburton harmless against the costs for controlling the well as well as for the cleanup and damages caused by the oil pollution.

In closing, Halliburton will continue to cooperate with the effort to understand what happened and what can be done to ensure that oil and gas production is undertaken in a safe and environmentally responsible manner.

Thank you for the opportunity to share our views, and I will be happy to answer questions later on.

[The prepared statement of Mr. Ferguson follows:]

## PREPARED STATEMENT OF JAMES W. FERGUSON

Prepared Statement

James W. Ferguson
Sr. Vice President and Deputy General Counsel
Halliburton

Before the

Committee on the Judiciary
U.S. House of Representatives

May 27, 2010

Chairman Conyers, Ranking Member Smith, and Members of the Committee:

Thank you for the opportunity to share Halliburton's perspective as you review legal issues related to the explosion that occurred on the Deepwater Horizon on April 20. Halliburton looks forward to continuing to work with the Congress, the Administration, and the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling to understand what happened and what we can collectively do in the future to ensure that oil and gas production in the United States is undertaken in the safest, most environmentally responsible manner possible.

The April 20th catastrophic blowout, explosions and fire on the Deepwater Horizon rig and the spread of oil in the Gulf of Mexico are tragic events for everyone. The deaths and injuries to personnel working in our industry cannot be forgotten. Halliburton extends its heartfelt sympathy to the families, friends and colleagues of the 11 people who lost their lives and those workers injured in the tragedy.

At the outset, I want to assure you that Halliburton has and will continue to fully support, and cooperate with, the ongoing investigations into how and why this tragic event happened. We have produced approximately 50,000 pages of documents to the Committee and to the Administration, and we will continue to make our senior personnel available to brief Members and staff.

Halliburton had four employees stationed on the rig at the time of the incident. We are grateful that they returned to shore safely. Each has and will continue to be made available to assist the investigative efforts underway. In fact, two of our employees are scheduled to testify this week in the investigation being led by the Coast Guard in New Orleans.

Since the blowout, Halliburton has been working at the direction of the well owner to provide assistance in the effort to bring the well under control. This includes intervention support to help secure the damaged well and planning and services associated with drilling relief well operations.

Halliburton has deployed survey management experts to assist in planning the path of the relief wells and has mobilized its technology group to work in collaboration with another industry partner to combine our technologies in an effort to develop an integrated ranging system to expedite the intersection of the original well.

We trust that you recognize that Halliburton cannot make any judgment or offer any theories about what happened until the current investigations by the government and BP are complete and the facts concerning the activities on the Deepwater Horizon are determined. Thus, in my testimony today, I will not be addressing those issues, but instead will focus on the issues you posed in your invitation to testify.

*Background on Halliburton*

As a global leader in oilfield services, Halliburton has been providing a variety of services to the oil and natural gas exploration and production industry for more than 90 years. Halliburton's areas of expertise are primarily in the upstream oil and gas industry. They include providing products and services for clients throughout the life cycle of the hydrocarbon reservoir--from locating hydrocarbons and managing geological data, to directional drilling and formation evaluation, well construction and completion, to optimizing production through the life of the field. The company is also engaged in developing and providing technologies for carbon sequestration and in providing services to the geothermal energy industry.

With respect to the Mississippi Canyon 252 well, Halliburton was contracted by the well owner to perform a variety of services on the rig. These included cementing, mud logging, directional drilling, and measurement-while-drilling services. In addition, Halliburton provided selected real-time drilling and rig data acquisition and transmission services to key personnel both on board the Deepwater Horizon and at various onshore locations. Halliburton is confident that the cementing work on the Mississippi Canyon 252 well was completed in accordance with the requirements of the well owner's well construction plan.

*Legal Liability Issues*

Mr. Chairman, in announcing this hearing and in inviting Halliburton to testify, you asked that we "elaborate on [our] public statements about liability in this matter." In addition, you have expressed concern about waivers individuals were asked to sign as they returned to shore from the Deepwater Horizon. Finally, you have asked more generally about "legal liability issues surrounding the Gulf coast oil disaster."

With respect to waivers, Halliburton did not ask any of our four employees to sign a waiver or any other document as they returned to shore. Our Employee Assistance personnel were already in contact with their families and provided whatever aid and support the employees needed. Since

then, we have reached a settlement with one employee and another is considering doing so. Any such settlement involves a release by the employee.

With respect to the broader liability questions of interest to the Committee, we offer the following to help you better understand the issues that generally arise for work done on deep water wells in the Gulf of Mexico. It is important to understand the structure of the oil and gas exploration and production business and in particular the roles and responsibilities of the various parties involved in drilling a deep water well.

In the Gulf of Mexico, an oil company obtains from the government the rights to hydrocarbons that might be found and produced from reservoirs below the ocean floor. After meeting applicable regulatory requirements, the oil company (as the well owner) will then drill wells to search for and, where successful, extract oil and gas from beneath the seabed. To do that, the well owner will engage a drilling contractor and a number of other service and/or equipment companies for work on the well. The construction of a deep water well is a complex operation involving the performance of numerous tasks by multiple parties led by the well owner's representative, who has the ultimate authority for decisions on how and when various activities are conducted.

Halliburton, as a service provider to the well owner, is contractually bound to comply with the well owner's instructions on all matters relating to the performance of all work-related activities. That does not extend, however, to acts that would create an imminent safety hazard. Our employees are authorized to stop work in such a situation.

Over the years, certain industry practices have developed with respect to the allocation of potential liabilities that may arise from these operations. Since it is the well owner that is entering into agreements with the drilling contractor and with the various contractors and suppliers that will be working on the rig, the well owner will often establish a system of reciprocal indemnity obligations through those contracts, the effect of which is that each party will take responsibility for and hold the other parties harmless against liability to that party's own employees and property. Also, it is customary for the well owner to take responsibility for certain potentially catastrophic events, such as loss of control of the well, pollution emanating from the well, reservoir damage, and loss of production. Accordingly, the well owner assumes the obligation to indemnify the contractors for liability arising from such occurrences.

Although we are not familiar with the terms of the well owner's contracts with the other contractors that worked on the Deepwater Horizon, we do know that the terms of the applicable Halliburton contract are consistent with this common liability allocation arrangement. Therefore, it appears that Halliburton is obligated to indemnify and hold the well owner and the other contractors harmless with respect to claims by our employees and with respect to loss or damage to our property and equipment. In like manner, the well owner and each of the other contractors (assuming their contracts have provisions similar to that of Halliburton's) are bound to hold

Halliburton harmless against claims by their employees and for loss or damage to their property. Finally, the well owner has assumed the obligation to hold Halliburton, and other parties with similar terms in their contracts, harmless against the costs for controlling the well, as well as for cleanup of and damages caused by the associated oil pollution from the blowout.

As you can no doubt appreciate, there has already been an immense amount of litigation filed in connection with the blowout. As of May 23, 2010, for example, Halliburton had been named in 112 suits involving pollution damage claims and 4 suits bringing personal injury claims. These cases have been filed in multiple state and federal district courts.

*Safety Culture and Record*

To put these liability issues in perspective, I want to close by reviewing our commitment to safety and our record in ensuring the health and safety of our employees. At Halliburton, we view Health, Safety, Environment and Operational Excellence as critical to our success and to long-term sustainability. We are committed to continuously improving our performance. Under our Corporate HS&E Policy, we mandate that everyone in the company must comply with all applicable laws and relevant industry standards of practice to protect the health and safety of our employees and to prevent environmental pollution. We continuously evaluate the health, safety and environmental aspects of our products and services. Our goal is to develop and provide products and services that have no undue environmental impact and are safe in their intended use, efficient in their consumption of energy, and which can be recycled, reused or disposed of safely.

How have we done in protecting the health and safety of our workers? Since 2000, as shown in the attached chart, we have decreased substantially our recordable injury rate, our lost time injury rate, and our recordable vehicle incident rate. We are proud of that record. But since nothing is more important than the safety of our employees, we will endeavor to improve on that solid record in the future.

* * *

In closing, I want to reiterate what I said at the outset of my remarks: Halliburton looks forward to continuing to work with the Congress, the Administration, and the National Commission to understand what happened and what we collectively can do in the future to ensure that oil and gas production in the United States is undertaken in the safest, most environmentally responsible manner possible.

Thank you for the opportunity to share our views.

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**Halliburton Safety Statistics 1 Jan 2000 through 31 Mar 2010**

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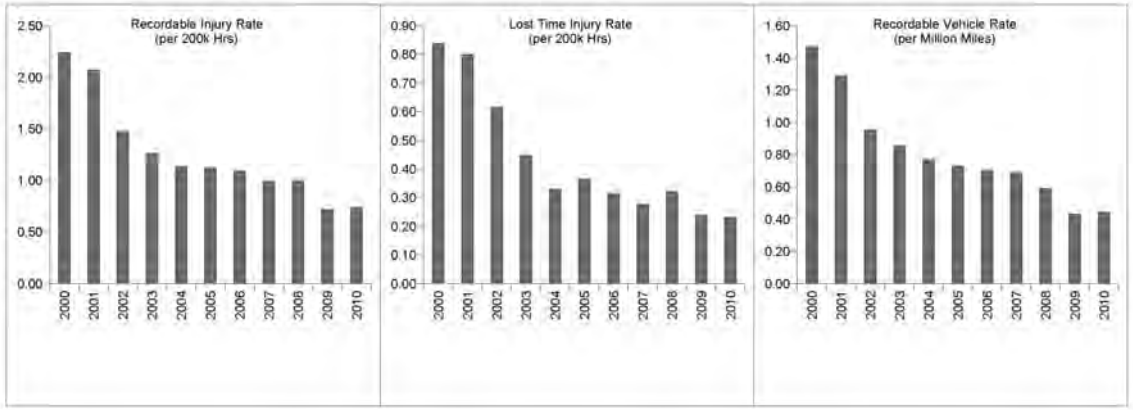
HALLIBURTON



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## Halliburton Safety Statistics 1 Jan 2000 through 31 Mar 2010

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### Definitions

**Recordable**

Work related deaths; nonfatal work related illness; and those nonfatal work related injuries which involve one or more of the following: loss of consciousness, restriction of work or motion, transfer to another job, or medical treatment (other than first aid).

**Restricted**

Any work related injury or illness that involves restricted duty. Restricted work days occur when an employee can return to work, but cannot perform any or all parts of his/her normal duties.

**Lost Time**

Any work related injury or illness, which results in days away from work.

**Fatality**

Any work related death while engaged in Halliburton Company business.

**Recordable Vehicle**

Fatality - Any vehicle incident which results in the death of one or more persons regardless of whether they are employed with Halliburton.
Injury - Any vehicle incident which results in an injury (to any personnel involved) requiring treatment away from the scene of the incident.
Vehicle Damage/Tow Away - Any vehicle incident requiring one of the vehicles involved to be towed away from the scene of the incident. This does not include:
- Damage which can be remedied temporarily at the scene without special tools or parts
- Tire disablement without other damage
- Headlamp or taillight damage
- Damage to turn signals, horns, or windshield wiper

Hazardous Materials Spill - Any unintentional release of hazardous materials other than fuel from the fuel tanks of the vehicle.

**Rates**

Injury Incident Rates are based on injuries per 200,000 hours worked. This standard ratio is based on 100 employees each working 2,000 hours per year. In other words the 'rate' could aslo be stated as 1.28 injuries per 100 workers. This normalization alows more accurate comparisons accross industries and takes into account changes in business activity. The formula is (Number of incidents X 200,000) / Hours. Vehicle rates are based on 1 million miles

For more details see Halliburton Reporting Standard C1S8

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Mr. CONYERS. Attorney William Lemmer, general counsel for Cameron International Corporation, was previously with Oryx Energy Company where he served as vice president, general counsel, corporate secretary, and as chief counsel. He has also held senior management positions at Sunoco and is a graduate of Michigan

State University Honors College and a juris doctor from University of Virginia law school.

**TESTIMONY OF WILLIAM C. LEMMER, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, CAMERON INTERNATIONAL CORPORATION**

Mr. LEMMER. Chairman Conyers, Ranking Member Smith, Members of the Committee, good morning.

My name is Bill Lemmer, and I am the senior vice president and vice president of Cameron International Corporation.

I wish I could say I appreciate the invitation to be here today, but the fact of the matter is that we are here to discuss a truly tragic event and the consequences it has and will continue to flow from it. Cameron continues to lend its assistance and efforts relating to capping the well, and we continue to work with everyone involved to try to understand what happened and how this happened.

Cameron is based in Houston, Texas, and is the leading provider of equipment and services to the energy industry, with eleven different operating divisions and approximately 18,000 employees in more than 300 locations. The Cameron product used by the Deepwater Horizon is called a blow-out preventer, or BOP, a product that Cameron invented in the 1920's that allows our customers to control the pressure in a well while being drilled.

There are over 400 Cameron BOPs operating sub-sea; 130 are operating in deep water. Each individual BOP stack is made up of components specified by our customers and configured to their specific operating specifications. Each is manufactured and tested in accordance with industry standards and applicable regulations.

Our BOPs have a very long history of reliable performance, including performance in some of the harshest operating conditions in the world. The BOP in the Deepwater Horizon was operating at 5,000 feet below sea level at the time of the incident. As soon as Cameron was notified of this incident, we mobilized a team of our best drilling specialists to work with BP, Transocean, and others to assist with efforts to shut in this well.

Our people have been working around the clock to assist in this effort, and we will continue to provide all of the resources at our disposal until this well is shut in.

On the subject of today's hearing, it is difficult to state anything with precision at this stage. Efforts to cap the well are ongoing, and the facts relating to the explosion and its impact on the BOP and its ability to function properly are simply unknown at this point. The present challenges involved in determining causes and effects are many, in particular, from our standpoint, the inability to examine the Deepwater Horizon's BOP. Therefore, it appears to be far too early to draw factual conclusions about how this incident occurred.

And so, too, is it with respect to questions of liability, which are by their very nature closely linked to these presently unanswered factual questions. Anything specific we might say in this connection would be speculative and perhaps misleading or potentially so to the Committee and to the public.

Given the very limited extent of everyone's present understanding of the facts, is it possible for anyone to make any liability

determinations at this point? Nonetheless every one of us is mindful of the personal, environmental and economic concerns associated with this incident. We understand the need to discover the facts relating to what went wrong and to do all that is possible to prevent the occurrence of such an incident in the future. I am here to answer any of your questions. Thank you.

[The prepared statement of Mr. Lemmer follows:]

PREPARED STATEMENT OF WILLIAM C. LEMMER

***United States House of Representatives***
***Committee on the Judiciary***

Written Statement of William C. Lemmer,
Senior Vice President and General Counsel
of Cameron International Corporation

May 27, 2010

My name is William C. Lemmer, and I am Senior Vice President and General Counsel of Cameron International Corporation. I have been with Cameron for 11 years and have over 30 years of experience in the oil industry.

I wish I could say that I appreciate the invitation to be here today, but the fact of the matter is that we are here to discuss a truly tragic event and the consequences that have and will continue to flow from it.

I want to assure all of you that since the day of the incident, Cameron has been lending its assistance and we will continue to work with everyone involved to understand what and how this happened.

Cameron is based in Houston Texas and is a leading provider of equipment and services to the energy industry worldwide, with 11 different operating divisions and approximately 18,000 employees in more than 300 locations. We have worked with our customers for over 120 years to design, manufacture and service products that help them safely find, develop, produce and transport oil and gas.

The Cameron product used by the Deepwater Horizon is called a "blow out preventer" or "BOP," a product that Cameron actually invented in the 1920's, that allows our customers to control the pressure in a well while being drilled. There are over 2,500 Cameron BOP's operating around the world today, both onshore and offshore. We have over 400 BOP stacks operating offshore, of which 130 are operating in deep water. Each individual BOP stack is made up of components specified by our customers and configured to their specific operating specifications. Each is manufactured and tested in accordance with industry standards and applicable regulations.

Our BOP's have a very long history of reliable performance, including performance in some of the harshest operating conditions in the world. In support of our commitment to our products' on-going performance, we maintain a system of

safety alerts and product advisories that keep our customers abreast of the latest information about our products.

As soon as Cameron was notified of this incident, we mobilized a team of our best drilling systems specialists to work with BP, Transocean, and others to assist with the efforts to shut in this well. We also mobilized teams from our subsea, surface and valves divisions to assist BP and its partners in some of the alternative methods they are deploying to contain the flow from the well. Our people have been working around the clock to assist in this effort, and we will continue to provide all of the resources at our disposal until the well is shut in.

The subject of today's hearing is Liability Issues Surrounding the Gulf Coast Oil Disaster. It is difficult to say anything with precision on this subject at this stage. Efforts to cap the well are ongoing and facts relating to the explosion and its impact on the BOP and its ability to properly function are simply unknown at this point. The present challenges involved in determining causes and effects are many, in particular, from our standpoint, the inability to examine the Deepwater Horizon's BOP. It therefore appears to be far too early to draw factual conclusions about how the incident occurred.

And so too is it with respect to questions of liability which are, by their very nature, closely linked to those presently unanswered factual questions. Anything specific we might say in this connection would be speculative and, perhaps, misleading (or potentially so) to the Committee, to the public, and to Cameron shareholders. Given the very limited extent of everyone's present understanding of the facts, it is impossible for anyone to make liability determinations at this point.

Nonetheless, every one of us is mindful of the personal, environmental and commercial concerns associated with this incident. We understand the need to discover the facts relating to what went wrong, and to do all that is possible to prevent the occurrence of such an incident in the future.

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Mr. CONYERS. Attorney Vincent Foley, partner with Holland & Knight in the Maritime Practice Group, practicing primarily in the area of international litigation arising out of vessel casualties, including collisions, groundings, explosions, fires, and oil spills. He has participated in all aspects of oil spill litigation, oil pollution prevention seminars, formal response drills and oil spill response training, a graduate of the Merchant Marine Academy and the Tulane Law School.

**TESTIMONY OF VINCENT J. FOLEY, PARTNER, HOLLAND & KNIGHT, LLP**

Mr. FOLEY. Thank you, Mr. Chairman, and distinguished Members of the Committee.

I am grateful for this opportunity, honor, and privilege to address the Committee today. I am here to discuss the oil spill liability and compensation scheme in place in the U.S.

The Oil Pollution Act of 1990 is the primary Federal statute dealing with liability and compensation for the discharge of oil in navigable waters. OPA is part of a larger statutory scheme which includes the Federal Water Pollution Control Act, or the Clean Water Act, which also provides for civil and criminal penalties for oil spills on a per-day, per-barrel basis, with no limits of liability.

The OPA compensation and liability scheme, the objective of the scheme was to provide compensation to claimants for oil spills. OPA works by designating a responsible party to set up a claims process to allow claimants to seek compensation. For a vessel, the responsible party means the owner or operator or basically the entity responsible for day-to-day activities. And the OPA limits of liability for a vessel are calculated based on the gross tonnage, which is the total overall internal volume of the vessel.

The OPA also has a provision for offshore facilities. The responsible party for an offshore facility is the lessee or permittee of the area in which the facility is located. The offshore facility limit is a more complicated analysis which involves, because unlike gross tonnage for a vessel, which has a certain maximum capacity, an offshore facility has access to an oil field in the sea bed. The OPA limit for an offshore facility is $75 million for damages, but importantly, it is unlimited for removal costs.

Now, in addition to setting up a liability scheme, OPA also set up a compensation scheme through the National Pollution Fund Center and the Oil Spill Liability Trust Fund. The Oil Spill Liability Trust Fund is an emergency fund for payments to claimants over the OPA limits. The fund is sourced by a per-barrel petroleum tax as well as collection of fines and penalties for violation of other environmental statutes and recoveries by the National Pollution Fund from responsible parties.

The fund steps in to pay claims that are either denied by a responsible party or that are over the responsible party's set limits of liability.

Now, with respect to the limits of liability, it is important to point out that the OPA limits of liability require the participants in the industry to show evidence of financial responsibility up to those limits. And the purpose of that financial responsibility is so that there are immediate funds available to set up this compensation scheme and to start paying claimants.

When I mentioned the offshore facility, the $75 million limit for damages and unlimited for removal costs, those are the two primary types of OPA claims. The removal costs include the cleanup, the prevention, minimizing the extent of the oil spill, mitigation and disposal of the oil. The damages are the economic loss damages, such as injury to natural resources, injuries to real or personal property, loss of revenue from use of natural resources, loss

of profits and earning capacity and public services rendered during or after removal activities.

With respect to both types of claims, whether they are removal or damages, there is supporting documentation needed to establish that you have a compensable claim under the statute, whether you make the claim to the responsible party or to the National Pollution Fund.

And the way the system is set up, the claimants are required to make the claim first to the responsible party to seek payment. If that claim is not paid within 90 days, they may, they have the option to litigate against the responsible party or to seek compensation from the National Pollution Fund Center, which will be an adjudication also based on documentation of that claim.

So that is the system set up by OPA.

With respect to the limits of liability, there have been increases in OPA limits with respect to vessels. There was a recent increase for vessel OPA limits in the 2006 Delaware River Protection Act. It increased the OPA limits of liability for vessels and also increased the responsible party payments to the trust fund.

And in 2010, just recently, we had a consumer price index increase in the vessel limits for liability.

There have not been increases to the OPA limit of liability, the damage limitation of $75 million, but, again, there is an unlimited amount for removal costs.

Now also when we talk about limits of liability, it is important to understand that there is unlimited liability under OPA. A responsible party will lose their liability limits and be strictly liable on an unlimited basis in two situations: One, there is a situation where they lose their limits for gross negligence or willful misconduct, violation of an applicable Federal safety construction operating regulation by a responsible party or by a party under contract with a responsible party, or the third category where you would lose a limit would be a failure after the spill to report the spill, a failure to provide reasonable cooperation or a failure to follow a governmental order.

If any of those circumstances exist in the aftermath of a spill, the responsible party would lose their limits of liability and have unlimited liability.

The second area where you have unlimited liability is that OPA allows States to impose supplemental liability over and above the OPA limitations. So here is another opportunity to have unlimited liability that is already built into the statute.

With respect to the industry experience with the OPA liability schemes that I have just described, it has been a positive experience. The system works within the responsible party limits for the vast majority of oil spills. For exceptional spills which exceed the OPA limits, the Emergency Trust Fund is available to make payments. And the Emergency Trust Fund is based on a per-barrel petroleum tax. Alternatively, the responsible party will pay in the excess of their limits without seeking reimbursement for the reasons I—because of the threat of an unlimited liability for violation of a Federal safety—applicable Federal safety regulation or gross negligence or potentially criminal liability under the Federal statutes that impose criminal liabilities for oil discharge.

It is important when you are considering an increase to the OPA limits, it is important to carefully study the overall liability and compensation scheme. A precipitous change in OPA limits could have adverse and unintended impacts on this functioning and reliable compensation system for oil spills.

There is also a potential to disrupt U.S. oil imports because an increase in OPA limits comes with an increase to the participants in the industry to provide this financial responsibility certificate. This essentially will require extraordinary and, in most cases, unaffordable premiums for the participants in the industry and may cause most small, mid-sized and even large owner and operators out of business, leaving only major players who can self-insure to continue with the U.S. oil import business.

Thank you for the opportunity to address you this morning, and I look forward to your questions.

[The prepared statement of Mr. Foley follows:]

PREPARED STATEMENT OF VINCENT J. FOLEY

**STATEMENT OF**
**MR. VINCENT J. FOLEY**
**PARTNER, HOLLAND & KNIGHT LLP**
**ON**
**LEGAL LIABILITY ISSUES**
**SURROUNDING THE GULF COAST DISASTER**
**BEFORE THE**
**COMMITTEE ON THE JUDICIARY**
**HOUSE OF REPRESENTATIVES**
**MAY 27, 2010**

Good morning, Mr. Chairman and distinguished members of the Committee. This statement is submitted in response to an invitation from the Committee dated May 21, 2010 to testify concerning "Legal Liability Issues Surrounding the Gulf Coast Disaster." I am Vincent Foley, a partner in the maritime practice group of Holland & Knight LLP. My specialty within the practice group is environmental liability and oil spill litigation. In practice, I have represented ship owners, charterers, oil companies, and insurers of maritime risks. During the period of 2003-2008, I also represented a sovereign, the Kingdom of Spain, in litigation in New York arising out of the sinking and oil spill from the *M/V Prestige* off the Northwest coast of Spain on November 13, 2002.

**Oil Spill Liability – Federal Law**

The Oil Pollution Act of 1990 (OPA) is the primary federal statute dealing with liability and compensation for the discharge of oil in navigable waters of the United States. The statutory scheme for oil pollution also includes the Federal Water Pollution Control Act (FWPCA) which provides for both mandatory and discretionary civil and criminal penalties against the owner, operator, or person in charge of a vessel that discharges a prohibited amount of oil or hazardous substances into navigable waters. In addition to the OPA limits described below, the FWPCA provides for civil and administrative fines on a per- day per-barrel basis under with no limit of liability.

There are several other federal statutes which provide for criminal penalties arising out of an unlawful discharge of oil. Criminal prosecutions can have a decisive impact on enforceability of limitations of liability for two reasons. First, if the company is convicted, the civil standard to pierce limits of liability is often met. Second, if the company seeks to enter a guilty plea, the company will usually have to acknowledge facts which undermine what would otherwise be a right to limit liability. This statement will focus on the civil liability and compensation scheme created by OPA.

The primary objective of OPA is to provide compensation to claimants from oil spills in U.S. navigable waters. Under OPA, strict, joint and several liability is imposed up to statutory limits against the Responsible Party (RP) for a vessel or facility from which oil is discharged or which poses a substantial threat of discharge into navigable waters of the United States. For a vessel, the RP means any person owning, operating or demise chartering a vessel. Basically, this "operator" liability may be imposed on any person or corporation which exercises the day-to-day management or control over the vessel. For an offshore facility, the RP means the lessee or

permittee of the area in which the facility is located or the holder of a right of use or easement under applicable state law or the Outer Continental State Lands Act for the area in which the facility is located.

**OPA Compensation Scheme and Claims Process**

OPA also created the Oil Spill Liability Trust Fund (the Trust Fund) which provides compensation to injured parties for removal costs and damages resulting from an oil spill. The Trust Fund is managed by the National Pollution Funds Center (NPFC), an administrative agency of the United States Coast Guard. The NPFC administers the Trust Fund and acts as the implementing agency of OPA. The Trust Fund is primarily sourced by an eight cents per barrel tax on petroleum produced in or imported to the United States. In addition, the Trust Fund receives income from transfers from other pollution funds, fines, penalties, accrued interest and cost recovery from RPs.

Upon receiving notice of an oil spill, the NPFC designates one or more RPs for the oil spill, and provides notice to potential claimants of the RP's claims process in order to facilitate and expedite payments to injured parties. OPA provides a two step process for claimants seeking compensation. First, a claimant may seek compensation directly from the strictly liable RP or its guarantor. Second, if the RP does not settle the claim within 90 days, the claimant can either seek compensation through litigation against liable parties (including the RP) or submit the claim to the NPFC for adjudication and payment from the Trust Fund. Upon payment, the Trust Fund will be subrogated to the rights of the claimant against the RP. The Trust Fund has a fiduciary duty to ensure that when payments are made it is done on the basis of adequate supporting documentation. Claimants requesting compensation for lost profits or earning capacity must establish that property or natural resources were injured or lost and that the claimant lost income as a result of the oil spill.

In the event a RP is not immediately identified, the NPFC itself starts the claims process for potential claimants. The NPFC is also available for RPs to submit claims under circumstances where payments have been made by the RP in excess of its statutory OPA limits. In general, the maximum payout available from the Trust Fund for any one incident is $1 billion or the balance of the Trust Fund, whichever is less.

**OPA Liability of RP for Removal Costs and Damages**

Subject to certain statutory limitations addressed below, the RP is liable for all removal costs including the costs to prevent, minimize, or mitigate oil pollution, and the following categories of damages (including interest accrued on OPA claims prior to judgment):

(i) injury to natural resources,

(ii) injury to real or personal property (including economic losses resulting from that injury, and loss of subsistence use of natural resources);

(iii) loss of revenues on the use of natural resources or real or personal property and

(iv) loss of profits or impairment of earning capacity resulting from such pollution, and the costs of providing additional public services during or after removal activities. 33 U.S.C. 2702 (b).

A RP has very limited defenses to liability, which are available only if the RP can establish, by a preponderance of the evidence, that the oil spill was caused solely by (1) an act of God, (2) an act of War, or (3) an act or omission of a third party (other than an employee, agent or contracting party of the RP). The RP is not entitled to these defenses if it fails to report the incident, fails to provide all reasonable cooperation in response to the spill, or fails to follow a governmental order. Even if the RP has a defense, it still must pay the removal costs and damages to any claimant, and may only recover its expenditures through subrogation against a third party or the Trust Fund after payment. In addition, an RP is not liable to a claimant if the injury resulted from the claimant's gross negligence or willful misconduct.

**OPA Limits of Liability**

OPA imposes strict liability for removal costs and damages against an RP up to the statutory limits set forth in the statute. Pursuant to the statute, OPA's liability "shall be imposed notwithstanding any other provision or rule of law." This has been interpreted to mean that the Shipowner's Limitation of Liability Act of 1851 (which limits liability of the owner to the post-incident value of the vessel plus pending freight and creates a separate fund for personal injury claims) does not apply to limit or circumscribe OPA removal costs and damages claims. This Act may, however, be invoked by the vessel owner to limit non-OPA claims such as property damage or personal injury caused by the incident (as opposed to resulting from the oil spill).

A Mobile Offshore Drilling Unit ("MODU") like the Deepwater Horizon may be considered a vessel under OPA. The OPA limit of liability for a vessel is calculated based upon its gross tonnage. The OPA limit for a MODU which is a vessel would be $1,000 per gross ton. The Deepwater Horizon may also be an offshore facility. OPA's definition for "facility" includes any structure used for the purpose of "exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil." For an offshore facility, the overall OPA limit is $75 million for damages plus the total of all removal costs. Although liability for removal costs for an Offshore Facility is unlimited, the limit of liability for damages of $75 million for an offshore facility has not been adjusted since OPA was enacted in 1990. The current OPA limit for onshore facilities and deepwater ports is $350 million.

In contrast, the OPA limits of liability for vessels have been the subject of two recent increases. The first was the Delaware River Protection Act of 2006 which increased existing OPA limits for vessels and increased payments to the Trust Fund by responsible parties. This Act also provided for inflation-based increases to the OPA limits to be implemented by regulation every three years and imposed additional reporting requirements to the Congress by the executive branch on the effectiveness of these increases. The second increase came into effect when the Coast Guard adopted its final rule on February 2, 2010 to increase the limits of liability for vessels that apply under OPA to reflect significant increases in the Consumer Price Index. ("CPI").

A RP may lose its OPA limits of liability under the following circumstances:

(1) gross negligence or willful misconduct;

(2) violation of applicable federal safety, construction or operating regulations by the RP, its agent or employee, or a person acting pursuant to a contractual relationship with the RP.

There are a multitude of very specific federal safety, construction and operating regulations applicable to vessels and facilities which provide a basis to deprive an RP of the OPA limits for breach of a regulation which caused the oil spill. This broadly worded exception to the OPA limits has the potential to subject an RP to unlimited liability albeit without the financial guarantee in place to pay the excess liability.

In addition, a RP may be considered to have waived its OPA limits for failure to report an oil spill, or failure to provide all reasonable cooperation requested by a responsible official, or failure to comply with an order issued by a governmental authority.

**Evidence of Financial Responsibility for OPA limits**

OPA requires vessels and offshore facilities to establish and maintain evidence of financial responsibility sufficient to meet the maximum amount of liability resulting from an oil discharge imposed under the statute. Financial responsibility may be established by one or any combination of the following methods: (1) evidence of insurance; (2) surety bond; (3) guarantee; (4) letter of credit; (5) qualification as a self-insurer. For guarantors, OPA requires a statement agreeing to be subject to direct action claims from the government or injured claimants who have been denied payment by the RP. A vessel typically meets the financial responsibility requirement by carrying, and filing with the U.S. Coast Guard, a Certificate of Financial Responsibility (COFR) which identifies an approved guarantor to be liable up to the vessel's OPA limit. For an offshore facility, the Marine Mineral Service (MMS) has issued Oil Spill Financial Responsibility (OSFR) rules which extend the OPA requirements of financial responsibility to offshore facilities.

**Supplemental State Law Liability for Oil Spill**

OPA expressly preserved the rights of states to legislate beyond the federal limits proscribed by the statute. Any state or its political subdivision may impose additional liability or requirements with respect to the discharge of oil or removal activities. As a result, there are local spill statutes which exist in twenty-six states and territories which contain liability provisions for oil spills. Several of the state oil spill laws contain provisions for unlimited strict liability for clean up and removal costs, for example Alaska, California, and Maine. Of the states potentially affected by the Gulf Coast Disaster, Texas, Louisiana, and Florida have laws imposing strict joint and several liability. Conversely, Mississippi and Alabama do not impose limitations on liability, nor do they have oil pollution laws imposing strict liability.

**Adequacy of OPA Federal Liability Scheme supplemented by State Law**

The industry experience with oil spill litigation under the above described federal and state law scheme has been positive. The federal OPA limits of liability in the vast majority of oil spill incidents provide adequate funds from the RP to compensate claimants injured by the oil spill. In the exceptional cases where liability exceeds the OPA limits, the NPFC is in place to make payments from the Trust Fund (sourced primarily by a petroleum tax) which becomes subrogated to the rights of such claimants to recover from RPs or third parties who may be responsible for the damages.

A U.S. Coast Guard report on implementation of OPA 90 during the period of FY 1993-FY 2004 indicated that there were seventeen (17) incidents during this period for which the costs of the incident are known to have exceeded OPA limits. All of the incidents involved vessel spills. Seven (7) of the Seventeen (17) incidents generated claims to the Trust Fund for reimbursement from the RP for payments made in excess of OPA limits. The remaining ten (10) incidents did not result in a reimbursement request from the RP due to criminal liability, DOJ settlement, gross negligence, and/or violation of federal regulations.

**Comparison of OPA Regime to International Civil Liability and Fund Conventions**

OPA limits compare favorably to similar provisions of the Civil Liability and Fund Conventions (CLC), which have been adopted by most other jurisdictions worldwide (104 as of May 4, 2010) with the U.S. being a notable exception. One reason for the U.S. not acceding to the amendments to the CLC and Fund Conventions in 1992 was the higher OPA limits already in place at the time the conventions were amended.

By way of example, the OPA limit for a 50,000 ton vessel (other than a tanker) would be $50 million (50,000 gross tons at $1000 per gross ton) and the CLC limit would be approximately $42 million (Special Drawing Rights (SDR) 4.51 million plus SDR 631 per every ton over 5,000 tons). In both the OPA and CLC regimes, the Emergency Funds (i.e. Trust Fund and CLC Fund) which provide compensation to injured parties over and above the limits of liability are sourced by an industry tax on petroleum products. As noted above, for the Trust Fund, the maximum payout per incident is $1 billion while the CLC Fund has a multi-tiered compensation system providing compensation up to $305 million with a supplementary fund available (for certain signatory states) for up to $1.126 billion.

**Consideration for Increase in OPA Limits**

In considering whether to increase the OPA limits of liability, it is important to thoroughly study the implementation of OPA and the overall liability and compensation regime. Industry participants including owners and operators of vessels, agencies such as the U.S. Coast Guard, and various stakeholders in the aftermath of an oil spill could be adversely affected by a precipitous change in existing OPA limits with no corresponding benefit in terms of victim compensation or deterrence of future spills. If such changes are not carefully studied and slowly implemented, the reaction from industry participants could have unintended consequences including disrupting U.S. oil imports. An increase in the OPA limits would require vessel

owners to pay additional insurance premiums in order to continue to provide and maintain evidence of financial responsibility to meet the new increased limitations. As a practical matter, small and mid-sized independent tanker owners transport a majority of all imported petroleum products to the United States. For these owners and operators, insurance and other evidence of financial responsibility required by OPA are affordable only because of the relatively inexpensive and generally available mutual protection and indemnity pollution insurance of up to $1 billion per incident. Protection and indemnity clubs are associations of vessel owners joined together to pool mutual liabilities falling on their individual members. Mutual insurance provides security and stability to maritime trade because the claims of individual owners are not secured by a single insurer, but instead are collectively insured by the owners of 92% of the world's ocean-going tonnage if a claim exceeds a certain amount.

A dramatic increase in OPA limits and the concomitant requirement for these owners and operators to provide evidence of financial responsibility for higher limits could result in this insurance coverage not being available through protection and indemnity clubs, and therefore the necessary pollution insurance would not be available at all to small and mid-size operators. Such excessive additional insurance costs would force many of these operators out of business leaving only major players (to the extent any are willing to engage in oil transport) who can self-insure or otherwise afford to meet the financial responsibility requirements. Ultimately, the additional premiums for increased liability limits will have to be passed on to consumers in the form of increased prices for oil products in the United States.

Careful consideration should be given prior to legislating an increase in the present OPA liability limits which, based on industry experience, are an essential part of a functioning and reliable system for compensation of injured claimants. OPA has built-in mechanisms to supplement liability for the exceptional oil spills including broadly worded exceptions to OPA limits for violation of federal safety, construction, and operating regulations and the potential for unlimited supplemental state law liability.

Thank you for the opportunity to testify today. I look forward to your questions.

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Mr. CONYERS. Tom Galligan, is the president of Colby-Sawyer College. From 1986 to 1998, he taught at the Paul M. Hebert Law Center at Louisiana State University. He was previously dean and professor of law at the University of Tennessee College of Law and has published numerous books and articles on torts and admiralty. His scholarship has been cited in the restatement of torts and by

numerous legal scholars. He has been cited by the United States Supreme Court and other Federal and State appellate trial courts.

**TESTIMONY OF THOMAS C. GALLIGAN, PRESIDENT AND PROFESSOR, COLBY-SAWYER COLLEGE**

Mr. GALLIGAN. Thank you. Chairman Conyers, Ranking Member Smith and Members of the Committee, thank you for inviting me to appear before you today.

My name is Tom Galligan, and I am the president of Colby Sawyer-College in New London, New Hampshire.

The oil spill in the Gulf of Mexico and the ensuing disastrous consequences have forced our Nation to consider its damage recovery regimes for injuries and deaths arising from maritime and environmental catastrophes. Doing so reveals inequities and inconsistencies that you in Congress have the chance and ability to repair by amending the relevant statutes.

I would like to begin with a discussion of wrongful death recovery under the Jones Act, which is applicable to the negligence-based wrongful death actions by the survivors of a seaman, and the Death on the High Seas Act, which defines the rights to recover for wrongful death in all other cases arising from incidents occurring on the high seas.

As interpreted, neither of these statutes allows recovery for loss of society damages to the survivors of those killed in maritime disasters.

Now what are loss of society damages? They are compensation for the loss of care, comfort, and companionship caused by the death of a loved one. The majority of American jurisdictions today do recognize some right to recover for loss of society damages in wrongful death cases. But the Jones Act, and DOHSA do not.

Now one might arguably understand the unavailability of loss of society damages in 1920, when the Jones Act and DOHSA were passed. It was a different world. But to deny recovery of loss of society damages to a loved one in a wrongful death case in 2010 is out of the legal mainstream, and it is a throwback to a past era. A spouse, child, or parent who loses a loved one suffers a very real loss, a loss of care, comfort and companionship, and the law should recognize that loss.

Congress can appropriately make the law consistent with current moral, social, and familial realities by amending the relevant statutes to provide recovery for loss of care, comfort, and companionship in maritime wrongful death cases.

Now, interestingly, there is one exception to the rule barring recovery of loss of society damages under DOHSA. And that exception points up current inconsistencies in the law. In 2000, after the Korean Airline and TWA disasters, you amended DOHSA to provide recovery of loss of society to the survivors of those killed in high-seas commercial aviation disasters. Thus, in commercial aviation disasters, DOHSA is consistent with modern law and values.

But for anyone else killed on the high seas, someone killed on a cruise ship, someone killed on a semisubmersible floating rig, or someone killed on a helicopter, the survivors may not recover loss of society damages.

The proposed amendment would provide all survivors of those killed in maritime disasters with the recovery now available in commercial aviation wrongful death cases.

And I would like to pause here and say one thing about OPA 90. OPA 90 does not cover and does not provide recovery in personal injury and wrongful death cases. Those are outside the scope of OPA 90.

I would like to shift from wrongful death to survival actions and note that the Supreme Court in a high seas death case has held that predeath pain and suffering is not recoverable in a maritime survival action when the death arises on the high seas. Thus, in any case covered by that rule, no matter how much the decedent may have suffered before his or her death, those damages are not recoverable. They should be available.

Another subject of significant import arising out of this disaster is the potential recoverability of punitive damages in various types of maritime cases. The United States Supreme Court has twice in the last 2 years held that punitive damages are recoverable under general maritime law. But it has limited that recovery in admiralty to a one-to-one ratio of punitive damages to compensatory damages.

Today, America might well consider if that one-to-one ratio cap frustrates the deterrent aspects of punitive damages in certain maritime cases.

It is less clear if punitive damages are available in Jones Act and DOHSA cases. Until the most recent Supreme Court case on this subject, I would have said no. Now I am less sure.

A final critical point in this analysis is the effect and applicability of the Limitation of Liability Act to these events. Originally passed in 1851 to encourage investment in maritime shipping and commerce, the act allows a vessel owner and some others to limit liability to the post-voyage value of the vessel plus pending freight if the liability is incurred without the privity or knowledge of the owner. One may justifiably wonder whether an act, passed at a time before the modern development of the corporate form and before the evolution of modern bankruptcy law, is still salient in personal injury and wrongful death cases. However, limitation still exists and in this case presents this Committee with an opportunity to consider and discuss its amendment to assure personal injury and wrongful death victims more just compensation.

Thank you very much, and I would be happy to answer any questions.

[The prepared statement of Mr. Galligan follows:]

# Statement of Thomas C. Galligan, Jr.

President and Professor of Humanities, Colby-Sawyer College and Scholar on Maritime Personal Injury Law

on

## Legal Liability Issues Surrounding the Gulf Coast Oil Disaster

before the

House Judiciary Committee

May 27, 2010

## I. Introduction

Chairman Conyers, Ranking Member Smith and members of the Committee, thank you for inviting me to appear before you today. My name is Tom Galligan and since 2006 it has been my great good fortune to serve as the President of Colby-Sawyer College in New London, New Hampshire where I am also a Professor in the Humanities Department. From 1998-2006, I was the dean of the University of Tennessee College of Law where I also held a distinguished professorship. From 1986-1998, I was a professor at the LSU Paul M. Hebert Law Center in Baton Rouge, where I also held an endowed professorship. From 1996-1998, I also served as the Executive Director of the Louisiana Judicial College. At both Tennessee and LSU, I taught and wrote about maritime law and torts. Along with Frank Maraist, I am the author of three books on maritime law, one of which is and another of which will soon be co-authored by Catherine Maraist. I have also written law review articles on various aspects of maritime law and given countless speeches on maritime law, and I continue to speak and write on the subject. Indeed a new edition of one of my co-authored books will be published very shortly. It is an honor to appear before you today.

The oil spill in the Gulf of Mexico and the ensuing disastrous consequences have forced our nation to consider its various damage recovery regimes for injuries and deaths arising from maritime and environmental catastrophes. Today those liability regimes are complex, inconsistent, incoherent to the people they impact, overly dependent on issues of status and location and they under compensate the survivors of many of those who are injured and killed as

a result of maritime torts. I would like to address several of those issues, particularly the fact that loss of society damages are not recoverable by the survivors of many who are killed in maritime disasters. Indeed, in failing to allow recovery of loss of society damages—damages for loss of care, comfort, or companionship—maritime law is contrary to the rule prevailing in the majority of the states. Katherine J. Stanton, *The Worth of Human Life*, 85 N.D. L. Rev. 123, 130-31 (2009). Congress has the chance and ability to change this state of affairs by amending the relevant statutes. I would also like to address the availability of punitive damages in maritime disasters, the availability of damages for economic loss under maritime tort law, and the potential applicability of the maritime doctrine of limitation of liability to these events. In particular, on this last group of topics I would like to point out that the relationship between maritime law and the Oil Pollution Act of 1990 might lead to inconsistent, unjust, and even incomprehensible results in matters like those presented by the Deepwater Horizon disaster.

**II. Loss of Society in Maritime Wrongful Death Cases**

Over the years when teaching admiralty I counseled and warned my students that when we came to matters of wrongful death and survival actions, almost everything we had covered up to that point on status, vessels, maritime jurisdiction, and limitation of liability came together and their meeting was more like a Gordian knot than a rational meeting of the minds. The important concepts- and they are arguably all implicated here--include: seaman status and rights, the Jones Act, the Federal Employers' Liability Act, the Death on the High Seas Act (DOHSA), the Longshore and Harbor Workers Compensation Act (LHWCA), the Outer Continental Shelf Lands Act (OCSLA), the Shipowner's Limitation of Liability Act, general maritime tort law and remedies, and possibly state law. In this matter, the Oil Prevention Act of 1990 (OPA 90) is also involved.

**A. Seamen**

The analytical starting point is to determine whether an injured or deceased person was a seaman because that status determines the legal rights of the claimant. A seaman is a person who does the work of a vessel, *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), and who has an employment-related connection to a vessel which is substantial in duration (more than 30% of one's work time is spent on a vessel or fleet of commonly owned or controlled vessels), *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), and nature (the worker is exposed to the perils of the sea). *Harbor Tug and Barge Company v. Papai*, 520 U.S. 548 (1997). Maritime law treats a semi-submersible drilling rig as a vessel. *Marathon Pipe Line Co. v. Drilling Rig/Odessa*, 761 F.2d 229,233 (5th Cir. 1985). That is because a moveable drilling rig is "capable of being used as a means of transportation on water." See 3 U.S.C.A. § 3; *Stewart v. Dutra Construction Company*, 543 U.S. 481 (2005). The Deepwater Horizon is a drilling generation rig and therefore, under maritime law, it is a vessel. Interestingly, a drilling platform, as opposed to a semi-submersible drilling rig, is not a vessel.

Assuming that the Deepwater Horizon was a vessel, workers with a substantial employment-related connection to the Deepwater Horizon would be seamen. A seaman has several possible claims against his or her employer: 1.) the right to recover maintenance and cure; 2.) the right to recover injury caused by the unseaworthiness of the vessel on which he or she served (a vessel is unseaworthy if it presents an unreasonable unsafe condition to the seaman on board); and 3.) a Jones Act, 46 U.S.C.A. § 30104, right to recover in negligence against his or her employer. Frank L. Maraist & Thomas C. Galligan, Jr., *Admiralty in Nutshell*, 194-99 (5th ed. 2005)

**1. Jones Act Negligence**

The Jones Act incorporates the provisions of the FELA. 45 U.S.C.A. § 51. The Jones Act (actually the FELA) also provides certain survivors of seaman killed as a result of their employer's negligence with wrongful death and survival action claims against the employer. Basically, a wrongful death action is an action that compensates certain beneficiaries for the loss they suffer as a result of the death of the victim. The survival action provides recovery for the damages that the decedent suffered before the death.

Critically, what do those recoverable damages include and what do they not include in a Jones Act negligence wrongful death action? The survivors can recover any loss of economic support, any lost services, and other traditional types of pecuniary damages. The survivors *cannot* recover loss of society damages. That is, they cannot recover for the loss of care, comfort, or companionship caused by the death. Loss of society damages are, in essence, those damages survivors suffer as a result of the fact that the deceased is no longer there to share the joys of life with the them. The inability of the Jones Act seaman's survivors to recover loss of society damages in the negligence action does not result from the language of the Jones Act or the FELA. Rather, it is the combination of a 1913 decision of the United States Supreme Court, *Michigan Central R.R. Co. v. Vreeland*, 227 U.S. 59 (1913) which refused to recognize the right to recover loss of society damages under the FELA and which actually predated the passage of the Jones Act by seven years and the result of the Court's reliance on that decision in *Miles v. Apex Marine*, 498 U.S. 19 (1990). One might arguably understand and appreciate the *Vreeland* holding in an era when the law of wrongful death was still in its relative infancy; human life spans were shorter, and given the state of technology, industry, and law, accidental death was a more common part of the American landscape than it is today. However, to deny recovery of

loss of society damages in a wrongful death case today is out of the legal mainstream and is a throwback to a past era. A spouse, child, or parent who is not dependent upon a relative seaman killed in a maritime disaster suffers a very real loss and the law should recognize it.

Congress could easily remedy this state of affairs by amending 45 U.S.C.A. § 51, the FELA wrongful death statute to state that recovery by a named beneficiary in a wrongful death action shall "include nonpecuniary damages for loss of care, comfort, and companionship." That amendment would bring the Jones Act and FELA much more into line with modern tort law regarding the recovery of damages in wrongful death cases, as well as the economic, social, and familial realities of today.

**2. Unseaworthiness**

Moving from the negligence claim for wrongful death to the unseaworthiness claim for wrongful death, the general maritime law provides certain survivors with wrongful death and survival actions against a vessel owner (or operator under many circumstances) if the seaman is killed as a result of the vessel's unseaworthiness. If the death occurs on the high seas, then DOHSA, 46 U.S.C.A. § 30302, governs the recoverable wrongful death damages arising from the vessel's unseaworthiness. DOHSA limits recovery to "pecuniary loss." 46 U.S.C.A. § 30303. Thus, the survivors of seamen killed as a result of a vessel's unseaworthy condition on the high seas may not recover loss of society damages. Consequently, the spouse, parent, or child who has no claim for pecuniary damages recovers nothing for the losses caused by the death of a loved one and all of the issues raised concerning the inequity, incongruity, and antiquated nature of that limitation on recovery discussed above in conjunction with the Jones Act apply to DOHSA. One case worthy of note is *Rux v. Republic of Sudan*, 495 F.Supp.2d 541 (E.D. Va. 2007), which chillingly presents the operation of DOHSA. There, 56 surviving family

members of the 17 sailors killed in the terrorist bombing of the U.S.S. Cole sued the Republic of Sudan under the Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1605(a)(7) alleging that Sudan was at fault for providing material assistance and support to Al Qaeda, the group responsible for the attack. The court held that DOHSA applied and because nonpecuniary damages were not recoverable, 22 family members, including parents and siblings recovered nothing as a result of the deaths even though the court noted:

> The court sympathizes greatly with plaintiffs, who continue to suffer terribly years after their loved ones died. But the court is bound to follow the legal precedent before it. Congress makes the laws; courts merely interpret them. Whether to amend DOHSA to allow more liberal recovery in cases of death caused by terrorism on the high seas, as Congress did in 2000 for cases of commercial aviation accidents on the high seas, is a question for Congress alone. Accordingly, plaintiffs' IIED [intentional infliction of emotional distress] and maritime wrongful death claims are dismissed for failure to state a claim upon which relief can be granted.

495 F.Supp.2d at 565. See also, *Rux*, 461 F.3d 461 (4th Cir. 2006), cert. denied, 127 S.Ct. 1325 (2007); *Rux*, 672 F.Supp.3d 726 (E.D.Va. 2009). See generally, Ross M. Diamond, *Damage—Unequal Recovery for Death on the High Seas*, 45 Sept.—Trial 34 (2009).

Here, as in *Rux*, in addition to the general and very substantial reasons to allow recovery of loss of society damages in DOHSA cases, there is an additional analytical prong involving a 2000 amendment to DOHSA (referred to in the quote from *Rux* above). In response to several highly publicized commercial airline disasters, Congress amended DOHSA to provide, in part, for recovery of nonpecuniary damages (loss of care, comfort, and companionship), 46 U.S.C.A.

§ 30307(a), for death resulting from "a commercial aviation disaster occurring on the high seas beyond 12 nautical miles from the shore of the United States…but punitive damages are not recoverable." 46 U.S.C.A. § 30307(b). See generally, Stephen R. Ginger and Will S. Skinner, *DOHSA's Commercial Aviation Exception: How Mass Commercial Aviation Disasters Influenced Congress on Compensation for Deaths on the High Seas*, 75 J. of Air Law & Comm. 137 (2010) (discussing the legislation and the jurisprudence). This amendment brought DOHSA into the legal mainstream as far as the survivors of victims of commercial aviation disasters, but, while the survivors of the victims of a commercial aviation disaster on the high seas may now recover nonpecuniary damages the survivors of anyone else killed on the high seas (including for instance someone killed on a cruise ship or on a semi-submersible floating rig or even a helicopter) may not. It strains reason to come up with a meaningful, rational principle to justify the differential treatment, other that the very real social and political turmoil that followed the high profile tragic air disasters. The disaster of the Deepwater Horizon is, of course, a similarly tragic event, which presents an opportunity to bring the law into some logical, sensible, compassionate symmetry.

To add another relevant point to the analysis, OPA 90, 33 U.S.C.A. § 2701 et seq., allows victims of oil spills to recover various damages, including removal costs, § 2702(b)(1); damage to real or personal property, § 2702(b)(2)(B); damage to natural resources used for subsistence, § 2702(b)(2)(C); and economic damages because of damage to property or natural resources even if the claimant does not own the property. § 2702(b)(2)(E). These rights to recover damages assure compensation to persons injured in various ways by an oil spill. But, critically, OPA 90 does not apply to personal injury or wrongful death claims. See, generally, *Gabrick v. Lauren Maritime (America), Inc.*, 623 F.Supp.2d 741 (E.D. La. 2009)(OPA does not cover

bodily injury claims damage). Consequently, the survivors of the seaman killed on the high as a result of negligence or unseaworthiness do not recover for loss of society while the persons whose property was damaged or who lost profits do recover. This is not to say that recovery for damaged property or lost profits is not appropriate, it is merely to point out that currently recovery of economic loss is more readily available than recovery for loss of a loved one.

I have noted above how a possible amendment to the FELA would deal with the seaman's negligence claim, DOHSA could also be amended to delete the word "pecuniary" before "loss" in 46 U.S.C.A. § 30303 and to add the language, "including nonpecuniary damages for loss of care, comfort, and companionship" after "loss." This is basically the language that was originally included but taken out of the proposed Cruise Vessel Security and Safety Act of 2008, S. 3204, 110th Cong. (2008); Cruise Vessel Security and Safety Act of 2008, H.R. 6408, 110th Cong. (2008).

**III. Survival Action Pre-Death Pain and Suffering**

Additionally, shifting from the wrongful death claim to the survival action claim, the Supreme Court in a case that did not involve a seaman has refused to allow recovery of pre-death pain and suffering as part of a survival action claim if death occurs on the high seas. *Dooley v. Korean Air Lines Co.*, Ltd., 524 U.S. 116 (1998). The law does allow the Jones Act seaman's survivors to recover for pre-death pain and suffering; see, David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 32 Tul. Mar. L.J. 493 (2008).Thus *Dooley* does not apply to those claims but in any case covered by *Dooely*, involving a death caused by events on the high seas,

no matter how much the decedent may have suffered before his or her death, those damages are not recoverable.

To remedy this situation, Congress could amend the law to not only make loss of society damages recoverable as suggested above but also to make pre-death pain and suffering available in maritime survival actions. Congress could accomplish that by adding the following language at the end of 46 U.S.C.A. § 30303: "The individuals for whose benefit the action is brought may also recover damages for pre-death pain and suffering." This is precisely the language that was originally included but taken out of the proposed Cruise Vessel Security and Safety Act of 2008, S. 3204, 110th Cong. (2008); Cruise Vessel Security and Safety Act of 2008, H.R. 6408, 110th Cong. (2008).

**IV. Tort Claims Against Third-Parties**

The beneficiaries of a seaman or other maritime worker killed on the high seas may have claims not only against the vessel but may also have general maritime tort claims against other parties such as manufacturers, contractors, or others. By definition, if death results, DOHSA applies and nonpecuniary damages would not be recoverable. Concomitantly, if the death occurs in territorial waters, nonpecuniary damages are more likely to be recoverable. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974)(allowing the survivors of an LHWCA worker killed in territorial waters to recover loss of society). See also, *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1995)(allowing the survivors of a non-seafarer killed in territorial waters to rely on state law to seek recovery of loss of society damages). Thus where one dies may be more relevant to recovery than other critical circumstances, such as the injury to the relevant survivors.

If workers who are not seaman, are killed as a result of a maritime disaster on the high

seas, DOHSA would also govern their survivors' recovery which would be limited to pecuniary damages, as currently defined. There would also be no recovery for pre-death pain and suffering. The amendments to DOHSA, proposed above, making nonpecuniary damages and pre-death pain and suffering damages recoverable, would apply to those claimants as well.

If a worker is killed on a *stationary drilling platform* on the high seas, as opposed to being killed on a semisubmersible mobile rig, state law would govern his or her tort recovery rights against third persons and state law very probably would mean survivors could recover loss of society and pre-death pain and suffering damages from third persons. This is because the Outer Continental Shelf Lands Act, 43 U.S.C.A. § (a)(2)(A), adopts the laws of each adjacent state to govern on OCS platforms, which are treated as islands in an upland state (recall that platforms, unlike rigs, are not vessels). See generally, Frank L. Maraist & Thomas C. Galligan, Jr., *Admiralty in a Nutshell*, 323-27 (5th ed. 2005). See generally, *Alleman v. Omni Energy Services Corp*, 580 F.3d 280 (5th Cir. 2009). Thus the measure of recovery in a fatal injury action on an off-shore oil or gas production facility (a rig or platform) would depend upon whether the relevant vehicle was a platform or a rig, even though the job that the killed worker was doing and the cause of the death was exactly the same. The point is that the potential recovery would illogically and unfairly depend upon happenstance not substance.

**V. Maritime Punitive Damages**

Another subject of potentially significant import arising out of this disaster is the recoverability of punitive damages in various types of maritime cases. The United States Supreme Court has held that punitive damages are recoverable under general maritime law. See, e.g., *Atlantic Sounding Co., Inc. v. Townsend*, 129 S.Ct. 2561 (2009); *Exxon Shipping Co. v.*

*Baker*, 128 S.Ct. 2605 (2008) (recognizing the right to recover punitive damages under maritime law but limiting them to a 1:1 ratio to compensatory damages). However, punitive damages are not available in DOHSA cases. Now, they arguably are available in seaman related cases given the holding in *Townsend* that a seaman may recover punitive damages under the general maritime law arising out of the arbitrary and willful failure to pay maintenance and cure. The matter will be the subject of future argument and litigation. Notably, the potential absence of punitive damages in cases involving deaths for which no loss of society and/or no recovery of pre-death pain and suffering are available may inadequately deter those who engage in activities that may cause injury or loss of life because it can result in an undervaluing of human life and the tragic ramifications when it is lost. See, Thomas C. Galligan, Jr. *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 La. L. Rev. 3 (1990).

While the Supreme Court has never considered the issue, several courts have held that punitive damages are not available under OPA 90. See, e.g., *South Port Marine LLC v. Gulf Oil Ltd.*, 234 F.3d 58 (1st Cir. 2000); *Clausen v. M/V NEW CARISSA*, 171 F.Supp.2d 1127 (D. Ore. 2001). See the discussion in: Wright, Roy, Stephens, and Colomb, *BP Deepwater Horizon Gulf of Mexico Oil Pollution Disaster, Preliminary Analysis: Law, Damages, and Procedure* May 2010 (Available from Louisiana State Bar Association and the authors). The cited decisions also say that OPA 90 preempts maritime law and therefore punitive damages are not available in a case involving maritime law and OPA 90. Interestingly, OPA 90 actually provides that it does not affect admiralty or maritime law. 33 U.S.C.A. § 2751(e). Moreover, OPA 90 does *not* provide that punitive damages are *not* recoverable; it is merely silent on the subject. And both *South Port Marine LLC v. Gulf Oil Ltd.*, 234 F.3d 58 (1st Cir. 2000) and *Clausen v. M/V NEW CARISSA*, 171 F.Supp.2d 1127 (D. Ore. 2001) were decided before the Supreme Court's

affirmation of the right to recover punitive damages in *Townsend* and *Exxon*. Indeed in *Exxon*, the Court refused to find that the Clean Water Act, see 33 U.S.C.A. § 1321, which was silent on the subject of punitive damages, precluded the recovery of punitive damages under maritime law. Finally, OPA 90 does not, as noted, apply to personal injury and wrongful death claims. Consequently, any preemptive affect OPA 90 might have on punitive damages in personal injury and wrongful death cases would seem to be limited.

**VI. Recovery of Economic Loss**

Damage to the environment devastates lifestyle, culture, and global well-being. It harms everyone; but more directly, it can cause very real and serious loss to those who depend upon the environment for subsistence or economic survival. A fisher whose potential catch is killed faces not only an environmental but also an economic disaster. The traditional and somewhat limited rule in maritime law has been to refuse to award purely economic loss (i.e., loss profits) unless the plaintiff could prove some physical injury to a thing in which he or she had a proprietary interest. *Robins Dry Dock and Repair Co. v. Flint,* 275 U.S. 303 (1927); *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985). See generally, Thomas C. Galligan, Jr., *Contortions Along the Boundary Between Contracts and Torts*, 69 Tul. L. Rev. 457, 512-20, 522-25 (1994); Wright, Roy, Stephens, and Colomb, *BP Deepwater Horizon Gulf of Mexico Oil Pollution Disaster, Preliminary Analysis: Law, Damages, and Procedure* May 2010 (available from Louisiana State Bar Association and the authors). What the basic rule means is that many people who suffer real and devastating injury do not recover and rational economic actors are consequently under deterred because real but unrecoverable loss is not a cost they must consider in deciding what to do and how to do it. The system fails to achieve efficient investments in safety. Predictably, since the rule is so harsh, some meaningful exceptions have developed. For

instance, commercial fishers may recover for their loss. *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d at 1021; *Union Oil v. Oppen*, 501 F.2d 558 (9th 1974). But, as Wright, Roy, Stephens, and Colomb, *supra,* note courts have denied recovery to marina operators, wholesale and retail seafood businesses which do not actually fish, and lessees of damaged property.

As noted above OPA 90 partially remedies this situation. It makes a "responsible" party liable for various types of damages, including economic damages because of damage to property or natural resources even if the claimant does not own the property. 33 U.S.C.A. § 2702(b)(2)(E). A "responsible" party is basically a "vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone..." 33 U.S.C.A. § 2702(a) and § 2701(32).

The statute supersedes the *Robins Dry Dock* Rule. See, *Dunham-Price Group v. Citgo Petroleum Corp.*, 2010 WL 1285446 (W.D. La. 2009); *In re Settoon Towing* LLC, 2009 WL 4730969 (E.D. La. 2009); *Sekco Energy v. M/V MARGARET CHOUEST*, 820 F. Supp. 1008 (E.D. La. 1993) *cited in* as Wright, Roy, Stephens, and Colomb, *supra.* But, once again, inconsistency and risk of inequity raises its ugly head. This is because only the "responsible" party is liable for economic losses. Maritime tortfeasors who were not OPA 90 "responsible" parties would not be liable for the economic loss they caused. Ironically then, a party who is strictly liable under OPA 90, faces greater potential liability than a person who has negligently or recklessly caused economic loss. That result is illogical and inconsistent with the moral and economic underpinnings of American tort law.

**VII. Limitation of Liability**

A final critical point of interest here in this initial analysis is the effect and applicability of the Limitation of Liability Act, 46 U.S.C.A. § 30501 et seq., to these events. Originally passed in 1851 to encourage investment in maritime shipping and commerce, the limitation act allows a vessel owner (and some others) to limit its liability to the post-voyage value of the vessel if the liability is incurred without the privity or knowledge of the owner. 46 U.S.C.A. §§ 30505(a), (b), and 30506(e). One may justifiably wonder whether an act passed at a time before the modern development of the corporate form (and other liability limiting devices) and the evolution of bankruptcy law is still salient; however, limitation is still an important part of maritime law. OPA 90 has its own liability limitation scheme and the applicable limit in this matter seems to be $75,000,000. While the Supreme Court has not considered the matter, lower federal courts have held that the OPA 90 supersedes the limitation act. See, e.g., *Complaint of Metlife Capital Corp.*, 132 F.3d 818 (1st Cir. 1997); *In re Southern Scrap Material Co., LLC*, 541 F.3d 584, 595 (5th Cir. 2008) (dicta); *Gabrick v. Lauren Maritime (America), Inc.*, 623 F.Supp.2d 741 (E.D. La. 2009). But, as noted, OPA 90 does not apply to personal injury or wrongful death claims so, once again, confusion is created. Does this mean that the Limitation Act may apply in personal injury, and wrongful death claims but not OPA 90 claims? If that is the case and if the limitation fund provided under maritime law is less generous compensation than the OPA 90 regime then personal injury and wrongful death claimants would be treated less favorably than economic loss claimants.

**VIII. Conclusion**

I have sought to only point out a few of the myriad of legal issues that may arise as a result of the disaster in the Gulf. In particular I have focused on four issues—recovery of nonpecuniary damages in certain types of maritime tort cases (particularly Jones Act/FELA and DOHSA cases), the availability of punitive damages in maritime disasters, recovery of economic loss, and the impact of the Limitation of Liability Act--where the current law is confusing, conflicting, arguably incoherent when viewed as a whole, and potentially under compensatory and an inadequate deterrent. The tragedy in the Gulf of Mexico provides a sad but necessary opportunity for our nation to reconsider and improve our law in the wake of this disaster.



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Mr. CONYERS. I invite Ranking Member Lamar Smith to begin the questions.

Mr. SMITH. Thank you very much. I know we have a vote coming up, and so I won't use up all of my time.

Let me direct my first question to Mr. Willis.

And Mr. Willis, I just want to confirm what I believe BP's position is, and that is that you don't feel that taxpayers should pick up any of the cost of the oil spill, is that correct?

Mr. WILLIS. Representative Smith, we are going to pay all legitimate claims associated with damages caused by that spill. We are going to pay for damages to people's livelihood. We are going to pay for lost wages. We are going to pay all claims that are substantiated.

Mr. SMITH. I understand.

Mr. WILLIS. We are going to pay all claims that are reasonable and necessary.

Mr. SMITH. And you don't feel that taxpayers should pay any of the costs attributable to the oil spill?

Mr. WILLIS. I'm sorry, I didn't hear your question.

Mr. SMITH. You don't feel that the taxpayers should pick up any of the cost of the oil spill?

Mr. WILLIS. We realize that we are going to be judged by our response to the spill, and we will pay for all damage that has been caused that is directly related to this spill to people, to governments, to communities.

Mr. SMITH. And BP, not the taxpayers?

Mr. WILLIS. BP is going to pay for all damages that have been caused by this spill.

Mr. SMITH. Thank you, Mr. Willis.

Mr. Foley, I was going to ask you if you felt that the liability cap needed to be raised. I think you have actually explained very well in your opening remarks why that is not necessary and why people can still be adequately compensated. So let me go to Attorney General Hood and ask you a question if I may.

Attorney General Hood, do you feel that your State of Mississippi has received all the equipment and permits that you need to address the oil spill from the Federal Government?

Mr. HOOD. I am sorry, I couldn't hear your question.

Mr. SMITH. I am speaking into the mike. Do you feel that the State of Mississippi has received all the equipment and permits it needs from the Federal Government in order to adequately address the oil spill?

Mr. HOOD. Yes, sir. We have been satisfied with the efforts of the Federal Government. And BP gave $25 million to the State so that local governments could draw down the money to prepare for this bill coming.

Mr. SMITH. So you have everything you need for equipment and permits from the Federal Government?

Mr. HOOD. Yes, sir.

Mr. SMITH. Mr. Willis, last question. You have a background in oil exploration. Do you feel that we should consider limiting or eliminating all offshore drilling?

Mr. WILLIS. By training, I am a geologist. I grew up on the Gulf Coast. Born and raised in New Orleans, Louisiana. Spent many summers in Biloxi and Bay St. Louis, Pascagoula, and when my folks had a lot of money, we actually went over to Destin. I actually studied in the marshes of Louisiana, and I realize that there is a very delicate existence in Louisiana in particular between the oil industry and the fishing industry. I have family members who

work in the oil industry who love to fish. One of my uncles who worked in the oil industry taught me how to crab. I think they can both exist together.

Mr. SMITH. Both offshore exploration and fishing and crabbing.

Mr. WILLIS. Yes.

Mr. SMITH. Thank you, Mr. Willis.

Thank you, Mr. Chairman. I yield back.

Mr. CONYERS. Chairman of the Constitution Committee, Jerry Nadler.

Mr. NADLER. Thank you.

First of all, let me just say that I hope we can have Attorney General Hood back here before this Committee to really explore the issues he raised about the class action suits; about Federal courts removing these cases, perhaps not properly; and about why it is so bad in the Federal court, in any event. Even if it is removed, why should you get less justice in a Federal court, which obviously you think you do, than in a State court? So I hope we can examine that at a subsequent occasion.

Let me ask Mr. Willis, does BP have sole liability for damages caused by the use of dispersants as well as by the use of oil?

Mr. WILLIS. Sir, my involvement to date in response to the oil spill has been directly associated with the claims process.

Mr. NADLER. Fine. If someone files a claim, I got sick from breathing air made poisonous by the dispersants, would you award that person an award?

Mr. WILLIS. We have an open claims process, and anyone who feels like they have been damaged or hurt or harmed directly by this spill has every right——

Mr. NADLER. Directly by that spill. Does that mean the dispersants or only the oil? Are we going to have to determine Jones got poisoned by the oil, but Smith got poisoned by the dispersants, and therefore you are not liable; or are you willing to tell us it doesn't matter, you are willing to cover people who got sick for any cause?

Mr. WILLIS. What we are going to do is follow the law.

Mr. NADLER. Do you feel that the law—do you feel that the law covers the dispersants or only the oil?

Mr. WILLIS. I am not an attorney, but I will tell you that we have a claims process. It can be accessed three ways—through a 1-800 number——

Mr. NADLER. Stop, stop. You are wasting my time. I am not interested in the fact that you have a claims process, that it can be accessed. We know that. The question is: What will you respond to in the claims process? Can anyone answer these questions?

Mr. WILLIS. I will tell you what we will respond to in our claims process.

Mr. NADLER. What kind of claims?

Mr. WILLIS. To date, as I mentioned in my testimony, we have paid over 13,000 claims. Some of them have been for lost income. Some of them have been to fishermen.

Mr. NADLER. I am asking a different question. If someone breathes in air on the Louisiana coast and claims that that air is poisoned as a result of the dispersant, and can show that that is the case, is that a valid claim in your process?

Mr. WILLIS. They can file a claim, yes.

Mr. NADLER. I didn't ask if they can file a claim. I have said if they can prove that claim that they are poisoned because of the dispersants, is that a valid claim that you will pay?

Mr. WILLIS. Every claim will be evaluated——

Mr. NADLER. Can you answer yes or no, please? Do you consider poisoning by the dispersants your responsibility?

Mr. WILLIS. What I am telling you, sir, is that we will evaluate every single claim that we get.

Mr. NADLER. I know you will evaluate it, but you are evading my question. Let me read you something. I will read you a different question. Fishermen responders who are working BP's giant uncontrolled slick in the gulf are reporting bad headaches, hacking coughs, stuffy sinuses, sore throats, and other symptoms. The Material Safety Data Sheets for crude oil and the chemical products being used in the dispersants list these varying ailments as symptoms of overexposure to volatile toxic organic carbons, hydrogen sulfide, and other chemicals boiling off the slick.

BP is not offering people respirators. We just finished in the other room 2 days ago voting on $10.5 billion to compensate people who are poisoned by breathing in toxic air after the World Trade Center disaster because the Secretary of—the head of EPA at that time lied and said there were no ill health effects and the air was fine.

I very much fear we are recreating the same thing right now, and that BP—and I have a whole group of stories here. Seven people admitted into the West Jefferson Medical Center in New Orleans, receiving treatment for having contact with dispersants. Marine toxicologist Riki Ott said the chemicals used by BP can wreak havoc on person's body, even lead to death. Like other cleanup workers, Jackson, had attended a cleaning class and was told not to pick up oil-related waste. But he wasn't provided with protective equipment. The BP officials told us if we ran into oil, it wasn't supposed to bother us, which is clearly untrue.

I fear that what BP is doing now is going to get thousands and thousands and thousands of people sick, maybe dead. And my question is: Do you undertake the responsibility—not to evaluate the claims. Do you recognize that the toxic air produced by the oil and by the dispersants can make people sick, and it is your responsibility, yes or no? And what will you do to prevent this from happening, since you are obviously allowing and requesting people to work without proper protection?

Mr. WILLIS. I realize and I understand your question. We have received as a part of our claims process claims related to bodily injury. However, OPA does not contemplate personal injury, but as a part of our claims process, we will accept those claims, we will evaluate those claims, and we will address them as they come in.

Mr. NADLER. But in your evaluation are you going to reject them because they are caused by dispersants, not by oil? That is the real question. Are you going to protect the workers, or are we going to recreate thousands of people who are sick and who we are going to be debating a few years from now how to compensate?

Mr. WILLIS. We are going to do the right thing. We are going to respond to this in an effective manner. And we realize we will be judged on our response.

Mr. NADLER. I will just observe, since my time has expired, that the answers are totally unresponsive to the questions. And I hope that after this hearing you can get us answers to the specific questions I ask. One, do you accept responsibility for the poisoning of people by the dispersants in the air or the water as well as by the oil, or is that not direct under your definition? Two, what steps will you take to make sure that the people working on the recovery are not poisoned, as is now clearly happening to them? I hope you can get direct answers to those questions and not simply say, we will evaluate it.

Mr. CONYERS. Senior Member of the Committee Howard Coble.

Mr. COBLE. Thank you, Mr. Chairman.

I thank the panelists again for appearing here today.

Mr. Willis, let me put a procedural question to you. If a claimant submits a claim for immediate compensation, and compensation is, in fact, afforded, is that claimant permitted to subsequently submit claims if the damages are increased? You don't require a release upon delivery of the first response to a claim, I guess is the question.

Mr. WILLIS. Just to make sure I understand your question, you are asking whether a release is required when the first claim is delivered? A release is not required.

Mr. COBLE. I assumed that. Thank you, sir.

Mr. Attorney General, Mr. Hood. Mr. Hood, in your testimony you suggest that State actions related to this oil spill should not be removable to the Federal court. Now I am told, and I may be wrong about this, that tort reform advocates rate Mississippi at or near the bottom of their ratings in every category study. Now, why should we bar removal related to this spill if, in fact, Mississippi's liability system is a poor record? It may not be a poor record. My information may be flawed. What do you say to that?

Mr. HOOD. I suspect that the information that you have is probably biased.

Mr. COBLE. I have been the beneficiary of biased reports as well as you have.

Mr. HOOD. You see, you have Florida, you have Texas, Alabama, and Louisiana. You have all our States that our attorneys general want to bring our actions in our State courts and have the Federal judiciary recognize that we are a separate sovereign. We will be making claims under our Clean Water Acts, under our Coastal Wetlands Protection Acts. We are trying to recover resources for our States. If we get thrown into a mass tort action in Houston, Texas, we won't recover all that we are owed. That is all we want—all we are owed—and nothing else.

Mr. COBLE. Thank you, sir.

Mr. Lemmer, let me put a two-part question. Has Cameron International made an assessment yet as to whether it is exposed in any liability under the Oil Pollution Act, A? B, what is Cameron International's previous experience with malfunctioning in its blowout preventers?

Mr. LEMMER. Congressman, the answer to the first one is we believe we are not a responsible party under OPA; that that is initially BP and, as we heard today, Transocean. We don't believe that we are.

With respect to the history of blowout preventers, they have performed excellently over the years. They have gone from the surface to shallow waters to deep water, and we have never had an incident like this before.

Mr. COBLE. Thank you, sir.

Mr. Foley, I think you touched on this in your statement, but if you will discuss briefly the civil and criminal penalties that are relevant to this spill under OPA and other environmental laws.

Mr. FOLEY. There are civil and criminal penalties under the Federal Water Pollution Control Act for the negligent release of oil, and the penalties are on a per-day, per-barrel basis. And there are no limits of liability with respect to those criminal and civil penalties. In addition, there are several Federal statutes that are used criminally to prosecute in oil discharge cases for environmental damage, such as the Migratory Birds Treaty Act for oiling birds. That is a strict-liability statute. There are a number of others. I don't have them all listed here.

Mr. COBLE. Thank you.

Mr. Chairman, I want to join my colleagues in extending condolences to those who did lose loved ones in this tragedy, and I yield back the balance of my time.

Mr. CONYERS. Crime committee Chairman Bobby Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Willis, there are number of different areas in terms of direct and indirect and even remote losses. If a seafood processing plant—if a waterman can't work because the seafood has been damaged, seafood processing plant has nothing to process, they would be losing money. Workers who work with these plants could lose their jobs because there is nothing to do. A restaurant may not able to get seafood, so they would lose money in terms of sales, and the waiters would lose their jobs because the restaurant is closing. Even the local movie theater might suffer losses because nobody in the neighborhood is working.

Who sets the standards on who gets paid in all these situations?

Mr. WILLIS. Congressman Scott, the starting point for the standard is the law. And it is OPA, which was established by Congress for these types of situations. What we are doing is following that law in terms of damages, in paying for damages that are directly related and directly caused by the spill; paying for losses of income that are directly caused by the spill; paying those claims that have been substantiated, those costs that are reasonable and necessary as damages have been described in OPA. We are actually being guided by how the Coast Guard has interpreted this law for the last 20 years.

Mr. SCOTT. Now, can we get periodic reports as to what is actually being paid so that we can get an idea of what is getting paid and what isn't getting paid?

Mr. WILLIS. Yes, sir. As a matter of fact, every day we provide the Coast Guard with a report by State, by type of claim.

Mr. SCOTT. Now, there have been allegations of fraud, misrepresentations, pressure, and everything else. Let me ask the attorney general. This is a Judiciary Committee, and we are trying to figure out what kind of damages and liability there ought to be. What kind of standard should there be for punitive damages and criminal liability?

Mr. HOOD. That is, of course, going to depend on what the facts are in this case. If we find that there was gross negligence, that they should have taken some action that they did not, then that would elevate it to the level of punitive damages, which are available under some of our separate State actions.

As far as a criminal investigation, it will be up to the Department of Justice. That will be outside of our State jurisdictions to make that decision. And I am aware that it is being looked into from a possible criminal angle. But the facts will have to lay that out, and I am not really able to lay out any particular standards that will require for either of those causes of action to occur.

Mr. SCOTT. Mr. Chairman, I yield back.

Mr. CONYERS. Steve King, Ranking Member of Immigration committee.

Mr. KING. Thank you, Mr. Chairman.

It has been an interesting panel of witnesses here this morning. Listening to the testimony and the questions that have been asked by the Members of this Committee, I hear the reflection of what was said and done up at Ground Zero in New York City as if that might inform us as to what we might do here. I would recognize that we can't have any ex post facto laws, and whatever is in place now I believe should be what controls the liability. I don't intend to support anything that is going to do something retroactively. I hear a tone of something otherwise, and I am not going to try to quote some Member on that. I just want to make that point.

As I listen to the panel, it occurs to me that I haven't heard what went wrong. Of all the experts we have, is there anyone on the panel that can tell us what went wrong down hole?

Let the record reflect that there isn't an answer right now to that.

I will perhaps direct my question to Mr. Willis then, and that would be: Would it be reasonable, in your opinion, that before this Congress passed judgment on what mistakes were made by which entity, that we should determine what went wrong before we actually took some action to try to fix something?

Mr. WILLIS. I am not sure I understand your question.

Mr. KING. We have got a blowout preventer that apparently failed. We don't seem to know why. We don't know if there was a super-high-pressure gas bubble down there. I don't have any measurements of pressure. I don't know what went in the hole for mud. I don't know if it was replaced with seawater. I don't know what the control was of the blowout preventer. All those things down hole, I haven't seen those reports from BP or anybody else. I hope you are forthcoming with that data and that information so we can find out what you may know that you have not yet told America.

I see a whole Congress that is wrestling with this. I see hearings all over the Hill. There is a lot of media focus. It is on every day. But yet we haven't focused—the first thing I believe that we should

do is find out what went wrong. We don't know. Is there information that BP has that America would be interested in, do you think, Mr. Willis?

Mr. WILLIS. Congressman, all I can tell you is since April 29, my focus has been making sure that the people that have been hurt in Louisiana and Mississippi and Alabama and Florida by this spill are compensated for their losses in real time. That has been my total focus.

Mr. KING. Mr. Ferguson, representing Halliburton, I presume you were involved in preparations to cement the well.

Mr. FERGUSON. The company was on the well, yes.

Mr. KING. You are here as an expert not on the geology of it, but the legality of it.

Mr. FERGUSON. That is right.

Mr. KING. So that is where I am going to run into my blank here, and I just turn this into a statement rather than a question. I will just say, Mr. Chairman, to the members of this panel, I have great difficulty going down a path of trying to determine how Congress might deal with potential liabilities or what kind of message we might like to send if we are unable to actually determine what went wrong.

Holding people accountable for something that may have never been encountered before geologically occurs to me to be a little bit premature. I would like to have done this examination on the other side of the geological report that hopefully we will get; the technological report that will come from BP, from MMS, from Halliburton and other companies that are involved, and at that point we can be objective. But I think it is premature to be at this point in this testimony that is here today. And I am going to turn my focus on figuring out what went wrong, learning what went wrong, and at that point start to put some of my conclusions together on whether Congress needs to act and how we might do that with the best amount of judgment.

So I would just thank the witnesses for coming to testify today, and yield back the balance of my time.

Mr. CONYERS. Mel Watt, senior Member of the Judiciary Committee.

Mr. WATT. Thank you, Mr. Chairman.

And I don't disagree substantially with what Mr. King has said. It is unusual. But it is interesting that people are already starting to point the finger at each other.

Mr. Lemmer, I take it you all have already concluded that your blowout prevention system didn't cause this accident. You have testified to that affirmatively. Yet you have also testified that as soon as this occurred, you had people down there investigating and doing what was necessary to respond.

So I guess the first question I have picks up where Mr. King left off. Has anybody made any preliminary assessments of what did cause this?

Mr. Lemmer, you seem to know what didn't cause it. Perhaps you could tell us your theory on what did cause it?

Mr. LEMMER. Congressman, at this point we don't have the necessary facts to make that determination.

Mr. WATT. You made the determination that your company's system didn't fail. You must have made some kind of determination in order to be able to make that assessment. So what are the possible theories of how this occurred?

Mr. LEMMER. First of all, Congressman, what I said is we don't have enough information at this time to make any such determination.

Mr. WATT. I don't think you said that at all. I am looking pretty much at your testimony. You seem to have eliminated—in response to somebody's question, you said your company doesn't have any liability; it was BP and the other folks. So the question I am asking you is: What are—I mean, I am not asking you to tell me what caused this. What are the range of possibilities of what caused it, I guess is the question I am asking?

Mr. LEMMER. First of all, I want to go back to the point. The question was about our liability under OPA. That is a particular statute, not liability in general under common law or other statutory law.

Mr. WATT. I am sorry if I misrepresented what you said. Can you answer the question now?

Mr. LEMMER. The theories have been well expounded on in some of the other hearings. They go anywhere from a catastrophe down hole where there was a failure——

Mr. WATT. We know there was a catastrophe now. Come on.

Mr. LEMMER. Did the casing fly into the blowout preventer; did the casing hanger fly up into the blowout preventer; did the blowout preventer try to close on a tool joint? There are a number of instances that would prevent the BOP from closing.

Then there are the issues of controls. From what I understand from reading the paper and watching 60 Minutes and whatnot, the attempt to close the emergency disconnect did not occur until after the explosion. It could well be, although we don't know at this point—it could well be that that explosion cut the communication between the control and the actual operation of the BOP on the seabed.

Mr. WATT. We got your theory. What about the Halliburton theory? Tell me why Halliburton is not responsible.

Mr. FERGUSON. Like Mr. Lemmer, we do appreciate the investigations are still going on.

Mr. WATT. I understand that. I am asking you what you think happened.

Mr. FERGUSON. I can comment like Mr. Lemmer did that there were a number of things that were going on with this well. There were a lot of operations that were being done. There was a lot of equipment, and there were a lot of parts that were in the well that could have failed. The manner of doing the operations could have been a problem. Until the investigation is over with and we have seen all the facts, we just can't identify which one of those.

Mr. WATT. All of which would have been under the control, I presume, of BP, at some level.

Mr. FERGUSON. BP is ultimately in control of the operation.

Mr. WATT. Let me ask this question, Mr. Willis. There are already families of deceased people who died as a result of this incident. What efforts are you currently making to try to address the

needs of those families? Are you just waiting on the lawsuits to come and be resolved at the end of the process?

Mr. WILLIS. Congressman Watt, the first thing I would say is that our heart go out to the family.

Mr. WATT. I understand that, Mr. Willis. We all have that response.

Mr. WILLIS. My understanding is that each company is addressing the needs and claims of its own employees and survivors.

Mr. WATT. How many of those employees were employees of BP?

Mr. WILLIS. None of them were employees of BP.

Mr. WATT. Who were they employees of?

Mr. WILLIS. M-I Swaco, Transocean.

Mr. WATT. Transocean, where are you? What are you doing to address the needs of the survivors currently as opposed to just waiting on them to go in and prove whatever claim they may have?

Ms. CLINGMAN. Yes, sir. Of the 11 lives that were lost, 9 of those were Transocean employees. And we do take, happily, responsibility for addressing the needs of those families.

Mr. WATT. What are you doing right now?

Ms. CLINGMAN. We have made the conscious decision to wait until after a memorial service our company held on this past Tuesday to hold any financial discussions with the families. We held the memorial with all of the families.

Mr. WATT. So you are not taking any steps right now, other than waiting on the legal liabilities to be determined. That is what you are saying?

Ms. CLINGMAN. No, sir. We waited until after the memorial and are now in touch with those families and/or their legal representatives. We have actually started that process before the memorial. We did not want to have any financial discussions until after the memorial. We thought it was inappropriate to interrupt the grieving process.

Mr. WATT. To the extent that Mr. King has said we can't do things retroactively, I agree with that, but we can inform ourselves about what the future state of law should be. And I would just remind my colleagues that in the upcoming financial regulatory reform debate, this same issue about to what extent the Federal law preempts all State law is the same preemption question. All national companies would like to have one national standard and never answer to any State law, be subject to any liability from any attorney general's lawsuit, State attorneys general lawsuit. But you are going to get an opportunity in other contexts to address this same issue, and I hope we will remember this gentleman Mr. Hood's testimony when we get there.

I yield back, Mr. Chairman.

Mr. CONYERS. Darrell Issa.

Mr. ISSA. Thank you, Mr. Chairman.

Ms. Clingman, obviously, the loss of employees' lives are covered by more than just the caps that we are dealing with here today. I am not asking you to tell us about the settlement per se, but in overall terms what is the company's anticipated dealing with the loss of lives, and is any part of it affected by the $75 million cap that we are discussing here today?

Ms. CLINGMAN. Yes, Representative. No, the $75 million cap that has been referenced applies only to OPA, which are environmental claims. That cap has nothing to do with our responsibility for our employees. They are, however, subject to the limitation of liability action that has been filed in Texas Federal court. How we address that depends on how those claims play out.

What I can commit to you and to the families involved is that from our CEO down, we have testified and will proactively resolve those claims fairly, and we are at the very outset of that process now, but it is one of our top priorities.

Mr. ISSA. The business of drilling rigs, whether on land or at sea, it is pretty dangerous business, isn't it?

Ms. CLINGMAN. I would say no more dangerous than many industrial workplaces. There are obviously a lot of risk factors in offshore drilling. It has been historically safe. Our rig involved here has not had a single incident for 7 years of even minor injuries on board.

Mr. ISSA. Isn't it true that on the very day that this disaster occurred, your people were receiving a safety award for its operation of that rig?

Ms. CLINGMAN. Yes, sir. As ironic as that sounds now, the operation had been conducted so well and with so little safety or other concern, that there was being an award given, and executives were on board the rig that day for that purpose.

Mr. ISSA. I am going to continue on with you, if you don't mind, because there are too many to spread it around. Isn't it true that you had concluded your basic drilling 2 days before?

Ms. CLINGMAN. Yes, sir. Transocean was brought in to drill the rig by BP—it is a subcontractor—and that drilling had been completed on April 17, 3 days before the Deepwater Horizon incident. Ironically, we were in the process of concluding our work and were in the very short future going to remove the blowout preventer and the riser package and depart the well site, at the request of BP.

Mr. ISSA. So going through that line of questioning, isn't it true that the subcontractor for the concrete portion, Halliburton, was on site?

Ms. CLINGMAN. Yes, sir. Halliburton as well as M-I Swaco were performing the cementing.

Mr. ISSA. So we have British Petroleum that owns the lease. They have some oversight. We have at least three other contractors. You are in a transition phase. Is it a particularly dangerous time historically, this transition?

Ms. CLINGMAN. It is a good question. And I would say generally, not being a drilling engineer myself, it is actually considered one of the more safe times. One of the things that is so astoundingly unusual about this incident is it happened after a well had been cemented and cased. Normally you would anticipate during the drilling process, as you are reaching different geologic depths, you would see greater risks from hydrocarbons emanating from the structure. Here the well had been cemented, cased, and concluded. So it is extraordinary, and I have heard that repeated from everyone in the industry, that there would be such a catastrophic failure.

Mr. ISSA. So, going through that line of questioning for our edification, one, you are going to take care of your people based on laws

unrelated to our hearing here today. Two, your work had been completed; but, more importantly, there were multiple different folks, companies represented there. There is a whole series of logs, not all of which you probably have, that will have to be reviewed. The failing device may or may not have been the one that was inspected days before. The blowout preventer. The concrete is a factor of why and how it failed to perform.

So summarizing it, we don't know whether there was any failure that could have been anticipated. We don't know, and we are not representing here Mineral Management Service, who has a primary responsibility to ensure that, and yet we are talking about removing a cap that may or may not apply based on whether there was or wasn't wrongdoing by any of the companies represented here. Would you say that synopsizes what we are doing here today?

Ms. CLINGMAN. I agree with many of the statements you have just made. It is incredibly difficult to try and either prejudge liability or responsive action that should have been taken. I am thrilled to hear the report that perhaps the well leak has been stopped. That will allow more resources to be dedicated to the investigation. I wholly agree that until we know the cause of the incident, it is completely inappropriate to start to assign blame or liability. What is important, I believe, today is that claims are being paid, and people who are injured are being taken care of. And that is my commitment.

Mr. ISSA. I, for one, will be looking at how the companies handle their obligations, and obviously would like to have further research once there are more facts as to whether this was an inevitable event or something that could have been prevented by compliance.

Mr. Chairman, I thank you for your diligence in this and yield back.

Mr. CONYERS. We have now been called to some votes on the floor. We will take a recess. Mr. Brandon Johns will lead you and direct you to restaurants, delicatessens, restrooms, et cetera.

The Committee stands in recess.

[Recess.]

Mr. CONYERS. The Committee will come to order. Thank you for your return.

The Chair recognizes Sheila Jackson Lee, a senior Member of the Committee and chairwoman of the Transportation Security Subcommittee of the Homeland Security Committee.

Ms. JACKSON LEE. Mr. Chairman, again, thank you

for your leadership, and I thank this Committee for its wisdom in proceeding forward on what I believe is an enormously important process.

I disagree with my colleague and friend who is not here from California about the order of things; determining what happened before you can address the question of liability. This is a tort action. Whether it is an accident or not, there will be degrees of negligence—gross negligence, willful—and there is a question of the form of liability and whether or not punitive damages are too low, exist, and how are you to structure what may ultimately be the largest tort litigation in the history of this Nation.

One of the disappointments that I have, and certainly sad that we have come to this, is that we did not learn our lesson with the

incident in Alaska, the Valdez, if you will, in structuring a scheme that will be responsive to the potential catastrophic event that this is. This will go down in the history books.

I recognize the value of those who are here. Allow me just to own up, because I do come from the energy capital of the world. And, frankly, the presence of BP is in Houston; the presence of Transocean is in Houston; the presence of Halliburton was in Houston. They are headquartered in Dubai, leaving a gaping hole in our economy. And, of course, the presence of Cameron International in Houston. So I speak now for a sense of balance for the jobs that are created.

But I also come from a region that is not far from the Gulf Cost, and I recognize the vitality and the importance of the fishing and shrimping and oyster industry. And I have never found that industry to disturb the oil industry or the gas exploration industry. So why do we have a situation now where there is a constant referring that we are not ready to discuss liability when we have a whole entire industry shut down?

First of all, I want to association myself with the past president of Plaquemines Parish, and I want the Federal Government to give them everything they need and let them be in charge to clean up what is an additional liability and is the horrific marsh or wetlands that are being literally destroyed as we speak.

I have some quick questions for those who I have already extended my personal sympathy and concerns, and forgive me for just asking you quick questions so that I can focus on the question of liability.

Mr. Jones, has any of these particular corporations come to offer you a settlement, sought you to sign papers, or brought any issues to your attention regarding the tragic loss of your son?

Mr. JONES. Well, no. Nothing of the kind. I should say that M-I Swaco, Gordon's employer, has been very generous in their attention and their time. The day we knew Gordon was dead, the top five executives of M-I Swaco, which has its office in Houston, came to the house, sat around the dining room table and talked to us.

Ms. JACKSON LEE. No one has asked you to sign a settlement agreement?

Mr. JONES. I am sorry?

Ms. JACKSON LEE. No one has asked you to sign a settlement agreement? You have not signed a settlement agreement?

Mr. JONES. Oh, no, no, no.

Ms. JACKSON LEE. If you will forgive me, I just wanted to try and precisely focus in on that.

Mr. Brown, has anyone approached you to sign away your rights?

Mr. BROWN. No, they haven't.

Ms. JACKSON LEE. Mr. Stone, I understand you were met in a store, a restaurant, and someone asked you to sign away or to say that you were not injured. Is that correct?

Mr. STONE. Yes, ma'am. That was for the personal items lost on the rig. They reimbursed us for that. But there was also a waiver that said I was not injured and I wasn't——

Ms. JACKSON LEE. Where were you located? Where was this meeting at?

Mr. STONE. It was at a Denny's.

Ms. JACKSON LEE. Did you have a physician there assessing you?

Mr. STONE. No, ma'am.

Ms. JACKSON LEE. Did you have a psychiatrist or psychologist assessing you?

Mr. STONE. No, ma'am.

Ms. JACKSON LEE. Did you have your own physician there assessing you while they were speaking to you?

Mr. STONE. No, ma'am.

Ms. JACKSON LEE. Did you have a lawyer there?

Mr. STONE. No, ma'am.

Ms. JACKSON LEE. Did it strike you as strange to be assessed as having not been injured by I don't know whether it was a claims adjuster in a Denny's restaurant?

Mr. STONE. Yes, ma'am.

Ms. JACKSON LEE. Can you tell me how soon that was, sir, after the occurrence?

Mr. STONE. I think maybe a week.

Ms. JACKSON LEE. Less than 2 weeks you were asked to sign a settlement. What company was that?

Mr. STONE. I believe it is Shuman Consultants. I think it is Transocean's insurance.

Ms. JACKSON LEE. Thank you.

Let me quickly try to answer these questions. First of all, in the Wall Street Journal today, they have mentioned three items that suggest that BP might have short-circuited, short-cut procedures that might have created the explosion, the rising gas. We are not here to determine that. That ultimately may be in a court of law. But quickly I go down to the companies that are involved: Transocean, BP, Halliburton, and the attorney general.

Quickly, to the attorney general. If I can pursue this question quickly, what is the fix that you need—and if you can be very quick on that. Let me let you be last—the fix that you need on liability.

To Mr. Willis, let me ask you directly, will you pay everything that is determined to be your fault to the maximum, including the environmental impact? Is BP prepared to pay it all?

Mr. WILLIS. Representative Jackson Lee, BP is prepared to pay for all of the damage associated with the impact of this spill.

Ms. JACKSON LEE. So that means health and safety, the oyster farmers and all to the maximum amount necessary to make them whole?

Mr. WILLIS. We are going to do the right thing and——

Ms. JACKSON LEE. Without litigation?

Mr. WILLIS. We are going to pay the damages caused by the spill.

Ms. JACKSON LEE. Who will determine the damages; a court of law?

Mr. WILLIS. The damages—I will give you an example. We have opened the claims process, and to date we have seen over 25,000 people in our claims office. We have paid over 13,000 claims, and we are doing it every single day.

Ms. JACKSON LEE. So what you are saying to me, and I guess the concern I have and I will have to pursue this later, is that you will pay the maximum, but the question is: Are you dumbing down the claims? I can't get that answered.

Let me ask the Transocean representative, please, as to why you would have a representative in a Denny's restaurant asking one of the victims to sign off on whether they were injured or not? And is this the mode of operations that you are doing to people who are now victimized, frightened, and without sufficient legal representation? Can I ask you to cease and desist this kind of method of approaching victims and asking them to sign away their rights?

Ms. CLINGMAN. Yes, Congressman. That has not been our course of conduct. The circumstances of this particular meeting were on April 30, 10 days after the accident, a guy by the name of Mr. Steven McClellan, who is not a lawyer, met with Mr. Stone to give him the $5,000 that was paid to all persons on board, not in settlement of anything, but just for personal belongings on board. That was the standard amount paid out to employees.

Ms. JACKSON LEE. But he understands you were trying to get him to sign away his release.

Ms. CLINGMAN. No release was signed. I have no release on file.

Ms. JACKSON LEE. I know. But he refused it. How many signed it out of fear, apprehension, and lack of knowledge? I am asking will you cease and desist putting forward these kinds of papers in front of anybody from now on?

Ms. CLINGMAN. It is an easy answer to say yes because we have not done so. No one has been asked to file a release of Transocean. They were asked some basic factual questions to help our investigation. That has already been included. Some employees participated; some did not. None has been asked to or has signed a release of liability in connection with the incident.

Ms. JACKSON LEE. Thank you.

Halliburton, you were responsible for the cementing, which has been characterized as erroneous. Are there any existing liability that you now owe that you are not willing to pay, or are you willing to pay the maximum that may be required because of further determinations?

Mr. FERGUSON. Well, we certainly are willing to honor any obligations that we have.

Ms. JACKSON LEE. Attorney General Hood, I quickly need to finish with you and ask: What is the fix, and do we need to lift the $75 million liability, and do we need to have legislation to allow you to be in your State courts—Texas, Louisiana, Mississippi, Florida, and Alabama and others that may be impacted?

Mr. HOOD. Yes, ma'am. Our recommendation is—and I have that attached to my comments, an actual draft of legislation—prevent removal of State causes of action when the State is the plaintiff. There is no respect in the Federal judiciary for the 11th Amendment any more. So we need to try to fix that.

The Class Action Fairness Act, there were 47 attorneys general signed letters to Congress asking that we be excepted from the Class Action Fairness Act, and it was done because many said the States won't be subject to it. Well, the fifth circuit said that they are. We need to amend that and expressly except the States.

OPA 90. The States needs to be expressly excepted, although it is clear that the statute contemplates State concurrent jurisdiction. Federal judges have said, oh, that raises a Federal question; therefore you can be removed to Federal court.

The other would deal with the limitation of liability. We need to be excepted from that. Transocean has filed a limitation of liability before a Federal district judge in Houston, Texas, where they are trying—the Federal Government just got out of it yesterday, and we want out as well. And we believe it should be amended. It is just an antiquated 1851 statute where they are trying to drag us into Federal court.

Lastly, rule F that applies to admiralty matters, we suggest that it be amended.

So we just want to have our causes of action heard in the State court.

Ms. JACKSON LEE. Over all, do you think that $75 million—speak for yourself, but there are other victims here, individuals—do you think that $75 million that was placed in law is too low?

Mr. HOOD. I think it was. I think the industry had a tremendous impact of the drafting of that legislation in 1990, and I think it is too low. Certainly I am proud to see that BP committed in writing to five of us attorneys general they would not raise that cap. But we probably won't be—we probably won't even plead any actions under OPA because we are afraid some Federal judge is going to drag us out to Houston, Texas. And so we are probably going to just restrain and file State causes of actions. And so that OPA cap is somewhat—hopefully, won't be applicable to the States.

Ms. JACKSON LEE. Let me just thank the Chairman.

If I might just point to Mr. Encalade, who I know will be questioned, but are you without income now at all, sir? Are the 300 connected members of your community totally impacted right now, and do you see this as a long-range impact?

Mr. ENCALADE. Congresswoman, 90 percent of the fishermen in our community are completely out of income, though there are questions about some oyster beds being open, available for harvest, but the conditions are horrible. These fishermen also take it upon themselves to have a responsibility to the public, and they are not going to go into waters that they may feel could cause harm. So, yes, 90 percent of them are out of work in our community.

Ms. JACKSON LEE. Mr. Willis, can you help him? Can you help him right here today? Can you get to his location and deal with this harm?

Mr. WILLIS. As a matter of fact, Representative Jackson Lee, I actually met Mr. Encalade in Louisiana about 7 days ago at a town hall in Port Sulfur. I was on the phone last night with some folks who are working on the ground for BP in Pointe a la Hache, the community that he is describing. We have a claims office that we located in Pointe a la Hache. We have a community outreach center that we opened in Pointe a la Hache. We are seeing people there. We are bringing checks to them in Pointe a la Hache if they can't come across the water to our office in Venice. We are working with that community. As a matter of fact, I have personally written a check on behalf of BP for the food pantry in Pointe a la Hache, given the fact that so many people in that community rely on that water in Louisiana to make their living.

In that area, in Plaquemines Parish, we have paid over 1,000 claims. The claims office, as a matter of fact, Representative Lee,

in Venice, which is not too far from Pointe a la Hache, I was physically there and opened it myself.

Ms. JACKSON LEE. I am going to yield back. I just want to make sure that you are not making these farmers, these fishermen sign any of their rights away to get a minimum baseline check to help them get bread, water, and fruit.

Mr. WILLIS. Absolutely not.

Ms. JACKSON LEE. All right. I yield back, Mr. Chairman.

Mr. CONYERS. Senior Member Trent Franks, Ranking Member of the Commercial Law committee.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. Chairman, I want to begin by offering my sincerest and warmest condolences to the people who have lost loved ones in this tragic event.

As it happens, unlike most of the Members of the Committee, I have been intrinsically involved in this industry, having started out when I was a very, very young man working on a drilling rig. I am familiar with the Transocean Drilling Company. I am familiar with Halliburton. They have actually cemented wells that I have been on. And I have owned Cameron blowout preventers. So this is something that I am very familiar with.

I guess in some ways that is a little bit of a disadvantage to me, Mr. Chairman, because I understand the very difficult nature of going out into the middle of the ocean, a mile off the ocean floor, and drilling the total from top to bottom of 18,000 feet and recognizing some of the horrific bottom hole pressures there that are dealt with. I know that it is a very difficult environment.

We always used to hold up roughnecks as some of the toughest guys in the world because they had the courage to go out there and make that happen. So there is sort of a brotherhood that I feel toward some of the people that have done this kind of work.

And again, I understand there is just the intrinsic risk involved. It is not easy. Part of it, I will say, perhaps it will sound political but I don't mean for it to, part of it is that a lot of the major companies they would like to be drilling onshore, because it is about one-tenth as expensive if they could find the reserves and the opportunity to do that, but a lot of times they can't, and they are forced offshore and it is in an extremely difficult environment.

So when I ask these questions here, I don't know how long I am going to be offered here, but I am not trying to assign anything because I think one of the things that has been mentioned earlier today is we do not really know all of what happened. There are a few who do. But I do know that the primary protections against horrific bottom hole pressures in this case, if it is 18,000 hydrostatic gradient alone would probably be over 8,000 pounds per square, which is a volcano that very few people understand when it is completely unleashed, the destruction of the drilling rig is probably some sort of and example to people.

But having said that, there are two main protections that one has against the pressures like this, and that is the weight of the column of drilling mud, the drilling fluid and, of course, the blowout preventer if that fails. And I am told that that there was a small boat that they said it felt like it was raining and it looked like black rain.

I am absolutely convinced that was drilling mud that was blowing out of the hole at the time. Of course, a roughneck knows that when drilling mud blows out of the hole, that it is time to leave the premises. And I know that 11 people didn't get off in time, and again, I offer my most profound apologies and condolences, because I lost a very, very dear friend on a drilling rig at one time.

And in one case in my earlier life, there were five men that I knew not working for me at the time, but five men that I knew that were killed within a space of a month in the Texas oil fields drilling to the Ellenberger shallow 4,000 foot or less. So I know this is a very hazardous environment.

With that said, rather than my trying to talk about liabilities here, I would like the try to figure out a little bit about the echelons of the engineering process that took place. I am assuming that somehow the drilling column was diminished in density, whether it was mixing with seawater or something along those lines when they were staging the cement job, I am guessing, that happened, and I am not suggesting that I am just guessing it, but I guess I would ask, I know that Halliburton, Halliburton has worked for me at times and they have always done a fantastic and very professional job. But I know that sometimes they are sort of a team of engineers; it is sort of a joint effort between the Halliburton engineers or the cementing engineers and the engineers that worked for BP or the ones that worked for the operator, or, in some cases, the contractor hasan engineer too, but can anyone on the panel—it asks for a lot of courage, I suppose, but can anyone on the panel give me some idea of what the engineering protocol was there?

Who was in charge of the cementing process at the time? Again, I am talking about who was the ultimate last word in the process? And I probably should ask the Halliburton representative first.

Mr. FERGUSON. Yes, sir, I can't really go into all the technical details of it, but I can say that we did the cement placement on this well. We have an engineer who specializes in cementing who is actually in the BP offices in Houston. What we will do is they will come to us and they will ask us they will give us information on the well and on the temperatures and on the type of pressures and that sort of thing.

Mr. FRANKS. Were they able to give you a bottom hole pressure?

Mr. FERGUSON. We get a lot of different information from them in the beginning. It is that way on all wells. We don't go down and we don't have any way to get that ourselves. We get that information, we design what we feel is a good cementing program for that. We make proposals to them. It goes back and forth. There are a lot of other elements of the cementing process that is really controlled by the well owner on the rig that we don't have any control over, but we can run computer simulations and tell them if you do this, then it looks like you are going to have a certain result on the cement at the bottom.

And you go back and forth with that until such time that the owner decides what they are doing to do. And then at that point they go ahead and conduct the operation.

Mr. FRANKS. But BP's engineers, I have never worked for BP but their engineers are the ones that essentially had the last word, and

Halliburton engineers probably gave them their volumetric calculations and their projections.

Mr. FERGUSON. Certainly we do that. We even give them computer simulations, if you run it this particular way, this is likely to be the result, and it gives them charts and shows them how it looks.

Mr. FRANKS. That makes sense. Mr. Chairman, if you will indulge me again, the two aspects of this is the weight of the column of mud which did blow out. There was some miscalculation there. It could have been a methane bubble, whatever, something happened that the hydrostatic pressure of the drilling column became less than the bottom hole pressure, and that is what caused the blowout.

So if you will indulge me to ask the Cameron representative, I have owned Cameron blowout preventers, and I am guessing that this probably had a blind ram, and probably a pipe ram and a shear ram, and there has been some discussion that the shear ram hit a joint which is a much heavier element of the pipe and didn't shear it. And I am wondering is that, first of all, I guess I would ask you, are my conclusions, were these three or four rams present in the Cameron stack blowout preventer?

Mr. LEMMER. Congressman, yes, there were four rams. One was a test ram, there were a couple pipe rams, a shear ram, and I think there was an annular also. We don't know what happened, why this didn't work. One theory is it could have hit a pipe joint, but we don't know that for a fact, and we won't until we can retrieve it.

Mr. FRANKS. I understand that. And I fully embrace that because I think it would be speculation on anyone's part at this point especially since you probably lost communication with the BOP at the time when the rig, when it blew out. Am I correct in assuming that you probably had some sort of a hydraulic actuator and an electronic actuator and perhaps even a dead man switch on the BOP and that you probably lost contact with all of those, or at least the floor of the rig lost contact with all those when it went in the ocean.

Mr. LEMMING. Again, we don't know. We assume that the EDS lost contact, electrically or communications. We are not sure whether it lost it hydraulically or not. For the dead man to fire it requires all three to be lost. So the EDS could not work if the power is gone or the communication capabilities are gone, but if the hydraulics stay in place, then it doesn't get the message to fire, but neither does the dead man work because all three weren't cut.

Mr. FRANKS. One last thought, Mr. Chairman. A lot of the blowout preventers I have used have a nitrogen accumulator to actuate the closing the preventer or hydraulics. In this case, what was the actual energy source to close the blowout preventer? Was that something, was that sort of a accumulator on the ocean floor?

Mr. LEMMER. This is way beyond my area of competence but I understand that there were multiple accumulators on this BOP.

Mr. FRANKS. Mr. Chairman, I guess I will stop there.

Again, my condolences first and foremost to those who lost their lives and to those who have been left behind. It is a very, very difficult challenge, meeting the energy needs of this country, and I

know that there will be, in my judgment, personal and human error discovered here, or at least miscalculation, and those will have to, those things will have to bear out as they will. But I guess I would remind all of us that we only produce about 40 percent of our own oil in this country, and the 60 percent that we buy, some of that finds its way into terrorist coffers and so there are big implications here to losing our ability to produce our own energy.

And certainly countries like Iran and Saudi Arabia will probably be less inclined to curtail their drilling operations because of a tragic accident.

And I hope we can do whatever is necessary to make sure this never happens again. But we should not lose sight of the fact that there is a very challenging environment like so many other things in this enterprise of humanity. And thank you, Mr. Chairman, for indulging me.

Mr. CONYERS. Senior Member, Maxine Waters, chair of the Housing Committee and Financial Services.

Ms. WATERS. Thank you so very much, Mr. Chairman. First, let me say to Mr. Jones I am just so sorry about the loss of your son. I thank you for being here today. And to Mr. Brown, I am pleased that you survived, but I am so sorry about what you have had to go through and what you are still going through. And Mr. Stone and all of the families, I am just terribly pained about the loss of all of the personnel and the harm that has been caused in what I think will be the greatest ecological and geological disaster in the history of this country.

I had wanted to spend some time with you, Mr. Encalade, to talk about the history of the Black oyster fishermen down there, but I want to pass over that for a moment because BP is here today represented by Mr. Willis saying all the right things about what all they are prepared to do, and all the responsibility that they are going to accept. But I can't trust that. I can't trust that because of the history of BP that we have learned about since this disaster has taken place.

Over the past two decades, BP subsidiaries have been convicted three times of environmental crimes in Alaska and Texas, including two felonies. It remains on probation for two of them. It has also received the biggest fine for willful work safety violations in the U.S. history, and is the subject of a wide range of safety investigations, including one in Washington State that resulted in a relative minor $69,000 fine for 13 serious safety violations at its Cherry Point refinery, Ferndale, Washington.

As a matter of fact, a review of BP's history shows a pattern of ethically questionable and illegal behavior that goes back for decades. BP's best known disaster took place in 2005 when an explosion at its refinery in Texas City near Galveston killed 15 workers, injured 180 people and forced thousands of nearby residents to remain sheltered in their homes.

An investigation of the explosion by the U.S. chemical Society and Hazard Investigation Board blamed BP for the explosion and offered a scathing assessment of the company. It found organizational and safety deficiencies at all levels of the BP Corporation and said management failures could be traced from Texas to London. It goes on and on and on. The company eventually pleaded

guilty to a felony violation of the Clean Air Act and was fined $50 million and sentenced to 3 years probation. The Occupational Health and Safety Administration assessed BP the largest fine in OSHA history, 87 million, after inspectors found 270 safety violations that had been previously cited but not fixed, and 439 new violations. BP is appealing that fine.

But BP's legal and ethical problems go back much further. So we don't trust you. We don't trust what you say. We are watching what you do.

And I want to tell you that some of us are dedicated to the proposition that we are going to see that the people in communities that have been harmed get compensated and get compensated generously, and that we are prepared to do whatever we have to do to make sure that that happens.

And I want to tell you further as this disaster has occurred, when you first set up your claims offices and you are here to talk about claims, Mr. Willis, and you are talking about what you did, you didn't have a claims office that was in the minority community and in this village that Mr. Encalade comes from here today. They had to fight for that. And we also know that there was some attempt to have people sign settlements rather than claims.

So we don't trust you.

And I want you to know that in addition to the lack of trust that we have, we have people that we have had to organize who have organized themselves to come here today to be of assistance to Mr. Encalade in this testimony. We had to—Minister Edwards, he has to get all involved in this.

Mr. Encalade's son-in-law had to stop what he is doing, get all involved in this; young attorneys out of New Orleans that we have been working with because we had the same kind of situations where the small people were not being taken care of after Katrina that had been working with this situation, and they are doing it as volunteers. You aren't paying for any of that.

As a matter of fact, did you ask Mr. Encalade how he got here today? Halliburton? BP? Any of you rich corporate guys, do you know who paid their way here today? How they got here? And the people that accompany them? Would you ask them after this Committee hearing, and would you offer to be of assistance to them so that these people, especially Mr. Encalade, who has lost 90 percent of his income or all of it, would you assist him and in reimbursing him for the money he had to pay out of his pocket and all of those that accompanied him?

We have to tell you that we want to see better efforts and better work if you want us to believe you when you come here. Why do we have to keep struggling and fighting? Is it true, Mr. Encalade, that you all had to go and fight because you had to travel 300 miles to get to the claims office?

Mr. ENCALADE. Yes. Congresswoman Waters, yes. That is true. We had no claims. We had anything and it is something that I think BP still doesn't understand. You know, food stamps and welfare is fine for elderly people that are home that cannot support themselves that is living off of $500 a month. These fishermen work hard. They have boats that values in excess of 100-somethousand dollars, they have oyster beds, they work bedded,

and everything. I don't feel I should have to go up to a food stamp office to get food stamps to support my family for something that was out of my control, I had no doing with, for someone else to put me out of business.

And I say we live in a country that I love dearly. I am a veteran and I know anywhere if we did harm to any country or any citizen in another country, we would have to pay it. The United States Government would take care of that family just as we have done in the past. And what I am saying is no I am sorry, we are a proud people. Food stamps and welfare belongs with people that cannot feed or work or take care of themselves. We are proud people.

Ms. WATERS. Mr. Willis, I just reviewed your claims process. And I understand that people are calling in, they ask for certain information, and they don't send a claims adjuster out. They ask the people to come in there to the claims office. And you are basically getting 5 grand or $2,500, but what about, is that some kind of temporary holding compensation until there is an assessment done of the total damage that has been done to the individual? How does that work?

Mr. WILLIS. I am happy to answer your question, Representative Waters. And I wanted to start by just saying that in Louisiana alone, of the claims we have paid, over 60 percent of the moneys that have been paid out to date, over 60 percent of the 35 or so million, the $37 million has been paid in Louisiana. We paid a total of——

Ms. WATERS. Just tell me how the claims process works.

Mr. WILLIS. How the claims process works, we have three ways that the claims process can be accessed. It can either be accessed through our 1-800 number, which is 1-800-440-0858. That number is available 24 hours a day 7 days a week. People can go online and file a claim at *www.bp.com/claims,* or they can walk into one of our claims offices. As I mentioned in my testimony, we have a total of 24 claims offices open to date, nine of those in Louisiana. We have one in Venice, we had one in Pointe a la Hache——

Ms. WATERS. I know where they are. How do they work?

Mr. WILLIS. The way they work is you go into an office, and if you are a boat captain or a fishermen, you bring in a tax return. If you don't have a tax return, you can bring in payroll, pay stub for a month, you can bring in deposit slips, you can bring in boat tickets or shrimp tickets or anything that shows how much money you make for a month.

What we have tried to do is not put a cumbersome process in place. When I got involved in this——

Ms. WATERS. Please, when you bring in all your documentation and it is agreed upon how much money can you receive?

Mr. WILLIS. You will be fully compensated for your losses. But what we have done, Representative Waters, in order to expedite the process, this was a process that was initially going to take 45 days to get a check into someone's hands, we can do it in 48 hours now. And what we have done is bias the process toward getting money to people quickly, $5,000 for boat captains, $2,500 for deck hands.

Ms. WATERS. So you have this amount that you give that is a temporary and expedited process, and then the rest will come along?

Mr. WILLIS. Absolutely.

Ms. WATERS. In what length time?

Mr. WILLIS. It is going to come along as we continue to evaluate the process.

Ms. WATERS. You are not going out to do the adjustments, how do you figure out whether or not these claims are authentic.

Mr. WILLIS. We will be going out to do the adjustments——

Ms. WATERS. You are going to do that before you give the rest of the money——

Mr. WILLIS. It is an ongoing process. What I was most concerned about, what BP has been most concerned about is getting the money into the hands of the people who are hurting and been hurt by this oil spill sooner rather than later.

Ms. WATERS. Here is one of the problems. You can call your number and they will ask you for your Social Security number, they will ask you for a few other things. They will give you a claims number. Then they will ask you to come into the office, you will get the 5,000, but if you have got problems, your 1-800 number, 573 8249 is not a 24-hour number and this is where we run into problems. You run into problems because people are trying to follow up to find out when the rest of their money is going to come, what other documentation they have to have, what do they have to do, but this is where you are going to have problems. Why isn't that a 24-hour number also?

Mr. WILLIS. It is—the number for the claims line——

Ms. WATERS. 1-800-573-8249, 8 a.m. To 8 p.m. Not a 24 hour number. That is the follow-up number.

Mr. WILLIS. That is not a 24-hour number.

Ms. WATERS. Why don't you make it a 24-hour number?

Mr. WILLIS. We will definitely do that. I can make that happen.

Ms. WATERS. Mr. Chairman, as I wrap up, we have worked with the road home program from your beloved State, Louisiana. There are still people who have not been compensated. The system bogs down and it literally ignores small people, small people who don't have money to go get lawyers to fight the bureaucracy. And that is what we want to avoid.

Some of us are far away from Louisiana, but we care so much about these issues, we are coming. We are going to follow up on it. Just as I walk through your claims process, I am going to knock on the doors of the claims adjusters. I am going to come. I am going to follow up to make sure that these people are compensated. These small fishermen, these Black fishermen, these oyster fishermen have been doing this for years in third and fourth generations. They have got to be treated fairly and we want to make sure.

Transocean, I am suspicious of you, too. You have dodged paying your U.S. corporate taxes by locating headquarters in Switzerland. You know you can't be trusted. And aside from that, I want the Honorable Jim Hood to tell me about what have you filed, are you trying to limit liability in the way that they have filed, Mr. Hood?

Mr. HOOD. Transocean filed in Houston, Texas, an action to try to pull in as many people as they possibly could. BP filed a consoli-

dation action before another Federal judge in Houston, Texas to try to consolidate as many as possible.

We, States, and that includes Florida, some of the Republican colleagues will recall, Bill McCollum was a Member of this honorable body, is an attorney general in Florida running for Governor there, and I assure you that every one of my colleagues want to have our cases heard in our State courts and not be pulled off by some of their actions before some judge in Houston Texas.

So we have asked that there be some amendments to some legislation to prevent that. Those are procedural amendments. They are not some ex post facto problem. We believe that it would relieve the States from having to fight for 20 years as did people that were victims of the Exxon Valdez spill.

Ms. WATERS. Thank you so much, Mr. Chairman. I appreciate the extra time you have given me. This gentleman has a legitimate concern in that amendment that he is asking for and as Chairman, I will take your leadership on that. But we have to watch Transocean. Okay? Thank you.

Mr. CONYERS. Judge Ted Poe of Texas.

Mr. POE. Thank you, Mr. Chairman. I know you have had a long day. I have some questions and concerns, of course.

I represent Southeast Texas. We border south western Louisiana across the Sabine River, or as you all say in Louisiana, the Sabine River, and probably represent more refineries than any Member of Congress there in Jefferson County, 22 percent of the Nation's refineries. We love the oil and gas industry and we want to them stay in business because it supplies thousands of jobs for Southeast Texas. And most of those folks work in refineries. They work offshore. I think those are the toughest jobs in America. That is my opinion.

But right now, 180,000 people are affected by job loss because of this disaster.

And Mr. Hood, being an old trial judge in Houston, a State Judge, not a Federal judge, I agree you on the 11th amendment, just your legal opinion, do you think the current law allows you to file suit and have lawsuits in your State and this circuit misinterpreted it or they think you think they got it right and we need to fix it? Just a quick answer.

Mr. HOOD. The answer is that we have a cause of action we can file in State court. OPA contemplates State court actions. The Federal District Court in Louisiana is one that misinterpreted that. Fifth circuit misinterpreted CAFA and all the Senators agree that were on the floor, we had the minutes of it saying, States won't be subject to CAFA. It was bipartisan, 47 attorneys general signed a letter here, and I have a copy of it here, but we asked that we expressly accepted from CAFA and the fifth circuit who put that in their opinion but they ignored it. So you have Federal courts sapping up authorities that belong to the sovereign States, and we want to protect that.

Mr. POE. But you say, in your opinion, you can sue in State court.

Mr. HOOD. Yes, sir.

Mr. POE. My concern, and I think is really four issues here, first of all, we are going to need to deal with the loss of life and injuries.

We haven't heard a lot about that through the national media. Then we have to deal with the loss of businesses that are directly affected. We have to deal with the damage caused to the environment, and we have to find out what happened, and we have to find out what happened probably first. We don't know really.

My question and Mr. Foley may be the expert on this, who is in charge? We have heard that BP is in charge, the Federal Government is charge, nobody is in charge. Mr. Willis, who is supposed to be in charge of this situation?

Mr. WILLIS. Representative Poe——

Mr. POE. That is me. Guilty as charged.

Mr. WILLIS. All I can tell you is that I know who is in charge of the claims process for BP, and who is in charge for making sure folks are compensated for their losses, and that is me.

Mr. POE. And that is you. Is BP in charge of this whole cleanup operation?

Mr. WILLIS. I know that I am in charge of The Coast Guard——

Mr. POE. So you don't know.

Mr. WILLIS. I don't know.

Mr. POE. Mr. Foley who is supposed to be in charge of this?

Mr. FOLEY. In a Federal incident response, the Federal incident commander is in charge and is usually from a government agency.

Mr. POE. Like the Coast Guard?

Mr. FOLEY. He has 51 percent of the vote, but it is a collaborative effort between stakeholders and the responsible party and a number of different people involved in the spill response.

Mr. POE. So who is in charge? Is the Federal Government in charge?

Mr. FOLEY. The incident commander has the decision maker.

Mr. POE. And that is a Federal employee?

Mr. FOLEY. Yes. And right now, that is the Coast Guard.

And they are overseeing the responsible party's efforts to respond to the spill.

Mr. POE. So when the blowout happens, it seems to me we just kind of waited to see how much damage was done, I say we, the system, kind of waited to see what damage was done and then everybody started saying, pointing fingers at other people.

When it happens like this, blowout, oil spill, who is supposed to respond first?

Mr. Foley, can you answer that? We have 12 people here. Can anybody answer that question?

Mr. FOLEY. There is a scheme in place for oil spill response. The responsible party is supposed to report it to the National Pollution Fund Center and the National Pollution Fund Center sends out a notice to claimants to set up a claims process. In terms of——

Mr. POE. Cleanup. I am talking about cleanup right now.

Mr. FOLEY. For cleanup, usually the Coast Guard sets up different response centers in the areas that are going to be affected and the responsible party is responsible to bring the resources, there is a response an where they have to activate their oil spill response contractors and act, in this case, it is a spill of national significance, so it is going to be the biggest response that they have trained for, for these oil spills.

Mr. POE. So Coast Guard is in charge of the cleanup.

Mr. FOLEY. The government agencies have oversight responsibility for their responsible party who has to bring all the resources to bear on responses.

Mr. POE. I am not arguing with you, Mr. Foley. Is the Coast Guard in charge or not? Do you know under the law? You are the expert in this law.

Mr. FOLEY. I have not been in involved with the spill response in any way, and I am not familiar with any of the details.

Mr. POE. Can any of you answer that question? This happened, I assume the different corporations are trying to clean up, but who is in charge of making sure cleanup occurs? Even to this day?

Can any of you answer that question? At least FEMA is not in charge. But, who is in charge? Nobody knows?

Mr. HOOD. Judge, the Coast Guard has the responsibility. But the problem is that they have got, they are having to rely on information that is provided to them by BP so it is kind of a joint authority. But the end line, top line authority is supposed to be the Coast Guard.

Mr. POE. What concerns me is this has been 5 weeks and because—this is my opinion—the response to the cleanup seemed to delay, and I don't know if it is the Coast Guard or who, but that just increases damages because the cleanup, if it is not contained, of course, it eventually hits Louisiana or Mississippi or Texas.

And the longer we wait on cleanup, and we have heard these comments from different people that are affected that no one is really trying to clean up the mess or is in charge, it increases damages, and somebody is going to have to pay for that.

So Mr. Hood, do you want to give me some insight on that?

Mr. HOOD. Yes, sir. I flew over Chandelier Island, which is about a 60-mile island running north and south. The northern tip is about 30, 40 miles from Mississippi, our coast. On Thursday, 2 weeks after it occurred, Secretary Janet Napolitano came down and there were booms already around, so we have had the booms around our barrier island. I think the Coast Guard did a pretty good job in responding getting the booms out there, but they don't work. It was a sea of red around Chandelier Island, and there was some great fishing around that area.

So I think they got it out there, but they just don't have the capability of dealing with it. Booms just don't really work, especially in rough water.

Mr. POE. I understand in Louisiana there were people in—the fishermen that were willing to help on the cleanup and it got bogged down in red tape. Mr. Encalade, can you help me out with that? Is that true?

Mr. ENCALADE. Congressman Poe, yes. It is true, and I have to be honest with you, we stood, our old people, we stood on these banks and watched them deploy these booms in this rough water with a southeast wind coming in on the shores of Louisiana and Mississippi. And sir, I have to be honest with you. We told them they were wasting their time. But nobody listened. And it is those kind of things that—this is why I am here, because as Congresswoman Waters said, we can't afford to keep making mistakes, and we are paying the price for them.

And just like she stated, going home and all of this, we are still being affected. We haven't gotten our lives together completely by, from that. And now to go down these same roads to see BP following the same path, it just boggles the mind. You are still not listening to the people. And you are not listening, our parish president, Billy Nungesser, and I would love to make this comment if you don't mind, sir, the night this incident happened, the first thing he did, and we were on the phone 11, 12 o'clock at night, he called his entire fishing community and got advice and he knew what he had to do by the next day. Problem is, nobody listened to him.

Mr. POE. You have to know who to talk to.

Mr. ENCALADE. And it is the same thing. We just keep going. We have been begging for those islands to be pumped back for over 40 years. And so it is the same thing. That is the problem.

Mr. POE. One more question. Top kill apparently is working now, and at least so far today, who made that decision to use that procedure? Did BP make that decision? Mr. Willis, do you know.

Mr. WILLIS. I will preface my comments by saying that I was not involved in that decision. I have been involved in the claims process but——

Mr. POE. We need to have somebody from BP to make some other decisions besides claim here, Mr. Chairman, at some point, if that is appropriate.

I was just curious, but nobody apparently can answer that, since it probably works. Why wasn't it tried 3 weeks ago? Maybe we will find somebody else who can answer that question for us, Mr. Chairman. I want to thank you all for being here. Thank you, Mr. Chairman, I yield back.

Mr. CONYERS. Steve Cohen, Chairman of the Commercial Law Committee.

Mr. COHEN. Thank you, Mr. Chairman. Let me ask Mr. Willis, I was reading your statement, where did you go to school?

Mr. WILLIS. I went to High School at McDonogh 35, and I went to Northwestern State University in Natchitoches, Louisiana.

Mr. COHEN. You are going to pay all these damages and some, where it says directly related to, what if there is a restaurant that doesn't have—like Galatoire's, I was saying, or Acme Oyster Bar, they don't have any oysters or oysters, whatever you want to call them. Who is going to pay the Acme Oyster Bar? Are you going to do that?

Mr. WILLIS. Congressman Cohen, what we are going to do is, and we have put a process in place so that any business that feels like it has been directly hurt or impacted by this oil spill in the Gulf of Mexico can go in and file a claim through our process and it will be reviewed.

Mr. COHEN. It will be reviewed. And that is your stock answer, and I realize that is the limit of your authority, but the problem you have got is every restaurant in Louisiana in the Gulf Coast, particularly New Orleans, is going to be hurt. People go to New Orleans for a couple of reasons, and one of them is to eat. And if you ain't got any oysters, we can't go down to eat and if you are a seafood restaurant you are really going to be hurt.

So Felix is bad news, Acme is bad news. And while you can eat steak down there, you really go for the seafood. Rent a car business, they are going to be hurt. Hotels are going to be hurt. Casinos are going to be hurt because people aren't going to go down there. They all can file claims. Give me your thoughts of the probability of those people being compensated by BP oil because really you need to subsidize the State of Louisiana for a long time.

Mr. WILLIS. I will start by saying that I love the Acme Oyster House. It is one of my favorite places to eat.

Mr. COHEN. I hope I can meet you there some time in the future, and we will have to be real old.

Mr. WILLIS. What I would add to my comments is that this claims process is very specific. Individual claims would be very specific. Some of the easiest claims to resolve are those around individuals, fishermen, crabbers, oystermen. Business claims are coming in now and we are looking at every one individually. We are using the best resources available and we will make fair decisions.

Our goal through this whole process is to be reasonable, is to be reasonably efficient, and to be fair, and do the right thing.

Mr. COHEN. I got what you are saying. It is just going to be tough because to do the right thing, you are really going to have to take over that State and part of Mississippi and part of Alabama, I guess, because the damages you have caused are going to affect those States for the rest of my life probably, a long time. Several decades. And that is just fact. You are going to have to advertise every Tulane basketball game, even if nobody goes, LSU football games. You need to be the sponsor for all of them. Baseball teams. Everything. What was the profit of BP oil last year?

Mr. WILLIS. The profits of BP last year, I don't know that number offhand.

Mr. COHEN. Give me a ballpark figure.

Mr. WILLIS. I would guess it was on the order of $20 billion.

Mr. COHEN. That is not enough. You all have to work harder. That is not going to take care of what you owe. Are you all going to go out of business?

Mr. WILLIS. We are going to do the right thing, and we are going to mitigate all of the damage that we have caused as a result of this spill that we are obligated to do under the law. But in addition, there are some other things we are going to do as well. For example, we offered up the $25 million block grants to the State to expedite the cleanup process. We recently offered $70 million to the State to help sort of publicize tourism.

Mr. COHEN. How about all the losses they are going to have from sales tax revenue from folks not going down there? And how about when the marshes are destroyed and the next big 5 hurricane comes in, and the city gets wiped out, are you going to compensate the city of New Orleans for its path and for another evacuation of the city?

Mr. WILLIS. We will cover the expenses, the legitimate expenses that have been substantiated and are related to the spill.

Mr. COHEN. Mr. Willis, you are doing your job good and you have a tough job because legitimate, directly, and recorded in this bill, there is going to be a lot of people in this Nation that are going to suffer and the government is going to end up being the surety,

because we are going to have to pay for it and make up for Louisiana's losses and all the cities it is going to fall on the backs of the United States taxpayer, and we are going to have to come to the rescue because you are going to say they are not direct, et cetera, et cetera. Not your fault. It is the fault of your company. You are doing your job.

Mr. Lemmer, you know something about the Safety Valve Program, I guess, is that right?

Mr. LEMMER. I am a lawyer, not an engineer. I know something about it generally, yes.

Mr. COHEN. Well, when Judge Poe was throwing around, not him, Mr. Franks was throwing around those words, it seemed like you understood them. Should BP or somebody have seen the worst possible case scenario that this would have occurred and then prepared to respond? Should they not have been prepared to respond in some manner?

Mr. LEMMER. Sir, that is a difficult question for me to answer, because we are an equipment and service supplier, and BP is the operator.

Mr. COHEN. But as service supplier, wasn't there a possibility that what you supplied, would have a problem, which it apparently did, and that they should anticipated that and seen the worst possible case scenario and had top kill ready to go before this ever happened?

Mr. LEMMER. Should BP have foreseen something like this occurring? BP has testified that they viewed this as a failsafe device when, in fact, it is not. It is the last chance, but it is not a failsafe. So should they have foreseen it? I don't know. That is going to be for the courts to decide in the future.

Should they have a top kill ready to go? That is a different question. That procedure, I understand, has been used on the surface, it has never been used at these depths. I don't know that it has every been called on to be used in these depths before. It was talked about early on after the blowout. But why other efforts got priority over the top kill, I can't tell you.

Mr. COHEN. I don't know who is the right person to answer this question, maybe nobody can, but it doesn't seem to me it is right to allow us to let any company drill at depths where we don't have the ability to go in there and stop a leak. We don't have that benefit, well, top kill wasn't done at that depth, the first thing we had were the dome, we didn't have the Superdome ready, we couldn't do that either because we hadn't done it at that depth. We didn't know it was going to freeze when it got down there in the saltwater, and all that stuff and there was going to be a problem.

If they don't know how to do it, we shouldn't let them drill. It was the negligence of the Bush-Cheney-Halliburton regime that gave them that authority, and we are suffering from it today because they allowed this to occur, and it never should have been permitted. And for 8 years after they had their secret meetings in 2000 and 2001 that we still haven't seen the results of with the oil companies, and BP was there, and Conoco was there, and ExxonMobil was there, and Cheney was there. They came up with an energy program that has hurt this country to this day and con-

tinues to hurt the country. And it is the responsibility for this goes back to Bush, Cheney and Halliburton.

Thank you, Mr. Chairman.

Mr. CONYERS. Magistrate Hank Johnson, chair of Courts Committee from Georgia.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. Willis, I think you have the bearing and the manner of an attorney or a public relations professional. And I want to just, yeah, I want to commend you for the way in which you have handled the task that you were called upon to do today which is to represent British Petroleum.

And let me ask you, I have heard you say earlier that you have a degree in geology?

Mr. WILLIS. In geology and geophysics, a master's degree.

Mr. JOHNSON. And have you been to law school or——

Mr. WILLIS. I have not.

Mr. JOHNSON. And now do you report to a lawyer?

Mr. WILSON. I do not.

Mr. JOHNSON. You do not. Now, who do you report to? What division, if you will, of BP?

Mr. WILLIS. In my day job outside of the response associated with the spill, I report to the executive Vice President for North America Gas. I am the VP of resources, which essentially means I am the VP for geology and geophysics and petrophysics for the lower 48 onshore business.

Mr. JOHNSON. And you have no responsibility for dealing with legal issues whatsoever?

Mr. WILLIS. I do not deal with legal issues.

Mr. JOHNSON. But you have been assigned to deal with claims issues?

Mr. WILLIS. I volunteered to be a part of this claims process for two reasons: One is because I lived through Katrina with my mother. I lived through the Road Home, as a matter of fact, the check for the Road Home came; by the time we got the check from the Road Home, my mother was dead.

Mr. JOHNSON. Now you are kind of filibustering me right now, though. Let me proceed on. So you volunteered to serve your company in any way that they thought would be good, and so they assigned you to be the claims representative?

Mr. WILLIS. Actually, they didn't assign me to be claims representative. I saw that as an emerging need once the well continued to flow.

Mr. JOHNSON. Got you. Now having volunteered to handle the task of handling claims, are you working with an insurance company as you handle these claims?

Mr. WILLIS. We are actually working with a company called ESIS, which is a catastrophic—a company that deals in managing catastrophic claims for businesses. They are not an insurance company, although they are owned by an insurance company called Ace.

Mr. JOHNSON. So essentially, Gulf Oil is—excuse me, BP petroleum is self-insured with respect to this kind of catastrophe?

Mr. WILLIS. That is my understanding.

Mr. JOHNSON. And the claims process is a process that traditionally you adjust the claims and you limit your liability. Is that your understanding?

Mr. WILLIS. My understanding of the process that we have in place is that we are going to make sure we put a process in place that is efficient, that is fair, that is reasonable and that pays people comparable to the losses they incurred.

Mr. JOHNSON. Let me ask you this question. We have all these lawyers here, we have a professor of law, the hearing—we got lawyers all across the room. And the hearing is on legal liability issues surrounding the Gulf Coast oil disaster.

Can you think of any person at BP who would perhaps be more appropriate to handle this task than what you volunteered to take on? When I say this task, I mean preparing to appear before this Committee today. Is there someone who could have done it perhaps a little better than yourself?

Mr. WILLIS. I think in terms of coming to this Committee to talk about how BP is responding to the needs of the folks in the community in regards to the damage that has been caused, being caused by the spill, I am the best person to do that.

Mr. JOHNSON. Okay, well, did you bring your claims package here? I assume that you have a package, claim forms, if you will, that people would have to fill out? Isn't that correct?

Mr. WILLIS. There are claims forms that people will have will have to fill out yes.

Mr. JOHNSON. Last night, or excuse me, last week I had the opportunity to ask questions as a Member of the Transportation and Infrastructure Committee, the Water Resources Subcommittee, I had the opportunity to question your president, and he promised to send the entire claims package to us, which we have not received yet. Did he entrust you with that claims package to bring here today since you are the person in charge of claims for BP international, if you will?

Mr. WILLIS. When you say "claims package," can you tell me what you mean?

Mr. JOHNSON. All of the forms that one would have to sign in order for their claim to be considered?

Mr. WILLIS. I did not bring those forms with me today.

Mr. JOHNSON. Why not?

Mr. WILLIS. I was not aware that I needed to bring those forms with me today.

Mr. JOHNSON. Since you are in charge of the claims process, can you list for me, as you sit here today, all of the forms that are in the claims package?

Mr. WILLIS. Yes. And it depends——

Mr. JOHNSON. Well, now hold on now. It depends. Only thing I want is just the name of each form in the claims package, all claims packages combined.

Mr. WILLIS. I will start by saying that the claims form is available on our Web site at *www.bp.com/claims.* And on that Web site, we are going to have a claims manual that summarizes everything that is involved in the claims process. That manual is about 52 pages.

Mr. JOHNSON. And I am asking you for the forms that must be filled out, whether or not they are over the Internet or whether or not they are hard copies. I just want to get—yeah.

Mr. WILLIS. Okay.

Mr. JOHNSON. So you have a claim application form.

Mr. WILLIS. There is a claim application form, and that form differs slightly if you are a fisherman.

Mr. JOHNSON. What else do you have other than the claim application form which may differ, whether or not it is an economic damage, an environmental damage or an injury claim, personal injury claim, so you got the claim application?

Mr. WILLIS. Yes.

Mr. JOHNSON. What else do you have?

Mr. WILLIS. That is the form that has to be filled out.

Mr. JOHNSON. How many pages is it? That is the only form?

Mr. WILLIS. That is the only form that needs to be filled out. In addition to that form, there is some documentation that is required.

Mr. JOHNSON. Yes. Release of information, or something like that?

Mr. WILLIS. What we ask for is some proof that of income. It could be a tax return. It could be payroll stubs. It could be deposit receipts. It could be fish tickets or shrimp tickets showing that you actually transported and delivered a load for sale.

Mr. JOHNSON. Let me ask you this question. You said the other day, excuse me, you said earlier in this hearing that you paid out about 37 million claims—$37 million in claims on, with 400 adjusters, 24 walk-in clinics, and those kinds of things, Internet filing claims and everything, the $37 million, 25 of that went to Mississippi, was that the 25 million?

Mr. WILLIS. No. That is something totally separate. The 37 million is associated with money that is directly put into the hands of fisherman, shrimpers, oyster harvesters and businessmen in local communities from Louisiana to Florida.

Mr. JOHNSON. So what about releases, release of any and all liability in return for the payment that would be generated by the claim application?

Mr. WILLIS. There is no release required in our claims process.

Mr. JOHNSON. Okay, and the conversations that were had at the disembarking location when the workers were brought back to land, about 28 hours or so after the tragedy occurred, were those interviews tape recorded, either audio or video?

Mr. WILLIS. I do not know anything about what happened and what you just described. I took over the—and started running the claims process associated with responding to the oil spill on the 29th of April.

Mr. JOHNSON. All right. Thank you, sir.

Ms. Clingman. Basically, what you are arguing is that you are indemnified, or, in other words, Transocean is indemnified for any and all liability that it may have for everyone as a result of this catastrophe. You are indemnified by BP.

Ms. CLINGMAN. Yes, Congressman our contractual arrangements are similar to the OPA statute, and also for the organizational chart for rigs. So BP as the operator is responsible for the well and

any hydrocarbons from the well. That is OPA law, and that is reflected in our contract as well. You are exactly correct.

Mr. JOHNSON. And as you know or as you may know Transocean approved a $1 billion dividend to shareholders, just back on May 15, May 14, actually. Some have argued that that dividend makes it more difficult for victims of the Deepwater Horizon to pursue liability claims against your company. Others have likened this to a fraudulent transfer in bankruptcy. When a debtor transfers money or property immediately before filing a bankruptcy petition. Is this within 45 days of the event? Actually within about 2, 3, weeks before the event we have this transfer of wealth, if you will, from the corporation to the shareholders, and I don't know who those shareholders are, but I would assume them to be closely associated with the company in terms of management.

Was that an appropriate time, in your opinion, for shareholders to take those profits?

Ms. CLINGMAN. I am very glad, Congressman, you asked that question because there had been some confusion about the declared dividend and if I could clarify some of the timing.

Mr. JOHNSON. Mmh hmm. I am sorry would you repeat that, please.

Ms. CLINGMAN. Yes, sir. I am glad you asked the question. There has been some confusion about the declared dividend and I would like to address that. First and foremost, the dividend declared, none of which has been paid to date, in no way affects Transocean's responsibility or ability to meet its legal obligations to persons involved in this incident. So there is no, in terms of relation to bankruptcy or depleting assets, there is no concern whatsoever that Transocean will not be able to meet its liabilities.

Addressing the dividends specifically, I agree with you that the timing does not look as good as it might given the incident. It was, however, put in place significantly before the Deepwater Horizon incident. This had been board approved back in February 2010 after several years of Transocean being in a growth mode not paying shareholder dividends and so the board had decided mainly based on competitive factors and other companies paying dividends that it was time to reward loyal shareholders with an approximately $4 per share dividend. That was put out in a recommendation in a proxy filed with the SEC and distributed to shareholders before the Deepwater Horizon incident.

Now, you should also know there are safeguards in place to prevent the eventuality you described from being true.

Mr. JOHNSON. I don't want you to go into that because I want to yield back the balance of my time. But I do want to say that I feel that you have been very knowledgeable and communicative with me, and the time that I was here in this hearing, you have also been very forthright.

I would love for BP, I would love to be able to look at that position on the table, because this is not personally directed at you, Mr. Willis, but I would love to be able to say the same thing about BP. I feel like we have gotten bamboozled by BP with you being here to answer in the questions of Members of Congress.

And if I could, Mr. Chairman, I have been asked for a short yield to Mr. Cohen. And I shall so yield.

Mr. COHEN. Thank you, Mr. Johnson, and thank you, Mr. Chairman. I guess I needed to follow up a question of Mr. Ferguson here, since he is with Halliburton. What knowledge do you have, and did you attend any of those meetings with Vice President Cheney when they brought about the oil policy for the United States of America?

Mr. FERGUSON. I have no knowledge of that whatsoever. I have never attended any meeting. My understanding is nobody from Halliburton attended any such meeting.

Mr. COHEN. So you haven't seen any memos, any papers?

Mr. FERGUSON. No, sir, I have not no.

Mr. COHEN. You don't know anything about those meetings at all?

Mr. FERGUSON. Only what I have read in the newspapers.

Mr. COHEN. Is Mr. Cheney involved with Halliburton now.

Mr. FERGUSON. Not in any way that I know of.

Mr. COHEN. In Transocean and Halliburton and BP, do you all have any members of one of the other companies on your boards? Does anyone here, do you know? Mr. Willis, do you know who is on the board of BP?

Mr. WILLIS. I do not have those names in my head, no.

Mr. COHEN. Ms. Clingman?

Ms. CLINGMAN. I don't know of any members of these companies serving on our board. I will absolutely find out and get back to you.

Mr. COHEN. It is public knowledge, I am sure.

Mr. Ferguson?

Mr. FERGUSON. There is no current person at BP that is on our board. There is one board member that is retired some years ago from BP that is on our board right now.

Mr. COHEN. He is retired. What is his name?

Mr. FERGUSON. His name is Robert Malone.

Mr. COHEN. What was his position at BP?

Mr. FERGUSON. Don't hold me to this. I think he had a similar position to what Mr. Lamar McKay does.

Mr. COHEN. President.

Mr. FERGUSON. Of BP Americas.

Mr. COHEN. And he is now on the board of Halliburton?

Mr. FERGUSON. Right. Although like I said, he is completely separated from BP.

Mr. COHEN. Ms. Clingman, what were the profits last year at Transocean?

Ms. CLINGMAN. The Transocean entity that paid the dividend out of Switzerland, I would have to get the number. I don't know. I don't have any figure.

Mr. COHEN. Ballpark? No? Mr. Ferguson what is the ballpark on Halliburton last year?

Mr. FERGUSON. Again, we can get the number, but it is something under a billion dollars.

Mr. COHEN. Thank you. Thank you, Mr. Johnson.

Mr. JOHNSON. And I yield back. Thank you.

Mr. CONYERS. Dr. Judy Chu of California.

Ms. CHU. Thank you, Mr. Chairman. First let me ask the panel even though only a dozen of Transocean's employees are physically located in Zug, Switzerland, and more than 100 are based in Houston Texas. Transocean moved its headquarters 2 years ago. To me,

it seems the apparent underlying purpose is to avoid U.S. corporate income tax. We know now that the Transocean flag of the Deepwater Horizon is in the Marshall Islands, can anyone on the panel explain why a vessel that is flagged in a particular country, whether such company seek to avoid safety regulations by flagging the vessel outside of the United States?

Ms. CLINGMAN. Yes, Congresswoman, I would be happy to address that. You are correct; the Deepwater Horizon is flagged in the Marshall Islands. Transocean is an international company. Of our approximately 139 drilling rigs, all but 15 are outside of the United States. And so very few of our vessels are flagged in the United States.

Most importantly, that does not result in any break in operational requirements for operating in U.S. waters and we remain under U.S. Coast Guard jurisdiction for our operations in United States waters such as the Gulf of Mexico.

Logistically, however, if a rig is flagged in the United States, what that requires under Coast Guard regulations is that a member of the U.S. Coast Guard conduct a physical inspection of that rig annually. When the rig itself is traveling around the world and it is sometimes in the Middle East or the Far East that becomes a logistical issue.

Another requirement is that a U.S. flagged vessel be captained by a U.S. citizen. We do that for every in rig in the Gulf and all the members on board the Deepwater Horizon Deepwater Horizon were citizens of the United States. However, when those rigs are moved to less hospitable jurisdictions, we have great difficulty employing a U.S. citizen to command and chair those rigs.

And so the flagging is predominantly a logistical issue as a majority of our rigs are working outside of the United States. There is also a financial tax benefit to doing that but importantly there is no regulatory or compliance benefit from flagging the vessel in a foreign country as opposed to in the United States.

Ms. CHU. Does anybody else have any comment on that?

Okay, well, then I will turn to another topic. Actually, I am very anxious to ask questions pertaining to the Vietnamese fishermen in the area. I have been in touch with representatives from the area. They are experiencing particular problems, so Mr. Willis, I would like to ask you questions pertaining to their plight. There are, today, tens of thousands of Vietnamese shrimpers that are making their livelihoods in the waters of the Gulf Coast, and, in fact, they represent about one-third of the shrimping community in the Gulf Coast. Because of that strong Diaspora in Louisiana, Mississippi, and other Gulf States, there is a problem with English proficiency.

And in fact, with one community in Louisiana, English language proficiency in Louisiana is about 10 percent. They have expressed concerns over access to BP and government programs due to the language barrier. The translators provided by BP have been unable to communicate clearly the legalities for seeking damages for lost income, cleanup employment opportunities and unemployment assistance.

And in fact, Vietnamese fishermen have been encouraged to sign contracts written in English by BP representatives that provided

$5,000 in damages in exchange for waiving one's right to sue and similar liability waiver was required to access employment for the vessel of opportunity program which hires local boat operators to assist with response activities, so in other words, to get the job, they would have to sign that liability.

First of all, are you still requiring people to sign the liability?

Mr. WILLIS. We never required any sort of signing of waiver of liability for the claims process. Never.

There was a waiver of liability, as I understand it, associated with the vessels of opportunity program that you described. That was destroyed and a very simple form was put in place. It was a mistake and it was corrected quickly.

Ms. CHU. So you were not requiring——

Mr. WILLIS. Absolutely not.

Ms. CHU. I want to hear you say that that you are not requiring that waiver of liability.

Mr. WILLIS. We are not requiring a waiver of liability.

Mr. HOOD. Dr. Chu, I am sorry to correct the record. I am Jim Hood, AG from Mississippi. We have many Vietnamese fishermen on our coast who did sign some of those waivers. We got a commitment out of BP to give us a list of those names, and we sent translators down to make sure that they know that that waiver has been withdrawn. So we are going to make sure that—it did occur. It did occur for when they hired them to pull booms and so forth, so I want to make sure that was correct.

Mr. WILLIS. I want to make sure you understand what I said. For the claims process, there was never at any time a waiver required.

For the vessels of opportunity program that Attorney General Hood just referenced, in the beginning, there was and it was destroyed. It was taken out of the process.

Ms. CHU. Well, is there something on the forms that say that there is a $5,000 limit for the claims themselves?

Mr. WILLIS. Can you repeat the question. Please.

Ms. CHU. In terms of the claims form, does it suggest that there is some kind of $5,000 initial limit?

Mr. WILLIS. No, it does not. What we said about the claims process is that we are going to compensate people for their losses. But in order to expedite the process, we are making advance payments interim payments to get money into people's hands within 48 hours versus having to wait 45 days or 30 days to make it happen. It does not say anything about $5,000 on the form.

Ms. CHU. Are these claims documents, these claims forms, are they translated into Vietnamese?

Mr. WILLIS. They are translated into Vietnamese and Spanish and they can actually be accessed on our Web site at *www.bp.com/claims*.

Ms. CHU. I want to point out that there have been some problems with the translation, and a Vietnamese priest told me that for instance, the translation for "deck hands" was translated into something like "hands growing out of decks." And I want to really emphasize that you have to have a culturally sensitive and culturally appropriate translation for these forms and for the outreach kind of program that you have for these fishermen.

And what kind of assistance will there be for people who are going through the process besides the translation of the forms?

Mr. WILLIS. I will tell you a little bit, Congresswoman Chu, what we have been doing, and I will talk specifically about what I have been involved in in Louisiana and Mississippi, in Louisiana in Venice and in New Orleans and in Mississippi in Biloxi. We have about 122 local people that we hired in our Venice community outreach center. Half of those people, actually 60 percent of them are either Vietnamese, Taiwanese, or from Cambodia.

We have people working there to help us in a variety of ways, one to get connected with the Vietnamese and Asian communities in the Louisiana area, but we have also moved some of those people in the claims center to help us get those folks do their claims process as quickly and efficiently as we can.

In New Orleans, just on Monday, Congressman Cao had an expo where we had 5 to 600 Vietnamese present. He asked us if we would offer a vessel of opportunity training. He asked us if we would open up a claims center for the day on site and we did, recognizing that the process we have in place is not perfect, but we are going to correct the problems we see with it, he recommended eight or nine, as I recall, translators that we should hire in our New Orleans office. We are in the process of bringing those folks in so that we can better connect with the community in the most effective way possible.

In Mississippi we have had training, specifically for the Vietnamese community around the vessel of opportunity program. We have had that training done in Vietnamese.

So we are continuing to work it every day and to make it as good as it can possibly can be.

Ms. CHU. And you are going to get back to the people who signed those waivers and make sure you do adequate outreach to them?

Mr. WILLIS. Absolutely, absolutely, we have to.

Ms. CHU. There are so many assistance programs available, but what steps will you take to educate the Vietnamese community through the media? You know, they don't partake necessarily of the mainstream media. Are you accessing the ethnic media?

Mr. WILLIS. I do not know the answer to that question, but it is definitely something I will find out.

Ms. CHU. Well, they need to know of these assistance programs, and I do have a list of the Vietnamese media outlets, so here so I would like you to make sure that they are part of this assistance and outreach program.

Mr. WILLIS. I will be happy to do that.

Ms. CHU. Thank you. And I yield back.

Mr. CONYERS. Attorney Ted Deutch of Florida.

Mr. DEUTCH. Thank you, Mr. Chair. First of all, Mr. Jones, my sympathy to you and condolences to your family and the ten other families who are suffering, and Mr. Stone and Mr. Brown, to you and the other 15 injured, I appreciate very much your being here today.

The goal of this hearing I think for the families of those who lost their lives and those who are injured Mr. Encalade whose businesses have been so impacted is ultimately figure out how we obtain justice. And along those lines, Mr. Willis, you said that BP has

stated you have stated throughout that you are going to pay all legitimate claims notwithstanding the cap in the Oil Pollution Act. And I know that you have paid thus far 13,500 claims. What is the total dollar amount?

Mr. WILLIS. It is around $37 million.

Mr. DEUTCH. And the analysis that you used to determine whether those claims were legitimate and how they are paid is there any consideration of the amount of the claim when those claims are fired.

Mr. WILLIS. No, based on the claim that was submitted.

Mr. DEUTCH. And will it change when you hit the $75 million cap and beyond?

Mr. WILLIS. It will not.

Mr. DEUTCH. And Mr. Willis, if there is no—if BP has made the determination that if, in fact, it is responsible for these losses and will pay well in excess of the 75 million, is there—is that simply a company determination? I guess the question was for Mr. Ferguson, Ms. Clingman.

Ms. Clingman, the Transocean seems to be the counterpart to BP. BP, according to Mr. Willis, tells us they are going to pay in excess of the $70 million cap, Transocean, on the other hand, has filed a claim trying to limit its liability to 27 million.

Why, in my case, I represent southeast Florida, if this oil comes into the loop current and hits the southeast coast, the damages will be well in excess of millions, well in excess of the billions. Why is it appropriate for liability to be limited?

Ms. CLINGMAN. Because it goes back, Congressman, to the two separate types of claims, and although there are many, many lawsuits they fall into two big categories. One are the OPA claims such as you are describing, damages to beach front, to fishermen, to commercial industries, tourism industries, those fall into the Oil Prevention Act. Those are the claims for which BP has been designated and has accepted responsible party status. Those are the ones going through the claim process. The lawsuit that we filed does not relate in any way to those types of claims. The limitation of liability action applies only to claims asserted under maritime law.

Mr. DEUTCH. Then in which case under the Oil Pollution Act, if there were claims you would be limited by the 75 million?

Ms. CLINGMAN. With respect to Transocean, Transocean has accepted responsible party status under OPA only with respect to oil or fuels or diesel that would emanate from the rig itself on the sea floor. I have no evidence that that has happened.

Mr. DEUTCH. Ms. Clingman, let's assume that it happened. Let's assume that this entire mess was Transocean's fault just for the sake of this discussion. In that case, would Transocean acknowledge that the $75 million cap under OPA is inadequate and that you would be responsible or should be responsible for more than that?

Ms. CLINGMAN. Nothing under OPA puts us in a responsible party position for the oil well leak, which is what is leaking. I can't wear BP's cap, but——

Mr. DEUTCH. Let me try it this way, Ms. Clingman. For Mr. Ferguson the question is this: There is a $75 million cap under OPA.

The fact is the estimates are that this may cost $14 billion; it may cost considerably more. We may not know for some time. Why shouldn't that cap be raised to a level that helps compensate those whose lives have been turned upside down by this environmental disaster?

Mr. FERGUSON. In our position we are just not involved in the cap, but as a general proposition on the hypothetical that you mentioned, I think we would support any reasonable change in the law. I can't commit without seeing what is written, what it is about. But the cap itself, as I have heard discussed here today, may be too low.

Mr. DEUTCH. Mr. Willis, I know you have agreed to this, but the way to confirm that BP has agreed to this is to acknowledge the importance of increasing that cap beyond the $75 million. A reasonable amount, I would suggest to the three of you, is an amount necessary to compensate those for their losses. BP would be willing to see an increase in that cap, presumably?

Mr. WILLIS. We have said, and I will say again, that we believe that cap is not relevant, and that we accept that we will exceed this cap, and we will pay all legitimate claims above it.

Mr. DEUTCH. And, therefore, Mr. Willis, if we introduce legislation to increase that cap, to remove that cap altogether, to cover all legitimate claims, BP would then support that legislation?

Mr. WILLIS. We will follow the law.

Mr. DEUTCH. I would like to turn to the Death on the High Seas Act for a moment. Under that statute there is a discrepancy that we have heard about earlier, that the surviving family members of a person who dies on a vessel on the high seas versus the damages available to those relatives whose—to the family members of a relative who died in a plane crash on the high seas, there is a discrepancy. I would like to know if there is anyone who can speak to why we shouldn't take action, why this Congress shouldn't take action immediately to change that law so that the families of those who perished in this accident should receive the same treatment as the families of those who lost relatives in an airplane crash in precisely the same location?

Mr. GALLIGAN. I would be happy to address that, and my answer would be that you should; that the current state of the law provides an inconsistency which allows recovery, as you have stated, to the victims of commercial aviation disasters, but it doesn't allow recovery to the other victims of maritime disasters.

Today, right now, and I don't want to use the Joneses as an example, I hope they will forgive me, but if they were to pursue their legal redress, and if they were to establish liability, nobody in the family would recover anything for the loss of care, comfort and society that they have suffered.

Mr. DEUTCH. Mr. Galligan, if I may follow up on that. In his opening statement we heard Mr. Jones say that he worries about his newborn grandson Maxwell and whether Maxwell will be eligible for any damages under the Death on the High Seas Act because he was born after his father Gordon died in this explosion. Can you comment on that? Can you give him some comfort in knowing that that is not the case?

Mr. GALLIGAN. I am not sure I can give him comfort. I can tell him that the state of the law is somewhat confusing. In DOHSA cases, in general maritime law cases, what the courts will frequently do in situations to define relationship, whether it is parent, spouse, child, is they will look to applicable State law to determine the relationship.

So in this case they would probably look to Louisiana law to decide whether or not a viable fetus subsequently born after the death of a parent has a right to recover. So Mr. Jones would have to go and consult what the law of Louisiana was; which, of course, means that the recovery of different people under DOHSA cases in different States may be different depending upon the relevant State law. Certainly something that could be done here would be to say that a child includes a viable but not yet born fetus.

Mr. DEUTCH. Mr. Galligan, just to wrap up this important topic, in order for us to ensure that Mr. Jones and the families of those others who perished in this accident—in order to ensure that they receive the treatment under law that they deserve and the compensation that should be rightfully theirs, the approach should be, one, to address this discrepancy that exists between airplane crashes and these types of accidents?

Mr. GALLIGAN. Yes.

Mr. DEUTCH. And, number two, to specifically address the types of family members and the occasions when this will be applicable?

Mr. GALLIGAN. Yes. And I think there is something else you would have to address, and that would be the effective date of any amending legislation. You would have to consider whether or not you would make that amending legislation applicable to events that occurred before the passage of the legislation. And in doing that, the questions that arise are two: One is policy, and the other is constitutionality.

On the policy standpoint, the questions are adequate compensation, which I have already discussed; modernizing the law, which I have already discussed; and making the law consistent with other aspects of maritime law and State law. And on constitutionality, unless a statute retroactively applied is going to inhibit some other constitutional right, the balance and test is is there a reasonable, rational basis to do that? And the rationality would be supported by what: By the same things that would justify the policy change.

Interestingly, you did exactly that when you amended DOHSA in 2000 to make loss of society recoverable by the survivors, the victims of commercial aviation disasters.

Mr. DEUTCH. Mr. Chairman, before I yield back, I would just like to again thank Mr. Jones and give Mr. Jones my commitment that I will work with you, Mr. Chair, and this Committee to do what we need to do in an effort to amend DOHSA so that you and the other families can receive the appropriate respect that you deserve under law.

I yield back, Mr. Chairman.

Mr. CONYERS. Judge Charles Gonzalez of Texas.

Mr. GONZALEZ. Thank you very much, Mr. Chairman.

First to Mr. Jones and his son Chris, you are lawyers, most of us up here are lawyers, lots of lawyers are witnesses today, and we are taught that words are powerful, and they can convey a mes-

sage, and they can express every human emotion—until you experience what you have experienced, and then we know they are not. As inadequate as the words are that you may find from Members, it is sincerely felt. I just wish there was a way we could convey them adequately.

Let us talk about adequacy. It is something that Mr. Jones brought up. His statement was about responsibility, liability. What is the law supposed to accomplish? Coming full circle, because we started off with Mr. Conyers' opening statement, what is the jurisdiction of this Committee? There are many things that we have asked today, and we may not be able to do much about them, but there is something we can do about the laws that govern the parties, the laws that allow remedies to the victims of what transpired in the Gulf, and looking at things prospectively.

So my question is going to be just to a few of you, I am going to assume certain things, and I am going to ask that you assume them with me, that the purpose of law would be two-fold. I am going to try to make it as simple as possible, and I am going to follow up on something that Mr. Deutch touched on. But if the law is to accomplish anything, it would be two things: One, it instills responsibility because of liability. That is human nature. The law does not assume that people are just going to do the right thing. The law is not going to assume that a party is not going to be negligent. It assumes negligence. It assumes carelessness. It assumes acts that are intended, actually. That is what we have to prepare for.

Now, there are consequences to those; they are called victims. And so what the law then proposes to do is to make the victim whole. That is justice. So it is really simple.

I think we all started off in law school kind of understanding those concepts, and we lost our way somewhere along that whole process. But nevertheless, if we apply that test, and we look at what we have today in the way of laws governing incidents that have occurred in the Gulf, and I would say may occur again—hopefully not to this degree, but we know there will be accidents—are the laws that are presently on the books adequate, adequate to instill responsibility, and adequate to make victims whole for their losses?

Mr. Willis, I know you are not a lawyer, but I am still going to ask you, do we need to amend the laws that govern instances of this nature?

Mr. WILLIS. Representative Gonzalez, you are right, I am not a lawyer, but what I will say to you is one of the things I worked very hard to understand, as I have been involved in this process, is what the law is around the damage that is being caused by this spill. What I can tell you is whatever the law is, BP is going to follow it. I have said and I will keep saying that we are going to go past this $75 million cap because it is just not going to be enough to repair the damage that is being done by this oil well that has been flowing into the Gulf of Mexico. We are going to follow the law.

Mr. GONZALEZ. It goes way beyond the $75 million. It goes into the types of remedies, the types of causes of action, the elements of damages. I mean, this goes way beyond certain numbers.

And I don't mean to pass over Mr. Hood: What is your opinion? Do we need to amend the laws? You have asked us to, so I assume your answer is going to be yes?

Mr. HOOD. Yes, sir. And I have attached our comments about five different ways that we thought would benefit the States just to protect the States' interests and the damages that we may be subject to incur.

What affects the States also, some of these amendments, also affects these individual claimants from Mississippi. I mean, a company, by the time this thing is over, I suspect will have caused damage to hundreds of Mississippians. Yet they, under the Class Action Fairness Act or different Federal procedural moves, they will have them in your State, Mississippi claimants, because a company has come to Mississippi and caused damage, down there in a multidistrict litigation or a class action court, and that court will decide categories of people, their damages, and they don't get—some will get more than they should, and some will get less than they should. And I think everybody ought to be paid what they are owed, and that is it, no more.

I would ask the Committee in addition to considering the proposed amendments that I have proposed expressly dealing with States, excepting States from cap, I would ask the Committee to go back and look at the Class Action Fairness Act and some of the abuses that are occurring by Federal judges just to get a case settled. When you have thousands of cases, it is human nature, you are going to try to do everything you can to force a settlement, and then people are left out, and it is not fair. It is not a fair process. Other than those written things that I have mentioned, I think the professor was dead on on some of the inequities among the different admiralty acts as well.

Mr. GONZALEZ. Ms. Clingman, present law is adequate or inadequate?

Ms. CLINGMAN. Congressman, I am an attorney, and I take the laws as Congress has enacted them and then make my legal recommendations based on the facts. We are not there yet in the case because we don't have the facts, and I would urge Congress to have that same deliberateness in finding out first what has happened.

It is inherently imperfect to compensate losses like this, the loss of human life, the loss of livelihood, the loss of recreational beach shore, with money. However, I do believe the U.S. justice system is the best in the world, and our U.S. justice system has dealt with complexities, torts, loss, damages for more than 100 years, and has done it very well. So I would encourage this Committee and other Members of Congress to let the judicial system do its job, to let the U.S. Coast Guard do its investigative job, and then to take, as we will in looking at our liability, a deliberate look at the legal regime and see if any changes need to be made.

Mr. GONZALEZ. But the courts can only apply the laws that we enact. And if we restrict recoveries, we restrict causes of action, we restrict damages, we cap, we limit, do we need to be addressing that so that we can give the courts maybe a little bit more latitude to address what are legitimate complaints, legitimate damages, and losses?

See, I tend to believe we are going to do something. What we have in place today, it is antiquated, obviously; but it is just not fair. I understand what you are saying, we can let this thing play out, but I am not sure that is exactly going to happen because there are some glaring shortcomings as we even start the process.

I will ask Mr. Ferguson, is the law adequate or inadequate?

Mr. FERGUSON. Well, I think we are certainly going to find out. And the lesson that is learned from that is going to drive the policy that determines how do we change these laws. The position we are in is that our policy is we comply with laws. If the laws are changed, we are going to comply with the way they are changed. It is clear that there is issues that are immediately obvious from what is happening here. It is up to Congress to address that policy and to change those laws as appropriate.

Mr. GONZALEZ. And I know, Mr. Foley, you have touched on it. You have said sometimes there are reasons that laws may look somewhat inadequate because they need to promote what might be commerce and such. And to some extent I might even agree, and I am not going to totally disagree with the Ranking Member Mr. Smith, my neighbor in San Antonio, but I don't think this would be the death knell of drilling. It would just have a little more justice in what is available to folks.

I will ask the professor, and I don't want to put words in your mouth, but I assume that you are saying, just as the attorney general is, "you guys need to change the laws and make them a lot more fair."

Mr. GALLIGAN. Yes. Obviously there will need to be investigations, and the facts still have to come out. But the laws in this area are imperfect.

You said it. Tort law ought to be about fairness. Aristotle called it corrective justice. It ought to compensate people to make them whole. If we don't compensate for loss of society in maritime wrongful death cases, we are not making them whole. Tort law ought to deter. It ought to encourage appropriate, efficient investments in safety. If we undercompensate, by definition we underdeter, and the Limitation of Liability Act of 1851, which applies to the personal injury and wrongful death claims here, is a further potential underdeterrent because it is a further potential limitation of liability.

Mr. GONZALEZ. Thank you very much.

I yield back, Mr. Chairman.

Mr. CONYERS. I thank the witnesses for their endurance and their testimony. We will have 5 days in which questions may be submitted to you that we ask be returned, and 5 days for any additional materials that might be submitted.

I introduce into the record written materials from Michael Russell and Steven Gordon.

[The prepared statement of Mr. Russell follows:]

PREPARED STATEMENT OF MICHAEL RUSSELL

My name is Michael Russell and I am the Captain/Owner of the 60' trawling vessel All My Boys homeport New Orleans, La . I am a 4th generation fisherman of 33 years and I have 3 sons that are 5th generation fisherman whom all own their own vessels. My wife retails shrimp and has done so for 20 years.

The past month has been a very stressful time for my family and all fishing families with oil spewing, fishing grounds closing and so much uncertainty. Crab fishermen whom were far from the spill were forced to pick up their traps and throw away their catch. My son threw away $1,500 worth of perfectly good crabs at a cost of $500 for fuel and deckhands.

Some fishermen are financially stable but most are not. Alot of fishermen are now working for B.P. Myself and my sons are not interested in this. We feel as though there is to many documented health risk that we are not willing to take.

The state decided to have an emergency opening of the brown shrimp season a month early before the oil spread over the fishing grounds. This was decided to give fishermen the opportunity to catch large white shrimp. It opened for one week, then closed for a week, then it was going to open a week later, then it wasn't , then it did. Needless to say it is very confusing and a job in itself trying to keep up with this. Due to the confusion my family and I missed both openings. We have to travel 10 hours to get to the fishing grounds that were opening. Because of short notice we got there late on the second opening. By opening the shrimp season early the brown shrimp crop is destroyed. The srhimp counted over 160 to the pound.

I am very concerned about the long term affects the oil spill will have on the fishing business. The dispersant being used may be more toxic than the oil and tar

all over the fishing grounds. Will the toxins stop the reproduction of shrimp, crabs and oysters? Will 75 million dollars be enough to cover this catistrophic disaster? The Horison disaster will be most damaging to the shrimp, crab and oyster fishermen. Then the docks who unload the seafood from the boats and deliver the seafood to the processors. Then those businesses that supply fishermen with nets and other supplies needed to keep their boats going. I feel as though oyster processors will be affected more then shrimp processors becuase they deal in imported shrimp. Very little fish comes from Louisiana due to ex-Govenor Edwin Edwards and the Coastal Conservation Association formally none as the Gulf Coast Conservation Association. They managed to take the fish out of fisherman?$?

In closing please keep in mind the next time a radical environmentalist speaks out against trawiling or fishing activities, fisherman help feed this country. Unfortunately it is becoming a rarity to have food that is grown and harvested in the United States. Seafood is a renewable resource that has allowed my family to be in this business for 5 generations. I hope that the B.P. Deepwater Horison disaster does not cause it to be the last generation.

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[The prepared statement of Mr. Gordon follows:]

Statement of Steve Gordon

Attorney for Douglas Harold Brown
Chief Mechanic/Acting Second Engineer
of the Deepwater Horizon

on

Legal Liability Issues Surrounding the
Gulf Coast Oil Disaster

before the

House Judiciary Committee

May 27, 2010

**STATEMENT OF STEVE GORDON**
**MARITIME ATTORNEY**

Chairman Conyers, Ranking Member Smith, and Members of the Committee, my name is Steve Gordon and I thank you for letting me submit my statement for the record.

I am a lawyer licensed for 25 years to practice law in Texas, Louisiana and the District of Columbia. I am a member of the American Association of Justice - Admiralty Law Section and an active member of the Maritime Law Association. I am also Board Certified in the area of Personal Injury Trial Law by the *Texas Board of Legal Specialization* since 1990. Gordon, Elias & Seely, LLP, handles cases involving injured seaman under maritime law and we have the honor of representing the family of Karl Kleppinger, Jr. who died in this horrific, but completely avoidable, maritime disaster.

Karl was one of the eleven crew members of the *Deepwater Horizon* that were never found after the explosion on April 20, 2010 and is now presumed dead. Karl was a Desert Storm veteran; was 39 years old; and was married to Tracy Kleppinger. Karl also left behind his wonderful, sweet and kind son, Aaron Thomas Kleppinger. Aaron is 17 years old and is mentally challenged. The Kleppingers live in Natchez, Mississippi. Karl and Tracy would have been married eighteen (18) years on May 2nd, 2010 and his Memorial Service was on May 3rd, 2010.

Karl was extremely dedicated to his job, working for Transocean for almost ten (10) years without missing one hitch. To demonstrate the kind of employee that Karl was, there was an occasion when a Transocean drilling rig began taking on water in one of its flotation legs. The Captain contacted the shore and an emergency team was being prepared to come out to the vessel. However, they were losing ballast rapidly and the vessel was listing. There was a call for any volunteers to jump into the Gulf of Mexico to close a valve below the water line. Without any hesitation, and without any diving experience whatsoever, Karl volunteered and went into the water to successfully fix the problem below the water line.

Karl's position on the DWH was a "shakerhand". The shakerhand, sometimes called the "mudman", works in the "shaker room" to monitor the shakers. These are screens mounted on a vibrating motor that separate the down-hole cuttings from the drilling fluid. The shakerhand maintains this equipment and weighs the mud. Though Karl's story will never be personally told, the evidence will show that the shakers were abnormally filling up with mud for quite some time and well before any explosion occurred. Also, the "shaker room" as well as the "pit room" and "pump room", are some of the very first areas where there will be a gas buildup if a "Kick" occurs or there is an impending blowout. Additionally, a shakerhand as experienced as Karl was would have clearly known for hours that there was a severe problem occurring with the well control. However, Karl never left his station; but, more sadly, no one ever ordered Karl, or the ten (10) other rig workers to vacate their positions. This type of behavior on the part of Transocean's OIM [Offshore Installation Manager] and others as well as BP personnel that were on the rig is not just negligence but surpasses gross negligence and actually rises to the level of criminal behavior. Basically put, these dedicated employees died manning their positions while placing their lives in the hands of people that clearly had an opportunity to save their lives but for

the company's desire to reduce costs, by avoiding any "down time", thereby increasing profits on this job.

We also have the honor of representing several other crew members who survived this horrific event. As Congress and the rest of the world has learned over the last few weeks, and as will undoubtedly be further discovered, this horrible tragedy was the result of conduct on the part of Transocean and BP that was so egregious that it reflected a conscious disregard for the safety and welfare of the crew members on board the *Deepwater Horizon*.

Despite the fact that their carelessness resulted in the death of eleven people and the injury of many more as well as damage to the fishing and other industries along the Gulf Coast, the full extent of which will not be known for many years, Transocean, and the foreign [Swiss] owner of the *Deepwater Horizon* have already filed an action in Federal Court in Houston, Texas asking the Court to exonerate or limit their liability to $26,764,083.00.

Transocean acknowledged in their filing that "the amount of claims that are reasonably anticipated to arise from the events in question are expected to greatly exceed the amount and value of the Petitioners'" value in the vessel as it sits on the seabed floor.

Transocean seeks this protection despite the fact that they have already been paid in excess of $400,000,000.00 by their insurance company as a result of the loss of the *Deepwater Horizon*.

**Limitation of Liability Act, 46 U.S.C 30501, *et seq.***

In 1851, the United States Congress enacted the Limitation of Liability Act. The purpose of the act was to promote and encourage the growth of American shipping and the American merchant fleet. Under the terms of the Act, if certain factual prerequisites are met, a shipowner, *i.e.*, Transocean and Triton Asset Leasing GmbH [*a Swiss entity*] and others in this matter, can limit their liability for a casualty to the value of the vessel and the freight then pending, if any. Specifically, vessel owners and/or operators are entitled to limit their liability if the negligence or unseaworthy condition which caused the loss occurred without the "privity and knowledge of the owner or master."

The *Deepwater Horizon* is a "vessel". I realize people commonly refer to it as a "rig" but, in fact, it is actually a semi-submersible vessel. I will not, in this statement, get into what has, and what has not, judicially been held to be a "vessel" but, suffice it to say that the profits to be made by oil/gas exploration, development and production have accelerated technological development to construct very odd looking structures which has, in turn, "pushed the traditional legal definitions" of what is deemed a "vessel". The structures that we now see being utilized to extract hydrocarbons from the seabed floors, at incredible depths, do not look anything like a cargo tanker, or other traditional ship historically utilized in commerce and trade. The point is that, because the *Deepwater Horizon* is a "vessel" the: (1) Jones Act and DOHSA applies to injured/killed "seaman", (2) DOHSA applies to killed "non-seaman" and (3) the *Deepwater Horizon* owners/operators can avail themselves, *i.e.*, like they have in this matter, of the Exoneration and Limitation of Liability action set out in *Title 46 Subtitle III, Ch 305* Section 30501, *et seq*. [hereinafter called the "Limitations Action"]

(1) Why should the Limitations Action be available in today's world? *It should not.*

a. With insurance and indemnity coverage offered by the Lloyd's of London and other international insurance markets insuring vessels to extraordinary amounts, the Limitation Action is antiquated and functionally not necessary; and

b. Additionally, with the ability of U.S. companies hiring U.S. workers but legally shifting the ownership of the vessel, such as the *Deepwater Horizon*, into a company out of Switzerland, what is Congress' impetus to provide protection to the Swiss based *Triton Asset Leasing GmbH* under the Limitation Action? *There is none and it should be abolished.*

i. There are no Congressional requirements that the vessels extracting our natural resources be U.S. made, U.S. flagged, U.S. owned or, for that matter, U.S. crewed/manned. What interest does Congress have in protecting a Marshall Islands flagged vessel owner under the Limitations Action? *They have none.*

(2) If Congress does not abolish the Limitations Action, it should, ***at bare minimum***, amend it to require that any and all insurance covering the vessel and its owners be made a part of the "Limitation Fund" available for the claimants. As the Limitation Action sits right now, the movant is only required to post a surety for the amount of the appraised value. In the Transocean instance, that is $26MIL and change.

A question has been raised that "wouldn't this "Insurance Inclusion" amendment cause intentional underinsurance by the vessel owner and/or operator". On this topic, my response would be:

a. The companies that operate and own these vessels have no interest whatsoever in subjecting themselves to a situation where they file a Limitation Action and, at the end, do not get a limitation granted. If this occurred, it would subject their corporate assets to seizure due to a verdict that would exceed the low insurance limits that some people think would happen;
b. Furthermore, the vessel owners are usually obligated to obtain and maintain insurance that is sufficient to cover the lease holder [BP] as an additional insured as a prerequisite to getting the job of drilling the well and you can rest assured that, for example in this case, BP would never allow them to underinsure.

There is a practical application "issue" with an "Insurance Inclusion" amendment and it is:

a. Very infrequently, the vessel owner/operator will actually file for bankruptcy. When this happens, the bankruptcy filing places an automatic "stay" in any litigation that is ongoing against the "Debtor". Since the Debtor has been sued as a defendant, this requires the plaintiff to file, in the bankruptcy court, a "Motion to Lift the Bankruptcy Stay" and when this is done, the motion would state that

the plaintiff will agree to only recover from the available "insurance" proceeds in the underlying litigation. The bankruptcy court will routinely grant these requests to lift the stay because it does not disturb, nor touch, the actual assets of the debtor. The problem in the maritime context is that the policies are not true insurance policies but are, instead, "indemnity" policies. An "indemnity" policy will never pay claims until the insured has paid out of pocket to some third party. Thus, if the debtor [vessel owner] will never pay because they are in bankruptcy the contractual requirements to indemnify the debtor/vessel owner will never come to fruition. This could be legislatively addressed in the "Insurance Inclusion" amendment by expressly providing that any bankruptcy, reorganization, *etc.*, filing on the part of one or more of the "Parties in Limitation" would not, in any way, affect the requirement to tender the insurance as part of the Limitation Fund.

(3) In addition to including the insurance aspects in number 2 above, the Limitation Action should be excluded from use by "vessels" engaged in the exploration, development and production of hydrocarbons. The reason is simple: When Congress thought about protecting vessel owners it had no idea that someday there would be a vessel that could, in one event, destroy the entire ecosystem of a body of water as large as the Gulf of Mexico. If offshore drilling is here to stay, then the companies that choose to engage in this risky endeavor for incredible economic gain should not be afforded protections when they can kill people, hurt people and destroy four states' coastlines.

**Death on the High Seas Act (DOHSA)**

Under the current state of maritime law, seaman who are killed as a result of the negligence of their employer, a third party, or as a result of the unseaworthiness of the vessel upon which they work, are not afforded the same remedies as people who are killed as a result of negligence on land.

Congress previously amended the *Death on the High Seas Act*, which governs aviation and maritime death accidents, to afford aviation accident victims the same remedies as those accidents that occur over land. Prior to that amendment, following the tragic airline crashes involving TWA Flight 800, Swissair Flight 111, and EgyptAir 990, Senator McCain explained that: "[t]he families of aviation accident victims over international waters have waited far too long for Congress to make sure that their losses are accorded the same respect as those associated with accidents over land. Family members should know that their children have value in the eyes of the law. The recent aviation tragedies only highlight the need for prompt action." The DOHSA amendment afforded aviation accident victims non-pecuniary damages—e.g., damages for the loss of love and affection—a remedy previously unavailable under the law.

Congress, unfortunately, did not amend DOHSA to allow families of maritime workers to recover for the lost love and affection of their father, husband, brother, sister, son, or daughter. As a result, maritime families are currently not accorded the same respect as those associated with accidents over land, whose families are afforded the opportunity to recover non-pecuniary damages. Congress should change the law and allow families in maritime death cases to recover

non-pecuniary damages, including loss of love and affection and pre-death pain and suffering. As of now, if a non-seaman burned to death over the course of five minutes, in agonizing pain, the current law does not afford his survivors a remedy for those damages.

The Jones Act, likewise, does not allow families to recover non-pecuniary damages. That means that under both the Jones Act and DOHSA, if a seaman is not married and has no children, his parents do not have a remedy at law. Children that the seamen do not financially support also have no legal remedy.

A brief summary of the differences between damages available for those who die on land vs. those who die at sea is as follows:

| | State Wrongful Death Damages | DOHSA/Jones Act Death Damages |
|---|---|---|
| Financial Contributions to Family | YES | YES but for children, only until they reach majority |
| Loss of care guidance and support | YES | YES but only until children reach majority |
| Loss of companionship and society | YES | NO |
| Mental Anguish | YES | NO |
| Loss of inheritance | YES | NO |
| Punitive Damages | YES in some states | NO |

The *Deepwater Horizon* maritime disaster calls out to Congress to *promptly* amend the above maritime statutes to afford these workers and their families the same remedies as those involved in accidents occurring on land. *If Congress moves swiftly in adopting the above recommendations, it is this author's opinion that it would be applicable to these Deepwater Horizon victims both on the Limitations Action and on DOHSA*.

We truly hope that families like the Kleppingers, as well as the ten (10) other families who lost their sons, husbands and fathers that horrific night will never again be faced with the cold realities of the law as it exists today.

I realize that making laws can be very complex and that the interest of all must be taken into consideration but for far too many years the interests of the hard working men and women in the maritime industry who lay their lives on the line everyday have been silenced. The time has come for Congress to recognize this gross inequity in our judicial system and to act now.

Steve Gordon



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Mr. CONYERS. We thank you very much, and we declare this hearing at an end.

[Whereupon, at 2:50 p.m., the Committee was adjourned.]

# APPENDIX

## MATERIAL SUBMITTED FOR THE HEARING RECORD

July 23, 2010

**BY ELECTRONIC DELIVERY**

Hon. John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

**Re: Response to Chairman Conyers' Correspondence, Dated June 25, 2010, to Mr. Darryl Willis, Vice President, Resources, BP America, Inc.**

Dear Chairman Conyers:

I am writing on behalf of BP America, Inc. ("BPA") in response to your June 25, 2010 correspondence to Mr. Darryl Willis, Vice President, Resources at BPA, in which you and your colleagues requested responses to questions for the record submitted in connection with the hearing held by the Judiciary Committee on May 27, 2010, and entitled "Legal Liability Issues Surrounding the Gulf Coast Disaster." BPA is providing the information set out in the attached Appendix. These responses are based on information that is presently and reasonably available to BPA.

If you have any questions, please feel free to contact me directly or Liz Reicherts at (202) 457-6585.

Sincerely,

Tonya Robinson / JDW

Tonya Robinson

**APPENDIX**

**RESPONSES TO POST-HEARING QUESTIONS FOR THE RECORD
MR. DARRYL WILLIS, BP AMERICA INC.
HOUSE JUDICIARY COMMITTEE HEARING ENTITLED
"LEGAL LIABILITY ISSUES SURROUNDING THE GULF COAST DISASTER"
HELD MAY 27, 2010**

**RESPONSES TO QUESTIONS SUBMITTED BY CHAIRMAN JOHN CONYERS, JR.**

1. **BP has repeated stated publicly, including during the Judiciary Committee's May 27th hearing, that it will pay all "legitimate claims." Will BP sign a legally-binding document attesting to its commitment to pay all legitimate claims, and not to invoke the $75 million dollar cap in the Oil Pollution Act of 1990?**

BP has stated that it will pay all legitimate claims under the Oil Pollution Act of 1990 (OPA) without regard to the economic damages cap of $75 million provided under the OPA. Indeed, BP already has paid significantly more than $75 million related to economic damage claims, and neither has sought nor will seek reimbursement from the U.S. Government or the Oil Spill Liability Trust Fund.

Additionally, on June 16, 2010, BP announced the establishment of a $20 billion claims fund, which will be funded over the next three and a half years, that can be drawn upon to pay claims adjudicated by the Gulf Coast Claims Facility (GCCF). The GCCF will adjudicate private – individual and business – claims under the OPA and tort law. The GCCF is independent and will be administered by Kenneth Feinberg. BP hopes that the establishment of the claims fund and the GCCF will give further assurance that BP will stand by its commitment as one of the responsible parties under the OPA.

2. **In your testimony, you said that you were being guided by the Oil Pollution Act of 1990 when making decisions in your claims process ("Congressman Scott, the starting point for the standard is the law. And, it is OPA, which was established by Congress for these types of situations."). Will BP's legal liability extend to non-economic damages?**

As indicated in Mr. Willis' testimony and BPA's earlier correspondence to Chairman Conyers, dated May 25, 2010, when addressing claims, BP will follow the OPA and relevant precedent and will be guided by the U.S. Coast Guard regulations. Generally, under the OPA, claimants may recover for the following categories of costs and damages caused by an oil spill: removal costs, property damage, subsistence use of natural resources, net lost government revenue due to injury, destruction or loss of property or natural resources, lost profits and earnings due to injury, and net costs of providing increased or additional public services. In addition, while the OPA does not cover personal injuries or fatalities, BP has indicated that it is willing to evaluate each bodily injury claim submitted through its claims process on a case-by-

case basis. BP's primary objective is to be transparent and process claims fairly, expeditiously, and consistent with all legal requirements.

3. **In your oral testimony, you stated that "OPA does not contemplate personal injury claims, but as a part of our claims process, we will accept those claims, we will evaluate those claims, and we will address them as they come in." According to the daily report submitted by BP to the U.S. Coast Guard, BP has not paid a single personal injury claim. Does BP intend to pay such claims?**

Bodily injury claims are not compensable under the OPA; however, BP has indicated that it is willing to evaluate each bodily injury claim submitted through its claims process on a case-by-case basis. Moreover, as described above, the claims process is being transitioned to the independent GCCF, which will be administered by Mr. Feinberg, who will develop his own approach to evaluating such claims.

4. **In your testimony, you stated that BP would pay all claims that are "substantiated." Please define that term in relation to each kind of claim submitted, and provide examples.**

For property damage claims, BP has substantiated the claims by gathering information about the nature of the damage. Minor property damage claims have often been handled over the phone with the subsequent submission of supporting information, *e.g.*, photographs and replacement or cleaning receipts. Larger property damage claims may require on-site inspection by a claims adjuster. For loss of income claims, BP has gathered information about the nature of the income stream, proof of historical income, and proof of the loss linked to the incident, *e.g.*, a boat captain may provide his or her fishing license, boat registration, and/or proof of income. The information requested to support an economic loss claim can include tax records, trip tickets, wage loss statements, deposit slips, boat registration, and/or a copy of the claimant's current fishing license (as applicable). Commercial economic loss claims may require additional, business-specific records to support the claim. The information requested to support a claim for loss of rental income can include prior occupancy rates, cancellations, tax records, and bookkeeping records. BP has developed specialized claim forms for certain classes of claimants (*e.g.*, fishermen, oyster lease owners) that are available on its website. For those private claims that now will be submitted to the GCCF, Mr. Feinberg, who will oversee that claims process, will develop his own view of what information is required to substantiate a claim.

5. **In your oral testimony, you stated that BP would pay for damages "directly related and directly caused by the spill." Given the potentially widespread economic loss claims stemming from the oil spill, please provide a detailed explanation of what claims will be considered "directly related and directly caused by the spill," including the factors that BP will consider in making such a determination, the legal basis for this analysis, and the period of time that BP will continue accepting economic loss claims (e.g. 1 year, 5 years, etc.).**

During the time that BP has been addressing claims, it has followed the OPA (under which BP has been designated as one of the "responsible parties") and relevant precedent, and has been guided by U.S. Coast Guard regulations. BP's intent in handling claims has been to be efficient, practical and fair, and, consistent with the relevant federal law, to pay all legitimate claims for damages caused by the oil spill as well as necessary response costs. In making claims determinations, the company has sought information establishing that the oil spill caused the loss; the statutory elements have been satisfied; the loss is not remote or speculative; the loss is substantiated; the claim is honest (not fraudulent); and the claim represents the amount of the claimant's net loss.

As announced on June 16, 2010, the company is in the process of transitioning the claims process for individual and business claims to the independent GCCF, which will be administered by Mr. Feinberg. Mr. Feinberg is evaluating the current claims process and, during this transition period, is making independent determinations about how the process should work going forward. He is meeting with key stakeholders, including the Department of Homeland Security (DHS) and the Governors of affected states, and soon will finalize the guidelines that the GCCF will use to determine which claims for compensation are valid. Those guidelines will be published.

6. **Does BP consider itself liable for any claims arising out of the dispersants used in the oil clean-up and containment? If BP accepts some or all of the legal liability stemming from the dispersants used in the clean-up and containment efforts, will claims be processed differently depending on whether the individual claimant is exposed to the dispersant(s) through the water or air? If so, please provide a legal and factual basis for such a distinction.**

BP is reluctant to opine on the legal issues contemplated by this question, in part because related litigation is pending and also because it is difficult to do so without the benefit of knowing the particular facts that ultimately drive any determination of liability. Suffice it to say, to the extent anyone submits a claim to the GCCF for alleged injuries resulting from the use of dispersants, Mr. Feinberg will determine on a case-by-case basis whether such injuries are compensable.

7. **What equipment does BP provide to individuals engaging in the clean-up and containment efforts? In particular, does BP provide and has BP been providing respirators to individuals working on the clean-up and containment efforts? Does the equipment provided differ depending on the type of clean-up and containment work being done or the geographic location of the specific clean-up site? Does the equipment provided depend on whether the individual is a volunteer or an employee (temporary or otherwise) of BP? Please explain in detail.**

Industrial hygiene monitoring is conducted to determine potential exposure to constituents associated with crude oil, weathered crude, and dispersants. Where that industrial hygiene monitoring demonstrates that protective clothing is necessary, it is provided. Where it demonstrates that respiratory protection is necessary, respiratory protection is provided. The

most commonly provided personal protective equipment (PPE) includes protective clothing, disposable gloves, protective boots, and life jackets. Respiratory protection is available to and used by, for example, source control workers when industrial hygiene monitoring suggests it is necessary. The proper selection of PPE is monitored and adjusted as necessary to provide appropriate protection given the nature of the task, the conditions encountered, and associated risks. The provision of PPE does not vary based on a response worker's status as a BP employee, contractor, or volunteer.

In addition, BP has adopted workplace protocols that reduce the potential for exposure to dispersants. For example, dispersants are not to be sprayed within two miles of vessels or platforms, within three miles of shore, or within five miles of the MC252 well site. Moreover, workers who are involved in source control and controlled burns and those who apply, handle or work around people who are applying and handling dispersants are instructed in appropriate work practices and provided with appropriate PPE to minimize the risk of any significant human exposure.

**8. For all of the dispersants used in the clean-up and containment effort, please provide detailed information on their ingredients and chemical composition, any studies completed on their safety or effectiveness, and a time line on the Environmental Protection Agency's recommendations on each dispersant.**

***Active Ingredients of Dispersants.*** BP has employed two dispersants manufactured by Nalco (COREXIT® EC9500A and COREXIT® EC9527A) as a part of the approved response plan. COREXIT® EC9500A is a mixture of hydrotreated light petroleum distillates, propylene glycol, organic sulfonic acids salts and other substances. Organic sulfonic acid salts belong to a class of chemicals that are used in household detergents and dyes. Petroleum distillates are a mixture of short chain hydrocarbons with low acute toxicity to humans. Propylene glycol is used in many consumer products, including injectable medications.

The U.S. Environmental Protection Agency (EPA) has identified and published on its website[1] a more detailed list of the COREXIT EC9500A constituents, as follows: 1,2-Propanediol (CASRN 57-55-6); Butanedioic acid, 2-sulfo-, 1,4-bis(2-ethylhexyl) ester, sodium salt (1:1) (CASRN 577-11-7); Sorbitan, mono-(9Z)-9-octadecenoate (CASRN 1338-43-8); Sorbitan, mono-(9Z)-9-octadecenoate, poly(oxy-1,2-ethanediyl) derivs. (CASRN 9005-65-6); Sorbitan, tri-(9Z)-9-octadecenoate, poly(oxy-1,2-ethanediyl) derivs (CASRN 9005-70-3); 2-Propanol, 1-(2-butoxy-1-methylethoxy)- (CASRN 29911-28-2); and Distillates (petroleum), hydrotreated light (CASRN 64742-47-8).

The EPA has identified the COREXIT® EC9527A constituents to include all those in COREXIT EC9500A2-butoxy-l-ethanol (CASRN 11-76-2). According to Nalco, 2-butoxy-l-ethanol has low acute toxicity to mammals and is highly biodegradable. COREXIT EC9527A is not currently being used.

[1] http://www.epa.gov/bpspill/dispersants.html#chemicals.

***Studies on Safety and Effectiveness.*** BP is working under directives from the EPA and the U.S. Coast Guard to test water samples and track any potential effects of dispersants. With two specially outfitted research vessels, BP is working with the National Oceanic and Atmospheric Administration (NOAA) to provide monitoring in the vicinity of the subsea leak. In particular, BP is testing for dissolved oxygen, conductivity, temperature, petroleum hydrocarbons, and toxicity. As required by the EPA's monitoring directive, the monitoring results, along with maps showing sampling deadlines, are posted promptly after they become available. These data are variously posted on both the EPA's and BP's websites.[2]

Additionally, the EPA produced two reports on June 30, 2010 comparing the toxicity of eight dispersant products.[3] Prior to the oil spill, the EPA had produced a table of information about toxicity and effectiveness for the dispersants on the National Contingency Plan Product Schedule.[4]

Finally, BP has prepared a three-volume series of evaluations of dispersant options that includes a review of the scientific literature on actual case studies of dispersant use, as well as a discussion of laboratory studies, field studies and certain toxicity concerns (Volume 1); a review of studies conducted by BP on the relative performance of dispersants against MC 252 crude oil (Volume 2); and a review of additional effectiveness studies, toxicity trials using dispersed oil, and biodegradation of COREXIT EC9500A (Volume 3).

***Timeline of EPA Recommendations.*** A timeline of the EPA's recommendations is provided below. In addition to these directives, the EPA has issued approvals for the use of subsea dispersant nearly every day since May 29, 2010. These letters are available on the Unified Command's website.[5]

| | |
|---|---|
| April 23, 2010 | The EPA approved the use of COREXIT dispersants. |
| April 30, 2010 | The EPA, along with several other federal agencies and BP, concluded that sub-surface dispersant use was an effective tool in the spill response, following testing of subsurface use of dispersant at the release site. |
| May 10, 2010 | The EPA issued a directive requiring BP to implement a monitoring and assessment plan for surface and subsurface applications. |
| May 14, 2010 | The EPA issued an addendum to its May 10 directive, providing specific details of the monitoring plan. |

[2] http://www.epa.gov/bpspill/dispersants.html;
http://www.bp.com/sectiongenericarticle.do?categoryId=9033792&contentId=7062347.

[3] http://www.epa.gov/bpspill/dispersants-testing.html.
[4] http://www.epa.gov/emergencies/content/ncp/tox_tables.htm#dispersants
[5] http://app.restorethegulf.gov/go/doctype/2931/57851/

| | |
|---|---|
| May 20, 2010 | The EPA included an additional requirement that BP study the dispersants being used and identify whether there are less toxic and as effective alternatives to Corexit. |
| May 20, 2010 | The EPA and the DHS directed BP to share information about the dispersant ingredients. |
| May 26, 2010 | The EPA instructed BP to take immediate steps to scale back the overall use of dispersants and stop surface application of the dispersant without written justification and approval. |

**9. BP has stated that it intends to pay all legitimate claims. Please explain the specific criteria a claim must meet to be legitimate, and provide a description of any written instructions provided to claims processors or investigators, as well as any documentation requested of claimants to date, for the following types of claims:**

**A. Bodily injury claims**

**B. Psychological injury claims (Specify in the written response whether a nexus between the psychological injury and a physical injury is necessary for the claim to be considered "legitimate.")**

**C. Business loss claims (Specify whether there is any geographic restriction on the business claims submitted – e.g. Gulf Coast states.)**

**D. Property damage claims**

From the start, BP has endeavored to assure the public and governmental actors that it intends to pay all legitimate claims. It continues to stand behind that promise and, following the OPA and guided by the relevant U.S. Coast Guard regulations, believes it has handled claims fairly and efficiently. For the company, a "legitimate" claim is one that meets the statutory elements and can be substantiated. For your reference, the BP Claims Process Manual, guidelines and required claims forms used in the claims process are available online at www.bp.com/claims (see "Helpful Downloads").

In addition, as previously described, BP is in the process of transitioning the private claims process for individuals and businesses to the GCCF, the independent claims facility to be administered by Mr. Feinberg. The GCCF will evaluate private claims arising under the OPA and tort law and will pay any established losses from the $20 billion fund established by BP. The GCCF, under Mr. Feinberg's leadership, is developing standards for recoverable claims that will be published. BP therefore refers you to the GCCF for information about its procedures and requirements.

**10. If claimants experience increased damages after their initial filing with BP for loss, are they able to seek a larger damage recovery? Please describe BP's procedure for**

**handling any such claims, whether it is dependent on the time period between the initial and subsequent filing, whether the claimant would be required to submit further information to "substantiate" their additional damages and what information would be required to have their claim paid by BP, as well as any other information provided to BP employees processing claims to guide them in their response to subsequent submissions for additional damages.**

BP has not evaluated claims for final payment and has not sought releases. Therefore, claimants in the BP claims process remain free to substantiate any losses they have sustained. Going forward, the claims decisions to which Question No. 10 refers, to the extent they apply to individuals and businesses, will be determined by Mr. Feinberg in his capacity as the administrator of the GCCF, the independent claims facility. Mr. Feinberg is working to finalize the protocols that will guide claims decisions, including reconsideration of certain damages claims. BP refers you to the GCCF for information about its procedures and requirements.

11. **For claims submitted by fishermen and women (including shrimpers, oystermen, and others), how does the BP claims process account for the seasonal nature of their work? Specifically, if a fisherman or women earns their annual income in a three or four month period, what information will BP require to substantiate loss of income? For fishermen and women who provide sensitive information, such as income tax returns and payroll documentation, what process does BP have in place to secure the privacy of such information? Will such individuals be required to re-submit their claim each month, or will BP provide more long-term payments in recognition of the fact that the oil spill's effects will continue to impact their business for the immediate future. If some of these individuals have received partial payments for April, May or June, 2010, will additional payments be made to ensure that the affected fishermen and women are made economically whole again for this season?**

To date, BP's claims process has taken into account the seasonality of the fishing and seafood industry in particular by, among other things, permitting use of a broad range of documentation to establish any losses attributable to the oil spill and awarding supplemental payments to account for variances in month-to-month income. Going forward, the claims decisions to which Question No. 11 refers, to the extent they apply to individuals and businesses, will be determined by Mr. Feinberg in his capacity as the administrator of the GCCF, the independent claims facility. Mr. Feinberg is finalizing the protocols that will guide claims decisions, including issues related to income verification. BP therefore refers you to the GCCF for information about its procedures and requirements.

12. **For claims that have been paid in part, what is the maximum amount of time the claimant will have to wait before BP renders a final determination of the amount of damages claimed? Please provide any documentation on the time frame for resolution of this issue.**

As indicated above, all private claims for injuries arising under the OPA and tort law will be adjudicated by the GCCF, the independent claims facility to be administered by Mr. Feinberg.

BP therefore refers you to the GCCF for information about its procedures and requirements, including any temporal requirements.

**13. Some of the individuals with damage claims, like fishermen and women, have limited English proficiency. Please describe efforts by BP to remove language and cultural barriers in the claims process.**

BP has staffed translators in a number of its Claims Offices, including the following:

- For Vietnamese: Bayou LaBatre, AL; Bay St. Louis, MS; Biloxi, MS; New Orleans, LA; Boothville-Venice, LA; Gretna/Belle Chase, LA.
- For Spanish: Bayou LaBatre, AL; Bay St, Louis, MS; Orange Brach, AL; Mobile, AL.
- For Khmer: Bay St. Louis, MS.

BP Community Offices also have translators. Materials and claim forms are also available online in both Spanish and Vietnamese.

**14. During the hearing, you stated "The government agencies have oversight responsibility for their responsible party who has to bring all the resources to bear on responses." Does BP intend to limit its liability for any outstanding or pending claims by asserting that the government made or approved of decisions that resulted in a claim or aggravated any outstanding claims?**

BP is reluctant to opine on the legal issues contemplated by this question, in part because related litigation is pending and the company does not wish to waive any of its defenses in that context without first assessing the merits of claims on a case-by-case basis. That said, to the extent an individual or business submits a claim to the GCCF and compensable injuries are ultimately established, that GCCF decision will be binding on BP.

**15. Please provide a detailed listing of any federal civil or criminal charges against BP or a subsidiary company filed by governmental agency, organization or entity dating from January 1, 2000 to the present, including the nature of the charge and each claim and the resolution of each charge (including any pending charges).**

BP is gathering information responsive to this request and intends to provide a supplemental response.

**16. Did BP require any individual working on the clean-up and containment effort to sign a waiver of liability? If so, please provided detailed information, including whether such waivers have been withdrawn by BP.**

At the start of the volunteer program, some volunteers were provided with a form agreement containing some boilerplate waiver and release language. An example of this form

was previously provided to your staff on May 25, 2010 at BP-HZN-JUD000077-000080. As explained in the correspondence that accompanied production of that document, upon learning of these form agreements, BP's leadership ordered that they no longer be used. Under no circumstance will BP seek to enforce any such agreement. In addition, BP mailed a notification to these volunteers advising them that the waiver and release language will not be enforced.

**17. Does BP require individuals working on the clean-up and containment effort to sign a legally-binding agreement or contract providing that the individual cannot discuss aspects of their employment by BP, including certain information about the clean-up and containment efforts by BP or environmental conditions of the oil spill? If BP requires such agreements or contracts by its employees, then will BP consider rescinding such agreements or contracts?**

The Unified Command has established a media policy that participating federal agencies and the Oil Pollution Act responsible parties (including BP Exploration & Production, Inc., Transocean Ltd., Anadarko Petroleum Corporation, and MOEX Offshore 2007 LLC) and their respective contractors are obliged to follow.[6] It does not prohibit workers from speaking to the press. Rather, it advises federal employees, contractors and other responders that they may talk to the media about what they do: "In general terms, if you are responsible for it, you may speak about it." The Unified Command's policy also instructs field response personnel not to speak to the media about policies, plans or any other facet of the response for which they are not directly responsible.

BP fully supports all individuals' rights to share their personal thoughts and experiences concerning the response with journalists if they so choose. However, while individuals are free to speak openly on their own behalf, they are not authorized to speak on behalf of the Unified Command or BP. BP has directed its incident command centers to share this policy with all clean-up workers, volunteers, and Vessels of Opportunity operators. The company reiterated the policy in a July 1, 2010 press release available on BP's website,[7] along with a restatement of its media access guidelines. To better ensure that workers understand BP's policy, the company recently issued wallet cards for distribution to workers that repeat these guidelines:

> BP supports the right of all individuals to share their personal thoughts and experiences with journalists, if they so choose.
>
> BP has not and will not prevent anyone working in the cleanup operations from sharing his or her own opinions. However, they are not authorized to speak on behalf of BP or the Deepwater Horizon Response Unified Command.
>
> Workers are under no obligation to speak to the media, and may refer journalists to the Joint Information Center.

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[6] National Incident Commander, "*Policy For Media Access To Deepwater Horizon 252 Response Operations*" (May 31, 2010).
[7] http://www.bp.com/generaicarticle.do?categoryId=2012968&contented=7063384.

**18. Now that BP has announced an Independent Claims Facility (ICF), to be administered by Kenneth Feinberg, to adjudicate all OPA and tort claims, will claims currently pending in BP's claims process be transferred to the ICF? If not, will these claimants have the opportunity to withdraw and re-file their claim with the ICF? If the claimants will have the opportunity to withdraw their claim from BP's current claims process and re-file their claim with the ICF, when will they be able to do so? Will there be a time limit imposed for claimants to withdraw their existing claims with BP and re-file with the ICF?**

BP is in the process of transitioning the claims process to the GCCF. BP will work to process claims until the GCCF officially assumes responsibility for the process. If, at the time of the actual transition, an individual's claim is pending, the claim and any supporting information will be transferred to the GCCF, and the GCCF's consideration of that claim, including application of any time limits, will be guided by standards that the GCCF now is developing and will publish.

**19. Will BP have input in the development of standards and practices for calculating the damage amounts? Under the Independent Claims Facility (ICF), what is the appeals process for claimants who are dissatisfied with their damage award? Will such claimants waive their rights to file in court? Will the claimants be required to appeal through the OPA procedures?**

Mr. Feinberg, who will administer the GCCF, is developing the standards that will guide claims, and accompanying damages, decisions. Mr. Feinberg has complete discretion, within the guidelines provided by the OPA and other applicable federal law, to develop the protocols that he believes are appropriate for a fair, efficient and transparent claims process, but, based on the broad principles announced by President Obama on June 16, 2010, claimants who are dissatisfied with their awards will have the opportunity to appeal the administrator's decision and do not waive their rights to file in court. For further details, BP refers you to the GCCF for information about its procedures and requirements.

## RESPONSES TO QUESTIONS SUBMITTED BY REP. MIKE QUIGLEY

**1. I understand the EPA has ordered BP to continue looking for alternatives to Corexit, and that the EPA would begin its own testing of dispersant chemicals at a lab in Florida. Can you tell us if BP has made progress on this research, what some of the viable alternative chemical options might be and if we're going to know the long-term effects of such an alternative before we start pumping it into the ocean floor?**

At the EPA's, BP has investigated the option of using a dispersant other than Corexit EC9500A and recently provided its preliminary findings to the agency.[8] The EPA separately is conducting an evaluation of these alternative dispersants and released its first round of findings on June 30. The BP and the EPA evaluations are considering dispersant toxicity, effectiveness, and availability. Based on discussions with manufacturers, several of the alternative dispersants pre-approved by EPA are not available in sufficient quantities to support the response. Initial acute toxicity testing conducted by the EPA indicates that Corexit and the alternative dispersants are, according to the EPA, "slightly toxic, with some being practically non-toxic," "roughly equal in toxicity" to each other, and "generally less toxic than oil."[9] Thus far, BP's toxicity tests on the alternative dispersants also have shown no material difference in the relative toxicity of the different products. Additionally, effectiveness testing conducted by BP and shared with the EPA indicates that many of the alternative dispersants are less effective at dispersing MC 252 oil than Corexit EC9500A.

BP has committed up to $500 million to an open research program studying the impact of the Deepwater Horizon incident and the associated response actions on the marine and shoreline environment of the Gulf of Mexico. The key questions to be addressed by this 10-year research program reflect discussions with the U.S. government and academic scientists. BP will fund research to examine topics including technology improvements to detect oil, dispersed oil, and dispersant on the seabed, in the water column, and on the surface; improved remediation technology to address the impact of oil accidentally released to the ocean; the behavior of oil, dispersed oil and dispersant on the seabed, in the water column, on the surface, and on the shoreline; and the impacts of oil, dispersed oil and dispersant on the animals, plants and other aquatic life of the seabed, the water column, the surface, and the shoreline.

**2. These findings make it impossible to fight back worries that we may be dealing with a similar, or far worse catastrophe at one of the additional deepwater rigs. Will additional safeguards be put in place? Major oil producing countries such as Norway and Brazil require remote-control shut-off switches, an acoustic switch as you're no doubt aware, as last-resort protection against underwater spills. Would BP consider outfitting all U.S. rigs with an acoustic switch? Is BP considering other safeguards?**

It is not apparent to which "findings" this question refers, but, in any event, BP is deeply committed to safety and constantly strives toward its goal of a completely safe operational environment. BP also recognizes the importance of gleaning lessons from any incidents and implementing improvements that ensure safe conditions for BP's employees, its neighbors, and the environment. There undoubtedly are lessons to be learned from the Deepwater Horizon incident, and investigations to discern those lessons and determine the cause of the incident are ongoing. Once these investigations are complete, BP is committed sharing and using those lessons.

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[8] A second dispersant, COREXIT EC9527A,, was used previously but its use has been discontinued.
[9] U.S. Environmental Protection Agency, Transcript of June 30 press conference call with EPA Assistant Administrator Paul T. Anastas, Moderator: Brendan Gilfillan, June 30, 2010, 1:30 p.m.

In response to your query regarding remote-control shut-off switches, BP does not currently have a policy regarding the use of acoustic switches, which are designed to provide backup operation of certain blowout preventer (BOP) functions in an emergency. Although the *Deepwater Horizon* rig did not have an acoustic backup control system, it was equipped with multiple emergency systems: (1) an Emergency Disconnect System; (2) an automatic mode function or "deadman" switch, which typically activates when all hydraulic and electrical power is lost; and (3) the capacity to intervene using remotely operated vehicles. If a rig is equipped with multiple emergency systems, as was the *Deepwater Horizon*, an additional acoustic backup control system may be disadvantageous because it adds complexity to the hardware on the BOP stack.

3. **Officials from your company have stated in prior congressional testimony that they intend to pay all "legitimate claims" for loss or damages caused by the spill. I'm wondering if you could shed some light on what types of claims you view as legitimate and who will determine the legitimacy of claims?**

Please see the responses to the Chairman's Questions Nos. 2, 4, 5 and 9 above.

4. **How do you anticipate working with the new MMS, the EPA and Congress moving forward to ensure that this cleanup is done properly, that lawsuits do not mire our courtrooms for years to come, with those harmed seeking reparation for their loss of health or loss of life? Does BP stand ready to support climate action, and support the initiatives of the MMS, EPA and Congress in these areas?**

BP is committed to restoring the health and welfare of the Gulf Coast and its residents. As a part of that effort, BP is creating a separate stand-alone organization, the Gulf Coast Restoration Organization, to manage any longer-term cleanup and restoration work that may be needed once the well is fully contained and plugged. This organization will ensure that a group of dedicated response personnel will remain focused on this work even after the immediate spill response is completed.

In addition, in order to aid those affected by the spill through means other than litigation, BP hopes that the establishment of the claims fund and the GCCF will give further assurance that BP will stand by its commitment as one of the responsible parties under the OPA.

Regarding your query relating to BP's support for "climate action," BP supports precautionary action to address climate change. The company has long advocated that the climate change challenge demands a clear, predictable way forward with policy-makers creating a supportive environment for innovation. BP has been calling for action on this issue for over a decade, preferably by creating a price for carbon through market mechanisms and by promoting efficiency and new investment in low-carbon technologies. Additional information about the company's policy perspectives on climate change and affirmative actions to address its challenges is available on BP's website.[10]

[10] http://www.bp.com/sectiongenericarticle.do?categoryId=9032939&contentId=7060399.

**Questions for the Record**
**House Judiciary Committee Hearing on**
**"Legal Liability Issues Surrounding the Gulf Coast Disaster"**
**Ms. Rachel Clingman, Transocean Ltd.**
**Thursday, May 27, 2010**

**Questions from Chairman John Conyers, Jr.**

**1. Transocean decreased the number of employees in the engine room of the Deepwater Horizon over time. Why did these cuts in staffing happen, and did they occur prior to or subsequent to Deepwater Horizon changing its flagging to the Marshall Islands?**

Transocean did not cut staffing on the rig. At all times, rig staffing met or exceeded BP's specifications; the minimum safe manning requirements of the Flag Administration; and the Minimum Safe Manning Certificates issued for the Deepwater Horizon.

While the total number of crew members on board the rig did not decrease, there were adjustments in the personnel assigned to different areas over time, including a gradual modification in the number of people assigned to the engine room as a result of normal employee turnover and adjustments to meet operational needs. These adjustments were not related to, impacted by or the result of flagging the Deepwater Horizon in the Marshall Islands. In fact, the minimum requirements set forth in the September 2009 Marshall Islands Minimum Safe Manning Certificate for the Deepwater Horizon when "on location" (as it was at the time of the incident) are more stringent than those that were in effect in Panama in July 2001 when the Deepwater Horizon was flagged there.

As of 2001, the minimum manning for the rig required one Master or Offshore Installation Manager ("OIM"); two Able Seamen; one Ordinary Seaman; and eight survival craftsmen. As of 2009, under Marshall Islands flagging requirements, minimum manning required one Offshore Installation Manager; one Barge Supervisor; two Ballast Control Operators; two Able Seaman (MODU); one Ordinary Seaman (MODU); one Maintenance Supervisor; one Assistant Maintenance Supervisor; two Oilers/Motormen (MODU); one GMDSS Operator; and eight Survival Boat / Rescue Craft Crewmen. The Transocean crew on the rig at the time of the incident exceeded these more stringent licensing requirements, and more Transocean crewmembers held licenses than were required according to minimum manning requirements.

**2. Had the Deepwater Horizon been a United States-flagged vessel in the period leading up to the blowout, would the complement of crew and the safety procedures used have been sufficient to meet United States regulations?**

Yes, the complement of staffing and safety procedures met U.S. regulations. Staffing of Transocean's international mobile offshore drilling units, or MODUs, including for the *Deepwater Horizon*, complies with the laws and regulations of the United States. The MODUs also comply with international standards, regulations and codes applicable pursuant to the International Maritime Organization ("IMO"). Foreign flagged MODUs operating in U.S.

waters meet or exceed functional standards for U.S. flagged MODUs. The flagging of Transocean's MODUs is done for logistical purposes, not for operational or safety reasons.

A number of inspections are performed on all foreign flagged MODUs and were performed on the *Deepwater Horizon*, which was flagged in the Marshall Islands. The inspections and certifications fall into three categories. First, the U.S. Coast Guard evaluates and certifies all MODUs operating on the U.S. Outer Continental Shelf (OCS). The *Deepwater Horizon* Coast Guard Certificate of Compliance ("COC") was issued on July 27, 2009 and was current at the time of the incident and valid through July 27, 2011, with a mid-period examination due July 7, 2010. The *Deepwater Horizon* complied with the operational regulations as set forth in 46 C.F.R. § 109, in conjunction with the Coast Guard's Navigation and Vessel Inspection Circular ("NVIC") No. 3-88, which provides guidance and information on the inspection of foreign-flagged MODUs operating on the Outer Continental Shelf, and which governs the issuance of COCs to foreign documented MODUs operating on the OCS. The *Deepwater Horizon* complied with Option C in that NVIC, which provides that the "MODU is constructed to meet the design and equipment standards for MODUs contained in the 1989 IMO Code for the construction and equipment of MODUs." The Marshall Islands has adopted the IMO MODU Codes. The *Deepwater Horizon* had the required IMO MODU Code Certificate issued by the Marshall Islands.

Second, Flag Administration inspections are performed. The Marshall Islands requires an Annual Safety Inspection ("ASI") using its inspectors or inspectors for the American Bureau of Shipping ("ABS") class society. There are also annual statutory surveys carried out by ABS on behalf of Marshall Islands that include: International Oil Pollution Prevention ("IOPP"), International Sewage Pollution Prevention ("ISPP"), International Air Pollution Prevention ("IAPP"), MODU Code (for construction of mobile offshore drilling units), International Load Line Convention ("ILLC"), Annual Ship Station License (typically carried out by a third party recognized by flag), annual crane inspection (typically carried out by class or third party as directed by flag), International Safety Management Code ("ISM"), and International Ship Security Code ("ISSC"). The Marshall Islands ASI, the annual flag statutory surveys carried out by class on behalf of the Flag Administration plus the annual statutory, classification, hull and machinery surveys all take five to six days.

Third, class society inspections or surveys are performed every year within a given window by the American Bureau of Shipping (ABS) and other similar organizations. As performed on the *Deepwater Horizon*, these focus primarily on the vessel hull, machinery and safety systems integrity. Class surveys generally include what is called an underwater inspection in lieu of dry-docking, which is the examination equivalent to a dry-docking, which is logistically difficult if not impossible. Divers conduct the underwater inspections of the hull, and accessible internal and above water portions are inspected as during a dry-dock inspection.

The U.S. Coast Guard's QUALSHIP 21 program recognizes and rewards vessels, as well as their owners and Flag Administrations, for their commitment to safety and quality. One of the eligibility requirements for a vessel to be enrolled into the program is for the vessel's Flag Administration to be qualified. Only Flag Administrations that have demonstrated the highest commitment to the safety and quality of their vessels are eligible for recognition as a

QUALSHIP 21 Flag Administration. The U.S. Coast Guard has selected the Marshall Islands, and Marshall Islands is one of these qualified registries.

Certain restrictions apply to U.S. flagged vessels that present logistical challenges to companies with global drilling operations. Notwithstanding these challenges, Transocean MODUs operating in the Gulf of Mexico comply with U.S.-flagged requirements, as if they were flagged in the United States. For example, if a MODU is flagged in the United States, the MODU may be repaired only in U.S. shipyards or pay significant U.S. customs duties on the value of the work performed outside of the United States. While Transocean MODUs are operated in U.S. waters, Transocean rigs are repaired in U.S. shipyards, regardless of the flag country. The *Deepwater Horizon,* for example, would be repaired in U.S. shipyards throughout its work in the Gulf of Mexico and OCS. Additionally, if a MODU is flagged in the United States, the Master must be a U.S. citizen. When Transocean MODUs are operating in U.S. waters, all of the Masters are citizens of the United States, regardless of the flag country. Indeed, all seventy-seven members of the *Deepwater Horizon* rig crew on April 20th were U.S. citizens. Further, a U.S.-flagged MODU must be inspected annually by a member of the U.S. Coast Guard. When Transocean rigs are operating in U.S. waters, each rig is inspected fully by the U.S. Coast Guard, regardless of the flag country for the rig. Finally, the licensed Transocean crew members held licenses issued by the U.S Coast Guard, in accordance with U.S. standards and regulations.

**3. Has Transocean required or asked anyone to sign a waiver precluding or preventing claims related to the blowout? Did Shuman Industries, employed by Transocean's insurance company, ever ask anyone to sign a waiver precluding or preventing claims relating to the blowout? Did a Shuman Industries employee attempt to convince Mr. Stephen Stone to sign such a weaver at a Denny's restaurant? If such waivers existed, would Transocean use them to limit their liability in claims stemming from the blowout?**

No. The documents to which this question refers are one-page incident response forms reflecting Transocean's primary concerns following the incident and a one-page personal effects receipt, release and acknowledgment.

The incident response form was intended to address concerns such as obtaining medical care for any crewmembers in need, securing relevant information in a timely manner, and starting an effective investigation into the cause of the incident. The incident response forms were not intended to constitute—and do not constitute—waivers or releases precluding or preventing any legal claim or other rights.

The purpose of the personal effects receipt, release and acknowledgment was to confirm the crewmember's receipt of the $5,000 which was paid in compensation solely for personal items lost aboard the rig.

Shuman Consulting Services ("Shuman"), a company retained by Transocean, interviewed some crewmembers following the incident and asked questions related to medical care, grief counseling, and provision of food, clothing, hotel rooms, cell phones, transportation, and compensation for personal items lost aboard the rig. Representatives from Shuman only interviewed crewmembers if they were willing and available to be interviewed. Shuman also

presented these crewmembers with the incident response forms described above, which, as explained, were not waivers or releases precluding or preventing any legal claim or other rights. Crewmembers were not required to talk to Shuman representatives and were not required to complete the incident response forms in order to receive any of the services or compensation mentioned above.

Transocean is aware that a Shuman representative met with Mr. Stephen Stone at a Denny's Restaurant following the incident. To the best of Transocean's knowledge, their conversation only concerned the incident response form (which Transocean previously has provided to the Committee and is located at Bates number TRN-HCJ-00064567) and providing Mr. Stone with $5,000 in compensation, the standard amount offered to all crewmembers after the incident for personal items lost aboard the rig. Mr. Stone was asked to sign the personal effects receipt, release and acknowledgment which clearly does not preclude Mr. Stone from asserting claims relating to the blowout. Mr. Stone was not coerced or forced to sign any form. In fact, Mr. Stone declined to initial the section of the form addressing whether he had been injured in the April 20 incident.

**4. Did Transocean ask any of its employees to sign a statement or form listing or describing their injuries resulting from the April 20th explosion above the Deepwater Horizon? If so, does Transocean intend to use such forms or statements in any future legal matter? Please provide the details of such releases, including the number of employees asked to sign such statements or forms and whether the employees were able to consult an attorney prior to signing.**

As discussed in response to question 3, one of the purposes of the incident response forms was to obtain medical care for any crewmembers in immediate need. Accordingly, the incident response forms contain a section where crewmembers could initial to indicate whether or not they were injured as a result of the incident or the evacuation from the *Deepwater Horizon*. The forms did not ask crewmembers to otherwise list or describe their injuries, and Transocean has not sought this information through any other means.

The incident response forms have previously been provided to this Committee, and they bear Bates numbers TRN-HCJ-00064532 through TRN-HCJ-00064569. Transocean has not asserted and does not assert that these documents are releases of liability.

No employees were required to sign an incident response form, and the majority did not. Of the 79 Transocean employees on board the *Deepwater Horizon* on April 20, ultimately 37 signed forms. As reflected on the forms themselves, those who signed forms did not do so until two to fourteen days after the accident. Of the 37 who signed forms, approximately 17 crewmembers filled out the forms on April 22. (Although the form signed by one crewmember is dated April 20, that form appears to be misdated, as the accident occurred at approximately 10:00 p.m. on April 20, and the Transocean team members did not meet with any rescued crewmembers until after the Coast Guard allowed them to arrive onshore after April 21.) During that time, employees were offered medical consultation and could have talked to attorneys, family, or other advisors. Transocean is not aware whether or which employees actually decided to talk to lawyers at that time.

**5. Is Transocean prepared to compensate the families of the deceased Transocean workers, including children born after the incident, and the injured Transocean workers for the full rauge of damages available in traditional tort law?**

Transocean is prepared to meet all of its legal obligations arising from the Deepwater Horizon incident. While formal legal actions are in an early stage, Transocean continues to provide our injured colleagues and families of our deceased colleagues with grief counseling and employment benefits, including salaries, and the company continues to work diligently toward resolution of their claims.

**6. As of the hearing, Transocean had not yet entered into any settlements with its employees or their surviving family members. Since that time, has Transocean paid any settlements? If so, please provide a general description of the damages types paid by Transocean and the legal basis for such damages. Further, please provide the number of employees or their families who have received such settlements.**

Transocean has diligently continued confidential settlement discussions with employees and surviving family members. No settlement has been concluded.

**Questions from Rep. Mike Quigley (IL)**

**Concern:** Transocean's Management Style

**1. Deepwater projects are obviously extraordinarily complex. While Transocean is known for its expertise in this field, it is also known for pushing the envelope with each project seemingly a little more bold than the last. Your company owns nearly half of the 50 or so deepwater platforms in the world. My question is simple, should we be concerned with the structural integrity of *these* platforms?**

No, the Committee should not be concerned with the structural integrity of Transocean's deepwater platforms and/or vessels. Transocean is proud to be an industry leader in offshore drilling technology and practices, possessing more than fifty years of experience with high-specification rigs. Transocean's fleet is one of the most versatile in the world, consistently and safely operating in challenging conditions across the globe. Transocean holds over a dozen drilling records, achieved with minimal or no incidents. Last year, Transocean recorded its lowest ever Total Recordable Incident Rate (TRIR). That same year, the MMS awarded one of its top prizes for safety to Transocean. In the words of the MMS, the MMS SAFE award "highlights to the public that companies can conduct offshore oil and gas activities safely and in a pollution-free manner, even though such activities are complex and carry a significant element of risk." In presenting this award, the MMS cited Transocean's "outstanding drilling operations" and "perfect performance record."

Transocean's fleet includes over twenty ultra-deepwater drilling ships and semisubmersibles, capable of working in water depths greater than 7,500 feet, and over a dozen deepwater drilling rigs, for water depths between 4,500 feet and 7,499 feet. As of January 2010, Transocean held

nineteen of the past twenty-three world records for drilling in the deepest waters. The ultra-deepwater drillship *Discoverer Deep Seas* successfully set the current world water-depth drilling record of 10,011 feet in the Gulf of Mexico. Transocean's fleet also includes several harsh environment rigs, designed for the coldest climates and largest wave swells in the world, as seen in the North Sea and Norway. With such a robust fleet, Transocean is able to tailor the vessel to the specific requirements of a given well, geographic location, and/or environmental climate. Transocean has developed comprehensive training programs and safety tools and processes to complement this versatile fleet. Our strong commitment to safety is the underpinning of our ability to perform in these challenging operating conditions.

The Macondo well did not present the type of aforementioned challenges in terms of water depth, well depth, or weather conditions, which Transocean has experienced and successfully overcome on numerous other wells. The *Deepwater Horizon* MODU was amply suited for the drilling conditions at the Macondo well, performing well within its structural design capabilities and beneath its maximum operating conditions. The *Deepwater Horizon* was capable of drilling to a maximum well depth of 30,000 feet and in a maximum water depth of 8,000 feet (upgradeable to 10,000 feet). The Macondo well was drilled to a depth of over 18,000 feet, with the *Deepwater Horizon* operating in approximately 5,000 feet of water. Further, the weather conditions of the Gulf of Mexico are benign relative to harsh environments such as the North Sea and Norway.

**2. Staying on the issue of expertise, the Deepwater Horizon was described before the accident as one of the most technologically advanced drilling platforms in the world. Your company owns the platform, and BP leases it. From a distance, one might look at this situation in which 6 weeks after the blow-out, solutions seem as mystifying now as they did the day after the accident and wonder, have you or your business partners outsmarted yourselves and created the proverbial monster.**

**In your opinion, does BP have the technological expertise needed to thoroughly understand how to operate, maintain, and repair your invention? What safeguards does TO have to ensure its expertise is transferred to its clients and business partners?**

Respectfully, although Transocean did own the *Deepwater Horizon*, the Company did not "invent" it or its individual components. The numerous components comprising the *Deepwater Horizon* were designed, manufactured, and tested by multiple third parties; assembled into the finished rig in the shipyard; tested again; and thoroughly inspected before being used at any well site.

In terms of a relationship with business partners, Transocean supplies rigs and skilled crews to assist its customers, the well Operators, in accomplishing the Operators' drilling program objectives. Transocean's rigs are versatile, and, for each well site and/or Operator, there may be specific requirements dictated by the Operator. In each of its drilling contracts, Transocean specifically delineates the rig equipment that will be employed and any corresponding operational windows. The Operator is responsible for reviewing and evaluating these specifications to confirm that they comply with the requirements of the Operator's well plan.

In executing the well plan, the Operator acts as a "general contractor," hiring, directing, and overseeing various contractors who provide specialized equipment and services. In this case, the Operator, BP, selected Transocean as the drilling contractor. BP then contracted with additional entities to provide other specialized equipment and services, including drilling mud (M-I Swaco), casing (Weatherford), and cementing (Halliburton), among others. Within this framework, each contractor is responsible for its allocated scope of work; thus, BP does not necessitate the same level of detailed technological insight as each contractor as it relates to the contractor's contractual scope of work. However, each contractor operates at BP's direction, in accordance with BP's well plan, and coordinates with other contractors per BP's directives.

For these reasons, the nature of the relationship between Transocean and its business partners is not focused on knowledge transfer because BP does not operate, maintain, or repair the rig. Transocean provides a skilled crew to perform these activities in accordance with Transocean's standards, principles, and policies and per the well plan and drilling program objectives set by BP.

**Response of James W. Ferguson**
**Senior Vice President and Deputy General Counsel**
**Halliburton**

**to**

**Questions for the Record**
**House Judiciary Committee Hearing on**
**"Legal Liability Issues Surrounding the Gulf Coast Disaster"**
**Thursday, May 27, 2010**

**Questions from Chairman John Conyers, Jr.**

1. Did Halliburton ask any of its employees to sign a document stating that they suffered no injuries or limited injuries in the explosion on the Deepwater Horizon on April 20? If so, does Halliburton intend to use such forms or statements in any future legal matter? Please provide the details of such releases, including the number of employees asked to sign such statements or forms and whether the employees were able to consult an attorney prior to signing.

Response: No, Halliburton did not ask any of its four employees that were on board the Deepwater Horizon at the time of the blowout to sign anything prior to or upon their return to shore. Personnel from our Employee Assistance Program were already in contact with their families and provided whatever support was needed. Subsequently we have offered settlements to all four employees and two have accepted; each was encouraged to consult with an attorney. In accordance with our contractual indemnification obligations the releases for such settlements included BP and relevant service companies.

2. Does Halliburton intend to limit its legal liability in any way for the damages resulting from the April 20th explosion and subsequent oil spill? If so, please provide the legal and factual basis for such limitations.

Response: Halliburton will honor legal obligations that result from the incident. Pursuant to relevant contracts, Halliburton is entitled to defense and indemnity for certain legal exposures, as more fully described in the written statement submitted to the Committee.

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