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Leaking Gulf Oil Feeds a Litigation Flood

With more than 5,000 barrels of oil a day pouring into the Gulf of Mexico, this might be the first time in history that an oil spill causes a flood. In this case, however, the flood will not be of crude, but of lawsuits. The disaster stemming from the explosion of the Deepwater Horizon has the potential to swamp courthouses from Texas to Tampa for decades to come.

Damage from the BP spill is mind-boggling in its extent, even as it continues to spread. The direct environmental consequences are severe of themselves. But the collateral damage – to jobs, businesses, fishing, property, tourism and almost every aspect of the region's economy and lifestyle – is beyond measure.

At least 100 lawsuits have been filed already, and others are in the works. Most are proposed class actions. Plaintiffs run the gamut from Louisiana shrimpers to Florida restaurateurs to corporate shareholders. All tolled, these various plaintiffs claim the oil spill is costing them billions of dollars.

"We're talking about the entire ecosystem of the five Gulf Coast states and their combined economies," said P. Tim Howard, a lawyer in Tallahassee who is also a professor at Northeastern University in Boston. "The scale of this disaster is so much larger than anything that's come before."

The lawsuits could take decades to run their course, lawyers say. It took that long to conclude litigation after the Exxon Valdez oil spill in 1989. The damage from this latest disaster already appears to be far greater in its overall impact and to cut across wider swaths of both geography and the economy.

"I don't know that this litigation will take as long as Exxon-Valdez, but it will be more complex," said Amy L. Baird, a partner with Jackson Walker in Houston who represents energy industry clients in mass tort litigation. "There are multiple defendants, multiple potentially culpable parties, more types of plaintiffs with more types of damages, and more government entities with potential damages."

A Range of Lawsuits

At this point, no one can predict the ultimate extent of the damage. "A lot will depend on how quickly they get the flow stopped," said Robert Cunningham, a Mobile, Ala., lawyer who represents fisherman, condominium owners and other plaintiffs. "There has already been significant damage, but nothing compared to what will happen if the oil continues to flow and to come ashore."

A number of lawsuits have already been filed. Others could wait years before getting filed. In the end, the lawsuits are likely to be of six broad types:

- Tort actions filed by those who have suffered damages to their livelihoods and businesses. Lawsuits have already been filed on behalf of shrimpers, commercial fishermen, seafood processors and charter-boat operators, as well as tourism businesses such as hotels and restaurants.
- Property cases filed by owners and real estate agents for damages to their property and for losses of rental income as tourists steer away from the region.
- Shareholders suits against the companies involved in this disaster. BP shareholders have already filed a lawsuit alleging that the company put profits ahead of safety.
- Jones Act cases filed on behalf of the oil rig workers killed or injured in the explosion of the drilling platform. Several such lawsuits are already filed.
- Insurance cases sorting out disputes over coverage, indemnity, reinsurance and related issues.
- Government civil and possibly criminal actions filed under federal and state environmental and regulatory laws.

The U.S. Justice Department has sent its own team of lawyers and investigators to the Gulf, where officials already were at the scene from the Environmental Protection Agency, the National Oceanic and Atmospheric Administration, the Coast Guard, and other federal authorities.

Meanwhile, the federal government is itself the subject of a lawsuit. On May 18, conservationists and fishermen filed a lawsuit against the U.S. Department of the Interior. Their complaint alleges that the agency violated the law by exempting oil companies that drill in the Gulf from certain disclosure requirements.

On the state level, attorneys general from the five Gulf states have formed a coalition to coordinate their own legal responses. It includes the AGs from Texas, Louisiana, Mississippi, Alabama and Florida.

"The oil spill threatens precious environmental, ecological and wildlife resources across the Gulf Coast," Texas Attorney General Greg Abbott said. "Our top focus is ensuring that BP makes good on its promise to fully compensate individuals, coastal businesses and taxpayers for any expenses incurred during the clean-up effort."

Caps on Liability

The lawsuits filed to date name BP, the owner of well, and Transocean, the owner of the drilling rig, as defendants. They also name Cameron International Corp., which provided blowout protection equipment for the well, and Halliburton Energy Services Inc., which was involved in cementing the well.

As the cases move forward, a major issue could be the extent of the defendants' monetary liability. Under the Oil Pollution Act of 1990, BP is primarily liable for damages from the

oil spill, even without any showing that it was negligent. But the act caps BP's liability at \$75 million, unless plaintiffs can show that the accident was caused by gross negligence.

BP Chief Executive Officer Tony Hayward said the company will spend beyond the cap to compensate those damaged by the spill. "We are prepared to pay above \$75 million on these claims and we will not seek reimbursement from the U.S. government or the Oil Spill Liability Trust Fund," Hayward said in a letter to federal officials. "Where individuals and businesses substantiate claims for damages or loss, we will honor them."

How that promise will play out in court remains to be seen. But plaintiffs' lawyers believe they will have little problem proving gross negligence should the issue need to be litigated. "This case represents gross negligence and willful misconduct on a massive basis," said Tim Howard, who is coordinating a team of lawyers that has filed a class action lawsuit in Tallahassee on behalf of various Florida plaintiffs.

Meanwhile, Transocean is seeking to limit its liability to \$26.7 million under the federal Limitation of Liability Act, a law that allows vessel owners to limit their liability to the value of a sunken vessel and its freight. As of this writing, a federal judge in Houston had ordered a stay of cases against Transocean while he considers the issue.

Measuring the Immeasurable

The most challenging aspect of these cases could be the measure of damages, several lawyers say. Even as the impact of the spill is already being felt all along the Gulf Coast, no one can say for sure what the long-term effects will be.

"One of the biggest litigation challenges is that we cannot quantify the damages, we cannot quantify how far this will go," said Howard. "Even the dispersants are toxic. How far down the food chain will this go? We don't know what kind of biological harm will take place."

"How do you quantify things that aren't quantifiable?" asked Steve W. Mullins, president of Mississippi Association for Justice and partner in the Ocean Springs, Miss., firm Luckey & Mullins. "The damages here are off the charts, off the models, off everything."

Of course, some types of damages will be relatively straightforward to establish, such as lost profits for tourism and rental businesses, says Mullins, who is representing various plaintiffs with regard to the spill. "Economists can figure that out."

But the harm to the fishery may be immeasurable, Mullins says. "I've already interviewed some of the top marine scientists in the world. Some of them are already saying they have no clue what the long-term implications will be on seafood."

And that carries over to those who make their livings from seafood. Shrimping and oystering will take years to recover and may never get back to where it was, Mullins

predicts. That means that many shrimpers and oystermen may never get back their livelihoods.

The Home Court Advantage

Another issue already being fought is that of which court should oversee management of these cases. The defendants have asked the U.S. Judicial Panel on Multidistrict Litigation to combine them all in U.S. District Court in Houston. That city is headquarters for BP's North American operations and the other defendants all have offices there.

Plaintiffs' lawyers would rather see the cases remain in the state most directly damaged by the spill. Various motions have been filed to locate the cases in New Orleans, Mobile or Jackson, Miss. "You want the community that is feeling the pain to determine who is liable for the pain," said Howard.

The MDL panel is scheduled to consider these requests at its next meeting in July. Lawyers on both sides are asking the panel to decide the issue sooner than that, citing the scope of the disaster and the need for immediate judicial action.

The Defense Strategy

In the face of so enormous a disaster, how does a company defend itself? Lawyers who represent BP, Transocean and other defendants are not speaking to the press, so we do not know what their strategies will be.

But Amy Baird, the Houston lawyer who represents energy companies in mass tort cases, says she knows how she would handle it if she were representing a defendant. She would pursue the other defendants on liability and aggressively fight the plaintiffs' claims on causation and damages.

She would try to settle quickly on reasonable terms with the plaintiffs who have already suffered legitimate damages. "Limiting the number of wolves who are baying at you helps a lot when you get into the courtroom."

At the same time as she is defending against the private lawsuits, she would separately work to manage any government investigations and litigation. A key goal would be to ensure that nothing happens in a government-filed case to exacerbate the private tort and property lawsuits.

No matter what side they are on, lawyers agree that this is, as plaintiffs' lawyer Robert Cunningham put it, "a case of monumental proportions."

"I use the analogy of a rock thrown in the lake," Cunningham said. "The waves go out in every direction and every day you learn something more about the damages they are causing."

For Tim Howard, the implications of this disaster extend far beyond the courtroom. "This is a wake-up call," he said. "Americans need to slow down, take a deep breath and begin to care about the planet we live on."

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