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BP Found Grossly Negligent for Deepwater Horizon Spill

Ultimate Liability for Punitive Damages Still to Be Determined

In the post-trial Findings of Fact and Conclusions of Law issued on September 4, 2014, after Phase One of the BP oil spill trial, the United States District Court for the Eastern District of Louisiana found BP Exploration & Production, Inc. (BP) liable for gross negligence and willful misconduct in causing the blowout of BP's Macondo well and the resulting oil spill. The Phase One ruling exposes the company to up to \$18 billion in penalties under the Clean Water Act (CWA). The court found that BP's contract parties, Transocean Ltd., the owner of the mobile offshore drilling unit Deepwater Horizon (Deepwater Horizon), and Halliburton, the cement contractor for the Macondo well, were liable as well but merely negligent. On April 20, 2010, a blowout, explosion, and fire occurred aboard the Deepwater Horizon. The fire burned for two days, after which the oil rig capsized and sank into the Gulf of Mexico. For 87 days, millions of gallons of oil discharged into the Gulf of Mexico until the well was capped on July 15, 2010.

In November 2012, BP agreed to a record \$45 billion penalty to resolve criminal and securities claims resulting from the spill. In February 2013, the first phase of a three-part case to address civil claims commenced before U.S. District Judge Carl Barbier, concluding in April 2013. Phase One, known as the Incident Phase, addressed fault determinations relating to the loss of well control, the explosion and fire, the sinking of the Deepwater Horizon, and the release of oil from the Macondo well. In its recent Phase One findings, the Court presented several conclusions of law, most significantly its finding subjecting BP to enhanced civil penalties under the Clean Water Act, as Judge Barbier determined that the discharge of oil was the result of BP's gross negligence and willful misconduct. In evaluating the evidence, the Court focused on the recklessness of BP's personnel in continuing to drill despite negative pressure tests indicating that the well was not under control. A further complex series of negligent actions by BP increased the risk of losing control of the well and contributed to the finding of gross negligence. Although the Court also found Transocean and Halliburton liable under general maritime law for the blowout, explosion, and oil spill, it determined that their actions were merely negligent. The Court ultimately apportioned 67 percent of the fault to BP, 30 percent to Transocean, and 3 percent to Halliburton. Despite this allocation, the Court went on to conclude "that Transocean's and Halliburton's indemnity and release clauses in their respective contracts with BP are valid and enforceable against BP." As such, most of the contractors' liability will shift to BP by virtue of the contractual indemnities.

Judge Barbier also evaluated BP's liability for punitive damages under Fifth Circuit precedent, finding that BP was not subject to punitives. BP's victory, however, may be short-lived. Under general maritime law, punitive damages may be imposed for reckless, willful, and wanton conduct. Indeed, the Court concluded that "the conduct exhibited by BP's employees would make an award of punitive damages appropriate." Still, the rule in the Fifth Circuit is that operational recklessness or willful disregard by company personnel

is generally insufficient to impose punitive damages upon the employer. For punitive damages to attach to the company, the conduct “must emanate from corporate policy or that a corporate official with policy-making authority participated in, approved of, or subsequently ratified the egregious conduct.” The Fifth Circuit articulated this precedent in *In re: P&E Boat Rentals, Inc.*, noting that most courts applying maritime law require the employer to authorize or ratify the act.

At trial, the Plaintiffs' Steering Committee (PSC) argued that *P&E Boat* should be distinguished, as that case involved a routine transit by a crew boat to a drilling platform. The Deepwater Horizon well, by contrast, was a “significant and substantial operation, requiring the full commitments and attentions of BP and its contractors.” Thus, irrespective of the extent to which various participants might or might not be classified as “official policymakers,” this was not a situation where a “rogue employee decided, on his own, to engage in reckless conduct.”

The Court viewed the PSC argument as “not without merit,” concluding that drilling an offshore well like Macondo is at the “very heart of BPXP’s purpose.” A substantial amount of BP’s resources were devoted to drilling the well, including extensive preoperation planning, significant financial commitments, a massive drilling vessel with sophisticated equipment, and teams of onshore and offshore personnel. BP’s onshore engineers, geologists, and operational supervisors were tightly connected with the well, as were BP’s offshore personnel, and BP’s contractors. Data from the well was transmitted in real time to BP’s Houston office, and BP’s onshore personnel communicated frequently with those on the Deepwater Horizon. Under all these circumstances, the Court concluded that “BP should be viewed as the wrongdoer.”

Nevertheless, the Court determined that *P&E Boat* “does not appear to leave room for this interpretation.” It found that the employees involved were not policy-making officials and that the reckless conduct did not emanate from corporate policy. Further, BPXP did not appear to recklessly hire its employees.

While BP prevailed on the punitive damages claim at the Phase One trial, the issue is not resolved. The State of Alabama asked the Court to make separate findings with respect to the relevant punitive factors, as not all circuits follow the Fifth Circuit rule and some claims may ultimately be resolved under the law of other circuits. The Court granted Alabama’s request and analyzed these factors under the maritime laws in the Ninth and First Circuits. The Ninth Circuit’s rule follows the Restatement of Torts (Second) of 1975, which allows punitive damages against the corporate entity when the actor is in a “managerial capacity” and performing within the scope of his employment. In the present case, the Court found that the two top representatives for BP on the Deepwater Horizon, the well site leaders, acted in a “managerial capacity” and that their actions arose within the scope of their employment. The First Circuit appears to follow the same managerial agent theory used by the Ninth Circuit but with the added requirement that there be “some level of [corporate] culpability for the misconduct.” The Court concluded in a footnote that to the extent the standards of the First Circuit or Ninth Circuit applied to a particular claim, BP would be liable for punitive damages under those standards.

The Court has yet to issue a ruling on Phase Two of the trial, which concluded on October 18, 2013. Phase Two was divided into two segments: Source Control, concerning issues pertaining to the conduct or omissions relative to stopping the release of oil, and Qualifications, pertaining to the amount of oil actually released into the Gulf of Mexico, which will be an important factor for determining the amount of civil penalties under the Clean Water Act. The Court set the trial for Phase Three, the Penalty or Damages Phase, for January 2015. BP announced that it will appeal the Phase One ruling.

In addition to a potential appeal of the Phase One ruling, on July 23, 2014, BP filed a petition for an *en banc* rehearing before the Fifth Circuit challenging the lower court’s initial determination of BP’s liability under the CWA. BP’s petition sets forth an argument that only one “instrumentality” can be liable for an oil spill under the CWA, and a rehearing is necessary to determine which of the parties involved in the spill is liable. BP contends that, until the oil escapes confinement from a potentially liable facility, no “discharge” under the CWA can take place. For BP, the question is “which instrumentality *allowed* oil to escape confinement to the environment.” Thus, BP argues that it, as the well owner, cannot be responsible for an

oil spill when the discharged oil came from Transocean's Deepwater Horizon rig, not BP's Macondo well. The Fifth Circuit has yet to rule on BP's petition.

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