

BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



Randy J. Maniloff
maniloffr@whiteandwilliams.com

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Gulf Oil Spill: Gusher of Insurance Claims

The British Petroleum Claims are Coming
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-- If Paul Revere had been a lawyer

Right now there is only one thing that there is more of than oil floating in the Gulf of Mexico – blood. And the sharks smell it and are circling.

One media report that I saw had lawyers speculating that there could be hundreds of thousands of plaintiffs, from Texas to Florida, bringing claims for damages from the April 20 explosion of BP's Deepwater Horizon oil rig. Think asbestos – but legitimate. [Although opportunists will of course abound.]

My own simple PACER search turned up more than two dozen suits filed so far in various federal courts – most at the end of last week. And while this is being referred to as BP's problem, the list of defendants includes lots of other companies, such as the owner and manufacturer of components for the rig. And this list will no doubt grow. Eventually, any company that touched the rig, in any way, shape or form, may find itself as a defendant. That's just the way these things seem to work.

Of course, the full extent of claims will depend upon how quickly the leak can be stopped. In addition, it remains to be seen how many people will forego litigation and instead opt to pursue their claims under the Oil Pollution Act, where compensation is paid by the federal government using funds collected through an oil industry tax.

At this point, with the situation at such an embryonic stage, any estimates of the number of claims, or dollar value of losses – and there are lots out there and they are all over the place -- are just plain silly. But suffice to say, the number of claims will be enormous and the losses monumental – even by oil company standards.

Nonetheless, while the claims picture is currently much more speculative than certain, one thing can be said with assurance -- efforts will be made to place as much of the tab for the losses as possible at the feet of insurance companies. Insurance companies are well-prepared to handle the claims. But given their number, novelty and wide-variety, not to mention the

significant amounts at stake, it is inevitable that not everyone will see eye-to-eye when it comes to determining what's covered and what's not. Really.

The BP oil spill is likely to give rise to a host of claims under first- and third-party policies.

Third-Party Claims

The third-party claims are difficult to handicap given the nature of the allegedly responsible companies. Oil companies, and those that own and manufacture oil rigs, are usually not the type that buy insurance off-the-rack. To the contrary, the allegedly responsible parties likely have very complex insurance programs, including self-insured components (as has been reported for BP). These companies likely have unique policies, filled with couter endorsements and perhaps policies that are specifically designed to address pollution exposures. It also remains to be seen what the limits are of such policies and whether all of those limits are applicable to the relevant claims. Even if the limits are applicable, and seemingly very significant, the extent of liability under these circumstances may easily dwarf the limits. If this happens, surely there will be less begrudging of oil companies for having a lot of money in the bank.

First-Party Claims: Property and Business Interruption

The impending first-party claims offer more predictability as businesses that are covered by Commercial Property and Business Interruption insurance often have policies that are written on standardized forms published by Insurance Services Office, Inc. or those that resemble the ISO forms.

ISO's Commercial Property Form CP 10 30 excludes coverage for loss or damage caused by or resulting from the discharge, dispersal, seepage, migration, release or escape of pollutants. However, the exclusion does not apply if the discharge, dispersal, seepage, migration, release or escape was itself caused by a "specified cause of loss." The policy's definition of "specified cause of loss" includes fire and explosion.

Further, ISO's Commercial Property Form CP 00 10 provides Additional Coverage of \$10,000 (and possibly more) for expenses to extract pollutants from land or water at the insured premises if the discharge, dispersal, seepage, migration, release or escape was caused by a covered cause of loss.

In addition to insurers facing claims for property damage under Commercial Property policies, there is also likely to be a lot of activity surrounding Business Interruption claims. Indeed, the handful of complaints that I reviewed on PACER were brought by companies, operating in and around the Gulf of Mexico, claiming that the oil spill is and will cause severe financial consequences for their businesses. For example, my limited review of complaints revealed that they have been filed by owners of charter fishing vessels; owners of coastal rental properties; seafood retailers; seafood wholesalers; seafood processors; and shrimpers.

Expect to see financially impacted companies filing Business Interruption insurance claims – those that can -- while also pursuing their third-party suits. However, even companies that have Business Interruption insurance may be surprised to learn that, simply because your "business" has been "interrupted" does not mean that you have a business interruption claim.

A critical aspect of Business Interruption insurance is that the suspension of the insured's business operations must be caused by direct physical loss of or damage to the insured property. *See* ISO Form CP 0030. Therefore, even if the oil spill, and its various consequences, prevents businesses from operating, if such businesses did not themselves sustain direct physical loss or damage, business interruption claims will be foreclosed. This is likely to be a significant issue, given that the consequences of an oil spill can be far reaching without any need for the oil itself to actually reach those affected.

In addition, even claims that do trigger Business Interruption coverage may be limited by the policy provision that the period of restoration does not include any increased period required due to the enforcement of any ordinance or law that requires an insured or others to test for, monitor, clean-up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.

And on top of all this is another significant piece of the claims puzzle – first-party insurers that pay claims related to the oil spill will then likely pursue recovery, via subrogation, from the responsible parties – assuming they have any coverage left or have not been sued out of business.

Insurance as the Safety Net

Expect to see another dynamic at work in the claims picture. History has shown that, when there is a large-scale societal problem, that requires significant funding to solve it, insurers' policy language faces pressure to become more malleable than what was intended. And when this occurs, no amount of care in the drafting of the policy language could have prevented it. Sometimes the insurance industry finds itself being required or pressured to pay more than its appropriate share to resolve a massive problem -- not because it agreed to do so, but because it can. *See* Asbestos and CERCLA (continuous trigger); September 11 (War Risk and Number of Occurrences) and Katrina (flood exclusion).

On one hand, both the litigation and insurance claims arising out of the BP explosion are in the opening minutes of a very long play. On the other hand, it's one that we've all seen before.

If you have any questions, please let me know.

Randy J. Maniloff
White and Williams LLP
1800 One Liberty Place | Philadelphia, PA 19103-7395
Direct Dial: 215.864.6311 | Direct Fax: 215.789.7608
maniloffr@whiteandwilliams.com

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