DEEPWATER HORIZON LITIGATION:

PRESERVING HOMEFIELD ADVANTAGE FOR THE STATE

While it seems inevitable that consolidated multi-district litigation will occur within some Gulf South federal court, it is important to remember that the affected states have unique interests and considerations which greatly impact the decision of whether to sue; and, if so, in which forum. Assuming a state attorney general opts to file suit, a strong argument can be made in favor of doing so in state court. The aim of this paper is to provide a brief analysis in support of such a decision.

I. General Maritime Law: The Old Way of Doing Things

Prior to 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.

The general rule in admiralty is that persons who lack a proprietary interest in physically damaged property have no cause of action for their economic harms. This is commonly referred to as the *Robins Dry Dock* rule.[1]

The *Robins Dry Dock* rule arguably applied more to the claims of private litigants than it did to claims made by state attorneys general because public lands, waters and other resources are held in trust by the government for the benefit of its citizens,[2] and the Submerged Lands Act of 1953 granted title to the states of all lands lying beneath waters within three miles of the coastline.[3]

---

[1] *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (*en banc*) citing *Robins Dry Dock and Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927) ("It is unmistakable that the law of this circuit does not allow recovery for purely economic claims absent physical injury to a proprietary interest in a maritime negligence suit.").

[2] *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 358 (N.J. 1984) ("The public's right to use the tidal lands and waters encompasses navigation, fishing and recreational uses, including bathing, swimming and other shore activities."). Many bodies of water are thus deemed quasi-public property, giving the State special prerogatives at the expense of private parties. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892) (certain lands are held by the state in trust for the people, and legislative actions are void or voidable if the court finds they violate the trust); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) (public trust extends to all tidal waters, not just navigable waters).

[3] 43 U.S.C. §§ 1301-1315.

These things being said, it seems clear that OPA 90 now preempts the general maritime law (at least in part), leaving OPA 90 and state law as the sole sources of claims arising out of oil spills.[4]

II. The Concurrent Jurisdiction Trap

OPA 90 grants jurisdiction to state courts to hear claims arising under OPA 90 and state law.[5] Despite this grant of concurrent jurisdiction, at least one federal district court has found that an OPA 90 claim will support removal of an action from state to federal court.[6]

In *Tanguis v. M/V WESTCHESTER*,[7] Judge Clement of the Eastern District of Louisiana recognized that "OPA establishes an entirely new, federal cause of action for oil spills"[8] and looked to the legislative history of the Act to determine whether OPA 90 claims establish federal question jurisdiction. The court noted that the legislative history of OPA 90 "says nothing about prohibiting removal"[9] and reasoned "one would expect that this intention would at least be expressed"[10] if federal question removal was prohibited. As a consequence, Judge Clement found that the OPA 90 claims alleged by the plaintiff gave rise to federal question jurisdiction.

---

[4] *Gabrick v. Laurin Maritime (America) Inc.*, 623 F.Supp.2d 741 (E.D. La. 2009) (OPA 90 preempts general maritime law claims that are recoverable under OPA 90); *In re Setton Towing, LLC*, 2009 WL 4730969 (E.D. La. 2009) (OPA 90 damages provision preempts the general maritime law and allows for recovery of economic damages, despite the absence of a pecuniary interest in the damaged property); *Tanguis v. M/V Westchester*, 153 F.Supp.2d 859 (E.D. La. 2001) (OPA 90 established entirely new federal cause of action for oil spills that preempted traditional maritime remedies); *Clausen v. M/B NEW CARISSA*, 171 F.Supp.2d 1127 (D. Or. 2001) (OPA 90 provides the exclusive federal remedy for property damage claims resulting from oil spills); *National Shipping Co. of Saudi Arabia v. Moran Mid-Atlantic Corp.*, 924 F.Supp. 1436 (E.D. Va. 1996) (OPA 90 clearly preempts maritime law as to recovery of cleanup expenses and the cost of compensating injured persons); but see, 33 U.S.C. § 2751(e); *Gabrick*, supra ("it is important to note that [OPA 90] has no effect on damages not covered under OPA.").

[5] 33 U.S.C. § 2717(c) (2010) ("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 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.").

[6] *Tanguis v. M/V WESTCHESTER,* 153 F.Supp.2d 859 (E.D. La. 2001).

[7] *Id.*

[8] *Id.* at 867.

[9] *Id.* at 868.

[10] *Id.*

What does this decision tell us? Since a state is not a citizen for diversity jurisdiction purposes,[11] states should avoid OPA 90 claims if their goal is to avoid federal question jurisdiction and remain in state court.

III. State Law Survives OPA 90

OPA 90 contains a non-preemption provision which expressly allows a state to establish "additional liability requirements" for damages arising from oil spills.[12] Despite this statutory language, the defendant in *Williams v. Potomac Electric Power Co*.[13] argued that state common law causes of action "conflict with OPA's 'full purposes and objectives'"[14] and should be preempted. The district court rejected this argument, relying principally on *U.S. v. Locke*,[15] and stated the following:

> The Supreme Court has thus effectively foreclosed any argument as to preemption in this case. OPA does not preempt 'state laws of a scope similar to the matters contained in Title I of OPA,' such as the state common law actions pleaded here.[16]

In addition to state common law rights of action, several coastal states have adopted oil pollution prevention legislation which is more aggressive than OPA 90.[17] Courts have uniformly found that such legislation is not preempted by OPA 90.

---

[11]The Fifth Circuit has held that when a state brings a suit and the state is a "real party in interest," then the "presence of [the state] defeats diversity jurisdiction." *Louisiana v. Union Oil Co.*, 458 F.3d 364, 367 (5th Cir. 2006); see also, *In re Katrina Canal Litig. Breaches*, 524 F.3d 700, 706 (5th Cir. 2008) (holding "that it has been long settled that a State is not a person for purposes of diversity jurisdiction. This, with the long time companion insistence upon complete diversity, made the presence of additional parties aligned with the State irrelevant to federal diversity jurisdiction.").

[12] 33 U.S.C. § 2718 (2010) ("Nothing in this Act … shall affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to the discharge of oil or other pollution by oil within such State; or any removal activities in connection with such a discharge…."). OPA 90 does not, however, allow for double recovery of natural resource damages. *See*, 33 U.S.C. § 2706(d)(3).

[13] 115 F.Supp.2d 561 (D. Md. 2000).

[14] *Id.* at 564.

[15] 529 U.S. 89, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000).

[16] 115 F.Supp.2d at 565.

[17] Francis J. Goynor, *Dangerous Waters Without a Chart: Pollution Problems as They Relate to Tugs and Barges*, 70 Tul. L. Rev. 549, 557 (1995) (stating may states have introduced more strict and far-reaching legislation than federal statutes).

For example, in *International Association of Independent Tanker Owners (INTERTANKO) v. Lowry*,[18] the district court considered the extent to which a state may protect its marine environment by regulating oil tankers in areas of operation, personnel, management, technology and information reporting.[19] Alleging that certain sections of the state legislation at issue intruded into areas under the exclusive control of the federal government, INTERTANKO argued that the state legislation unduly burdened interstate commerce and should be preempted.[20] The district court found otherwise, noting that OPA 90 grants states the ability to impose additional requirements concerning all facets of oil pollution liability, compensation, prevention and removal.[21]

The lesson thus seems clear: State statutory and common law has survived OPA 90. But, this offers yet another question: Are available state law remedies at least as broad as those provided within OPA 90?

IV. Mississippi Law: Strong as OPA 90

OPA 90 is a strict liability scheme in which a "responsible party" owes a variety of damages to eligible claimants, including a sovereign state. States can recover: removal costs,[22] losses of government revenue,[23] costs of increased public services[24] and natural resource damages.[25] As set

---

[18] 947 F.Supp. 1484 (W.D. Wash. 1996).
[19] *Id.* at 1490.
[20] *Id.*
[21] *Id.* at 1492-93; see also, *Berman Enter., Inc. v. Jorling*, 793 F.Supp. 408, 414-16 (E.D.N.Y. 1992) (upholding state statute providing additional enforcement of federal clean water policy), aff'd, 3 F.3d 602 (2nd Cir. 1993); *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 630 (1st Cir. 1994) (Examining a Rhode Island statute that imposed liability for purely economic loss in oil pollution damage cases, the First Circuit noted that OPA "almost certainly" provides recovery of purely economic damages in oil spill cases, and expressly authorizes states to impose additional liability in such cases).
[22] The costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize or mitigate oil pollution from such an incident. *Claimant's Guide: A Compliance Guide for Submitting Claims under the Oil Pollution Act of 1990*, Nat'l Poll. F. Ctr., pg. 8 (as updated, November 2009).
[23] Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources. *Id.* at 12.
[24] Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety or health hazards, caused by a discharge of oil or directly attributable to response to the oil spill incident. *Id.* at 13.

forth below, it appears the patchwork of Mississippi statutory and common law allows the same items of recovery.

A. Statutory Claims

1. The Mississippi Air and Water Pollution Control Law

Miss. Code Ann. § 49-17-1, *et seq*. addresses the pollution of waters, streams and air in Mississippi.

Miss. Code Ann. § 49-17-29(2)(a) provides that "it is unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any waters of the state. It is also unlawful to discharge any wastes into any waters of the state which reduce the quality of those waters below the water quality standards or limitation…. Any such action is declared to be a public nuisance."[26]

Miss. Code Ann. § 49-17-43 provides the remedies for violation of sections 29(1)(a) and (2)(a). The remedies include injunctive relief,[27] civil penalties,[28] removal and remediation costs[29] and the costs of restocking state waters with fish and wildlife.[30] Importantly, the Mississippi Air and Water Pollution Control Law "is a regulatory scheme which allows the State of Mississippi, not private individuals, to oversee and abate air and water pollution. While it does allow for private party participation, i.e., the right to initiate a request with 'the commission,' it clearly does not provide a private right of action or a private remedy for those persons adversely affected by air and water pollution."[31]

---

[25] Damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing the damage. *Id.* at 16.
[26] Miss. Code Ann. § 49-17-29(1)(a) provides almost identical language with respect to air pollution.
[27] Miss. Code Ann. § 49-17-43(2).
[28] Miss. Code Ann. § 49-17-43(1).
[29] Miss. Code Ann. § 49-17-43(4).
[30] Miss. Code Ann. § 49-17-43(3).
[31] *In re. Moore*, 310 B.R. 795, 800 (Bankr. N.D. Miss. 2004).

Thus, it seems clear that certain OPA 90-like damages are recoverable by the State[32] under its Air and Water Pollution Control Law: removal and remediation costs and certain natural resource damages. This leaves the recoverability of additional natural resource damages, lost government revenue and public service expenses to be addressed elsewhere in state law.

2. The Coastal Wetlands Protection Act

Miss. Code Ann. § 49-27-55 empowers a chancery court to grant injunctive relief and imposes civil liability upon "any person who … violates any provision of this chapter, [or] regulation promulgated pursuant to this chapter… for the restoration of all affected coastal wetlands to their condition prior to such violation, insofar as such restoration is possible, and for any and all damages to the wetlands."[33] The statute expressly reserves other statutory and common law remedies allowable by law to public and private parties,[34] and goes on to allow for punitive damages not to exceed $500 per day "for each day that the violation exists beyond the date set by the court in its injunction for the restoration of the wetland."[35] If injunctive relief is not sought, then the appropriate chancery or circuit court has jurisdiction over the State's action for damages.[36]

"Killing or materially damaging any flora or fauna on or in any coastal wetlands" is a "regulated activity."[37] Also, pursuant to the Coastal Wetlands Protection Act, the Mississippi Department of Marine Resources has issued a regulation making it unlawful for any person or vessel to discharge any harmful substance (defined to include "oil") into its marine waters of the State of Mississippi.[38]

---

[32] Technically, action should likely be taken by the Attorney General on behalf of the Mississippi Department of Environmental Quality.
[33] Miss. Code Ann. § 49-27-55(a).
[34] Miss. Code Ann. § 49-27-55(b).
[35] Miss. Code Ann. § 49-27-55(a).
[36] *Id.*
[37] Miss. Code Ann §49-27-5.
[38]MDMR Rules and Regulations Part 10, Chapter 04.

It is apparent that the Coastal Wetlands Protection Act fills a gap left by the Air and Water Pollution Control Law; namely, recovery of money damages for restoration of the State's wetlands.

B. Common Law Claims

As a threshold matter, 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.[39] One commentator described the public trust doctrine as follows:

> Described simply, the doctrine provides that natural resources belong to the whole public; private owners may not deprive the public of access. The state has legal authority to pursue causes of action for damages and injunctive relief against parties responsible for the pollution of natural resources. If properly used, especially by the state AG, complete relief for the state citizenry is often possible.[40]

As a practical matter, the public trust doctrine provides standing to a state attorney general to pursue legal action.[41] Attorneys general may then utilize several alternative and complementary common law theories of recovery.

A public nuisance is an unreasonable interference with a right common to the general public.[42] The factors which assist in the determination of whether an interference with a public right is "unreasonable" are:

> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) Whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) Whether the conduct is of a continuing nature or has produced a permanent or long lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.[43]

---

[39] *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources*, 16 Duke Envtl. L. & Pol'y 57, 61 (2005).
[40] *Id.* (internal citations omitted).
[41] *Id.* at 62 n.29.
[42] Mississippi Law of Torts, § 9-3.
[43] *Id.*

While there is no seminal public nuisance case in Mississippi state or federal courts,[44] other states have utilized public nuisance and other common law rights of action in natural resource litigation to recover response and remediation costs,[45] as well as pecuniary losses upon the showing of a "special injury."[46]

An example of the power of the common law in natural resource cases can be found in *New Mexico v. General Electric Co.*[47] In a seventy-nine page decision, the court analyzed each common law claim of the State of New Mexico in a groundwater contamination case and made the following findings:

- The State's trespass claim could not be maintained because it did not plead an "exclusive possessory legal interest pertaining to the groundwater in question."[48] Instead, the State proceeded pursuant to its "public trust and *parens patriae* interests in protecting the public's right to the use of all of the waters of New Mexico;"[49]

---

[44] *City of Jackson v. Keane*, 502 So.2d 1185 (Miss. 1987) is a private nuisance case which establishes "the appropriate measure of damages" as follows: "Plaintiff can choose to prove *either* reasonable cost of replacement or repairs *or* diminution in value, and if he proves either of these measures with reasonable certainty, damages are allowable, so long as the plaintiff will not be unjustly enriched and the defendant does not demonstrate that there is a more appropriate measure of damages." *Id.* at 1187. In addition to the choice of replacement/repair costs or diminution of value, landowners may recover "special or incidental damages." *Id.* Finally, a plaintiff can recover reasonable and necessary expenses incurred to prevent future damages, "so long as those expenses do not exceed the diminution in value the property would suffer if the preventive measures are not undertaken." *Id.* at 1188.

[45] *Town of East Troy v. Soo Line R.R. Co.*, 653 F.2d 1123, 1132 (7th Cir. 1980) (permitting recovery of expenses incurred cleaning up groundwater contamination); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1043 n. 14 (noting in dicta that "New York law appears to provide the State with restitution costs in a public nuisance action."); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F.Supp.2d 245, 260 n. 10 (D.N.J. 2000) ("This Court agrees that for abatement of a public nuisance, New Jersey law permits cost recovery.").

[46] *New Mexico v. General Electric Co.*, 335 F.Supp.2d 1185, 1239 (D.N.M. 2004).

[47] 335 F.Supp.2d 1185 (D. N.M. 2004).

[48] *Id.* at 1235. The court contrasted the inadequacy of a trespass claim pursuant to the public trust doctrine with the adequacy of a claim of harm to lands owned by the State and harm to the State's "possessory interest as a water rights holder." *Id.* at 1234.

[49] *Id.* at 1234-35.

- The State's public nuisance claim could be pursued, which entitled it to abatement of the nuisance and recovery of "pecuniary losses" upon a showing of "special injury."[50] The court noted that "pecuniary losses arising from existing and future response and remediation costs" [51] were examples of recoverable special injuries.
- The State's negligence claim withstood scrutiny. The court determined that New Mexico could recover damages which "bear some reasonable relationship to the injury suffered" and are not "hypothetical or speculative,"[52] including damages for past, present and ***future*** restoration costs, response costs (e.g., site investigation costs) "and similar consequential damages."[53] As the court aptly noted, "[b]y allowing recovery for future restoration costs, the remedy thus available under Plaintiffs' state law claims affords greater relief than would be available under CERCLA."[54]

If one applies the rationale and reasoning of the New Mexico district court to oil spill litigation, it would seem that public nuisance and negligence claims[55] pack as much punch as OPA 90 when it comes to the recovery of response, remediation and restoration costs. Both legal frameworks allow for the recovery of past, present and future damages. Moreover, given OPA 90's

---

[50] Note that this "special injury" requirement is identical to the standard set forth in *City of Jackson v. Keane*, 502 So.2d 1185 (Miss. 1987).
[51] *Id.* at 1240.
[52] *Id.* at 1250.
[53] *Id.* at 1259. New Mexico law does not appear as favorable as Mississippi law in this regard. Under New Mexico law, the court had the choice to allow recovery for diminished value or repair costs. *Id.* at 1252 ("Because neither the diminished value nor the repair measure is appropriate for all cases, courts choose the measure deemed most adapted to the case at hand.") (quoting, 1 Dan. B. Dobbs, *Law of Remedies* § 5.2(2), at 716 (2nd ed. 1993)). By contrast, Mississippi law grants the choice to the plaintiff. *City of Jackson v. Keane*, 502 So.2d 1185, 1187 (Miss. 1987) ("Plaintiff can choose to prove *either* reasonable cost of replacement or repairs *or* diminution in value, and if he proves either of these measures with reasonable certainty, damages are allowable, so long as the plaintiff will not be unjustly enriched and the defendant does not demonstrate that there is a more appropriate measure of damages.").
[54] *Id.* at 1260.
[55] At least one case has found that common law strict liability is an appropriate theory of recovery. *Prospect Indus. Corp. v. Singer Co.*, 569 A.2d 908, 910 (N.J. Super. Ct. Law Div. 1989) ("However, in determining whether Singer was engaged in abnormally dangerous activity this court believes that the activity to be examined is not manufacturing, but rather the leakage of hydraulic fluids from the machinery. While this leakage is less egregious than the dumping in Ventron, the failure of Singer to control this leakage is sufficiently similar to the actions of defendant in Ventron to conclude that it should be considered a 'disposal.'").

allowance of recovery for governmental revenue and public services, it seems that these items are neither too remote nor too speculative to qualify as recoverable damage under a negligence theory.

C. Punitive Damages

While there appears to be some confusion with respect to the recoverability of punitive damages on a pure OPA 90 claim,[56] there is no doubt that Mississippi law allows the recovery of punitive damages.[57] As many of you may be aware, a defendant with a net worth greater than $1 billion can only be compelled to pay $20 million in punitive damages under the present law, unless certain limited exceptions (such as a felony conviction arising from the conduct at issue)[58] are met.[59]

CONCLUSION

Given the unique nature and scope of the *parens patriae* authority granted attorneys general to protect the natural resources and tax bases of their respective states, it should be of paramount importance that these claims are adjudicated within the courts of the state where the harm has occurred. Proceeding forward with purely state law claims should allow state attorneys general to accomplish this task, while at the same time preserving the state's ability to recover damages virtually identical to those allowed under OPA 90.

---

[56] The implicit debate appears to be whether OPA 90 preempts all maritime law with respect to oil spills, or whether OPA's savings provision (§2751(e)) preserves a claimant's ability to recover maritime punitive damages. Compare, *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008) (the Clean Water Act ("CWA") does not preempt maritime common law of punitive damages because the CWA is silent on punitive damages) with *South Port Marine, LLC v. Gulf Oil Ltd.*, 234 F.3d 58 (1st Cir. 2000) (no punitive in OPA 90 case) and *Clausen v. M/V NEW CARISSA,* 171 F.Supp.2d 1127 (D. Oregon 2001) (same).

[57] Miss. Code Ann. § 11-1-65 (2010).

[58] On May 17, 2010, eight United States Senators who are members of the Environmental and Public Works Committee wrote Attorney General Eric Holder to request the opening of a criminal "inquiry into whether British Petroleum made false and misleading statements to the federal government regarding its ability to respond to oil spills in the Gulf of Mexico." *see*, http://www.politico.com/news/stories/0510/37420.html.

[59] Miss. Code Ann. § 11-1-65(3)(d).