

# KEESAL, YOUNG & LOGAN

## A TALE OF TWO OIL SPILLS: THE M/V SELENDANG AYU AND M/V COSCO BUSAN OIL SPILLS.

### I. OVERVIEW.

More than twenty years have passed since the enactment of the Oil Pollution Act of 1990 (“OPA”). A review of the responses to a number of oil spills in the United States in the intervening years allows us to identify common factors that are likely to affect the ultimate civil and criminal liability of a vessel owner or operator involved in a significant oil spill in the United States. These factors include: (1) the size and location of the spill; (2) whether there is a chance for the vessel interests to limit their liability; (3) the political climate and the media coverage of the incident; (4) whether there are culpable third-parties whose conduct contributed in causing the spill; and (5) whether pre-spill or post-spill conduct violates other U.S. criminal laws. These factors also affect the strategies and positions adopted by Responsible Parties in responding to an incident. In this seminar, we will discuss the application of these factors to the M/V SELENDANG AYU and M/V COSCO BUSAN oils spills that occurred in the United States in 2004 and 2007, respectively; and how those incidents give insight as to how liabilities for future pollution incidents might be best managed.

Perhaps the most drastic change in the evolution of OPA 90 spill responses is the increased level of influence by factors external to the OPA 90 incident response framework. OPA 90 was designed to ensure a prompt and efficient response while attempting to avoid protracted litigation that would necessarily prevent those harmed by the spill from obtaining compensation. By design OPA 90 allows the government to designate a Responsible Party who must then participate in the spill response, settle third party claims and compensate trustees for natural resource damages. If the Responsible Party followed the law it was entitled to significantly limit its liability and recover spill related costs from a fund pooled from taxes on oil production. However, in recent years the government has gone to great lengths to interfere with the OPA 90 framework by pressuring Responsible Parties during response activities, immediately entering litigation to pre-empt the Responsible Party’s ability to limit liability, and criminally prosecuting vessel interests in most spills. It remains to be seen if this is a trend that will continue or if it is just a temporary condition.

OPA 90 provides that a Responsible Party has a complete defense to liability for an oil spill if the spill is the result of: (1) an act of god; (2) an act of war; (3) actions of a third party with no contractual relation to the Responsible Party. If a Responsible Party cannot claim a complete defense, it may still be able to limit its liability, which is between \$950 and \$3000 per gross ton, depending on the type of vessel.

In the initial years under OPA 90, our preferred method of responding to a spill was to cooperate with the spill response and take all possible steps to preserve the right to a limitation of liability. That is a strategy that worked in the KUROSHIMA spill and the SELENDANG AYU as we will discuss today. However, the government over the past few years has changed its strategy with

respect to oil spills in an effort that is detrimental to vessel interests. The discussion of the SELENDANG AYU and COSCO BUSAN spills will highlight how the practical application of OPA 90 has changed and the issues we believe are important for vessel interests with respect to responding to future spills in the U.S.

## **II. THE SELENDANG AYU**

The M/V SELENDANG AYU was a panamax-sized bulk carrier that lost power while transiting the Bering Sea in December 2004 due to a main engine casualty. The vessel subsequently ran aground in a winter storm in the Aleutian Islands of Alaska. The vessel and its cargo were total losses, and six of the crew died when a USCG rescue helicopter crashed while lifting them from the deck of the grounded vessel. The vessel's double-bottom fuel tanks were breached on impact, and the vessel broke in half within a short time after grounding. Approximately 1,800 metric tons of bunkers and marine diesel oil were released into the sea, most of which washed ashore in the storm surge.

The surviving crew were transported to shore, where they were interviewed by the United States National Transportation Safety Board and the United States Coast Guard. During the course of the investigation, the master revealed that he had instructed the crew to provide false information to the investigating authorities concerning the time that the main engine casualty had occurred. The master and the crew corrected their statements, but before the surviving engineers and officers could leave the United States, they were detained by the United States Department of Justice, which had initiated a criminal investigation into the casualty and the false statements made by the crew.

There was substantial publicity about the grounding, oil spill, and helicopter crash at the national and local level for a short period of time. However, while the media interest in Alaska and Washington State remained high for several months following the accident, the national media coverage was short-lived. The state and federal representatives from Alaska did not make public statements about the accident or the oil spill.

The grounding site was on a remote, uninhabited coastline on Unalaska Island. Because the spill occurred in a very remote area, it was very expensive to bring clean up resources to the spill area, and to clean up the oil on the remote shorelines. The Bering Sea is a pristine, remote region of the world with large populations of seabirds and large stocks of fish, shellfish and marine mammals. Several valuable commercial fisheries openings occur in areas close to the grounding site. The region is part of the Alaska Maritime National Wildlife Refuge. Thus, the spill raised the potential for substantial lost profits claims by commercial fishermen and a substantial natural resource damages claim.

A vessel owner or operator (the "Responsible Party" or "RP") may limit its liability under OPA if it can demonstrate that the OPA incident was not the result of gross negligence or willful misconduct, or the violation of a federal operating statute or regulation, on the part of the RP or a party in a contractual relationship with the RP. However, the RP will lose the right to limit its liability if it fails to report the incident giving rise to the spill, as required by law, fails to provide

reasonable cooperation or assistance in responding to the spill, or violates a clean-up order issued by the Coast Guard.

After investigating the accident, the vessel interests concluded that there was a chance that they could successfully limit their OPA liability. If the RP was able to limit its OPA liability, its total liability for oil pollution related damages would be approximately \$25 million. The total costs and damages paid out would eventually exceed \$140 million. Thus the ability to limit its liability would potentially reduce the RP's liability by more than \$100 million.

Given the potential to limit the vessel interests' OPA liabilities, the RPs' strategy for dealing with third party claims and the criminal investigations was heavily influenced by the goal of preserving the ability to limit their OPA liability. Thus, the RP attempted to settle the civil and criminal claims asserted against them without admitting they were negligent, and without engaging in litigation or discovery that might result in the development of evidence that could be used to break its OPA limitation of liability.

The strategy was largely successful. The RP settled all third party claims, with the exception of a few frivolous claims, without litigation. By settling the claims without litigation, the RP avoided the risk that adverse evidence or rulings from such litigation could be used to deny their limit of liability.

Similarly, the RP cooperated extensively in the U.S. Department of Justice criminal investigation into the incident. As a result of the RP's cooperation, the Department of Justice agreed that it would only bring strict liability misdemeanor charges against the RP. This decision meant that the RP would not have to plead guilty to any culpable conduct relating to the oil spill, and thus the criminal conviction could not serve as the basis for denying their right to limit their OPA liability.

The United States maintains the Oil Spill Liability Trust Fund (OSTLF) to pay for federal and state costs of cleaning up oil spills, and to provide compensation for damages when the RP fails pay these costs and damages. The National Pollution Funds Center of the United States Coast Guard administers the OSTLF, and handles claims asserted against the OSTLF to pay for OPA response costs and damages.

An RP may submit a claim to the NPFC asserting that the RP is entitled to limit its OPA liability, or that it has a complete defense to such liability. When the RP has paid more than the limit of its OPA liability, it may recover the amounts paid over its OPA limits from the OSTLF, if the NPFC agrees that the RP is entitled to limit its OPA liability.

The burden of proving that the RP is entitled to limit its OPA liability is on the RP. Thus the RP must present evidence to the NPFC that the Incident causing the spill was not the result of its gross negligence or willful misconduct, or the result of a violation of a federal regulation or statute. The RP must also demonstrate that it reported the incident as required by law, and cooperated with the Coast Guard's response to the incident. The RP must attach evidence in the form of declarations, affidavits, documentary evidence, and expert witness declarations to meet its burden.

In January 2012, the National Pollution Funds Center (NPFC) ruled that the RPs were entitled to limit their OPA liabilities. As a result of this decision, the RP's P&I Club is in the process of recovering amounts spent by the RPs to respond to the oil spill and settle claims. We anticipate that the total recovery from the NPFC will eventually exceed \$100 million, and will be the largest recovery from the NPFC by vessel interests since the enactment of OPA.

### **III. The COSCO BUSAN**

On November 7 2007, the container ship M/V COSCO BUSAN struck the San Francisco – Oakland Bay Bridge when departing port in heavy fog, in the middle of San Francisco Bay Area — one of the most densely-populated and environmentally-conscious populated urban areas in the United States. At the time of the incident, the vessel was under the command of a local compulsory pilot. As a result of this incident, approximately 53,000 gallons (275 tons) of bunker fuel were spilled into the Bay. The spilled oil contaminated shorelines within the Bay, and on the coastline outside the Bay.

Largely due to where the spill occurred, the public outcry resulting from the spill was enormous, and the spill received extensive local and national media coverage. In addition to extensive local and national coverage, several prominent politicians from all levels of government—federal, state and local, pressured the Coast Guard and state officials to mount an aggressive response to the spill. The political pressure and influence ultimately impacted every aspect of the response from the clean-up, natural resource damage assessment, and, litigation.

Perhaps the most significant impact the political pressure had on the COSCO BUSAN response was the extremely aggressive litigation approach adopted by the federal government and civil and criminal attorneys from the Department of Justice (“DOJ”). Even at the earliest stages of the response, senior Coast Guard officers were stating in press that the federal government was actively investigating whether the Responsible Party had lost its ability to limit its liability under OPA. Then, less than one month after the spill, while the clean-up was still underway, the DOJ filed a civil lawsuit in federal court, seeking damages under OPA (i.e., its response costs) and an order from the federal court that the Responsible Party lost its ability to limit liability. In addition, the DOJ sought civil penalties based on a finding that the discharge resulted from the gross negligence of the RP. Were the court to find that the RP was grossly negligent, it would not be entitled to limit its OPA liabilities.

In addition to its claims under OPA, the DOJ also brought claims under the National Marine Sanctuaries Act (NMSA) and the National Park System Resource Protection Act (NPSRA), seeking civil penalties under NMSA and NPSRA, as well as the forfeiture of the value of the vessel under the NMSA. The early litigation approach adopted by DOJ in the COSCO BUSAN matter was unprecedented but we have to look no further than the Deepwater Horizon incident, to see that it is now being used as a new template or model as means to gain monetary and evidentiary leverage against the RP.

Another critical consequence of the political pressure surrounding the COSCO BUSAN incident, and the filing of the federal government's civil lawsuit, was the external pressure these events

put on the RP and the natural resource damages trustees, who normally do not resort to litigation to resolve NRDA claims unless they are unable to reach a settlement. Because of court-imposed litigation deadlines, the RP and the trustees were forced to complete the natural resource damages assessment on an expedited schedule—and in critical areas without due regard to scientific protocols. This compressed schedule does not allow sufficient time to work through complicated technical questions regarding the effects of the oil spill on some of the natural resources present in San Francisco Bay.

The NRDA component of the COSCO BUSAN response was impacted by the political pressure in other ways, too. For example, the public's perceived need for an extensive initial response to the spill led to Coast Guard officials abandoning the typical response objective of prioritizing areas to respond to and the allocation of resources. As a result, the daily costs incurred by the RP during the early stages of the response were staggeringly high. However, as in all oil spills there was a risk the RP's taking issue with these costs would be interpreted as its failure to cooperate, and thus potential grounds for waiving its limitation rights. On the other hand, if the RP could maintain its limitation rights, there was also a risk that the OSLTF would later question the reasonableness of the costs, and the procedures from which they arose, and therefore deny their reimbursement. Mindful of this delicate situation, the RP took steps to document the fact it was cooperating with cost mandates from the government.

Shortly after the incident, the RP for the COSCO BUSAN concluded that it was unlikely to succeed in limiting its OPA liability. This conclusion was reached after determining that the crew likely violated several navigation regulations, including the COLREGS and regulations issued under the Ports and Waterways Safety Act. Having reached this conclusion, the RP focused on attempting to settle with the United States, State and municipal governments and third-party claimants. Faced with its inability to limit liability, the RP also focused on pursuing recoveries from other third-parties who were also culpable and contributed to causing the COSCO BUSAN incident, including the pilot who was navigating the Vessel when it struck the bridge.

Pilotage in the San Francisco Bay is compulsory. The local pilots association offers "trip insurance" to vessels, which provides for \$36 million of liability insurance for accidents caused by pilots. If a vessel declines to purchase such insurance, California law requires the vessel to defend, indemnify and hold harmless the pilot from any liabilities resulting from negligence pilotage. However, the vessel owner is not required to indemnify the pilot for losses caused by his gross negligence or willful misconduct.

During investigations of the incident, it was discovered that the pilot suffered from medical conditions that disqualified him from piloting. In addition, it was discovered that the pilot was taking large quantities of narcotic pain killers and other prescription drugs that made him unfit to pilot a vessel. It was also discovered that the US Coast Guard and the State of California were aware of some (but not all) of the pilot's medical problems, but failed to take steps to revoke the pilot's license.

As a result of these discoveries, the RP sued the pilot, his treating physicians, the Coast Guard, and the State of California. The RP ultimately succeeded in recovering substantial settlements from the pilot's insurance carriers and his treating doctors. The claims against the State of California were dismissed by the Court on the basis of sovereign immunity. The claims against the Coast Guard were dismissed as part of a global settlement between the RP and the United States. While not every spill warrants the cost of pursuing claims against third-parties, the COSCO BUSAN was situation that did. We will discuss the considerations an RP should make when determining whether to pursue third party claims, including whether limitation is available, the response costs the RP is faced with, and the factual and legal merits of the RP's claims against the third parties.

There is another significant issue which has become increasingly significant in U.S. oil spills – the potential for criminal prosecutions. Typical criminal charges in the U.S. require that the accused have intentionally acted when committing the crime. However, for some very minor criminal offenses there were certain exceptions where the accused would be strictly liable simply for causing a result, even inadvertently. With respect to oil spills, the government has more recently passed laws that create strict liability crimes that can be used to prosecute the vessel owners, operators or managers. Thus, a person who spills oil into navigable waters, or who kills seabirds by spilling oil, may be strictly liable for criminal misdemeanor charges. Such charges might be brought against a company who is named as the operator in the SMS documentation, actively manages the ship, or controls the crew.

There are additional criminal charges of increasing severity for oil spills resulting from (1) negligence; (2) gross negligence; and (3) intentional spills. The fines associated with these charges can be millions or tens of millions of dollars (or as we see in the Deepwater Horizon Oil Spill – billions). The criminal prosecution of those who spill oil follows a recent trend in the U.S. to “blame someone” when something bad happens. Although the criminal charges are often strict liability or negligence based, the offender is still labeled as a criminal.

Part of any “plea agreement” to resolve criminal charges requires that the defendant agree to a written “statement of facts” prepared by the government prosecutor. The government will negotiate more favorable terms (i.e. fines) for a defendant who will agree to a more egregious statement of facts. For instance, the government may agree to reduce a lower criminal fine where the defendant admits that it was grossly negligent in causing the spill. The information contained in the statement of facts can then be used by the government or other third parties against vessel interests in civil litigation meaning that those parties may be able to recover larger amounts from vessel interests in lawsuit. In addition, the language in the statement of facts may prevent vessel interests from obtaining limitation.

In addition to prosecuting vessel interests, the government frequently prosecutes individuals employed by the vessel interests working aboard the vessels or in management positions. Criminal charges against such individuals is usually focused on allegedly false statements or obstructing the government's investigation. The government then uses the individual prosecutions to develop evidence that will be helpful to the government in its civil lawsuit against the vessel interests and in an effort to prevent vessel interests from limiting liability under OPA 90. Individual defendants are even more likely to agree to outrageous factual

statements in a plea agreement if by doing so they can avoid serving time in jail. Under U.S. law, the employer of these individual defendants is vicariously liable for the criminal actions of its employees. The fines for false statements or obstruction of justice can be enormous.

Criminal prosecutions also complicate oil spills in another way – they create conflicts between vessel owners, managers and insurers. P&I Clubs normally cover response costs, third party claims and natural resource damages for a pollution incident in the U.S. If vessel interests are able to limit liability under OPA 90, the P&I Clubs or their reinsurers recover any amounts paid above limitation. P&I Club rules typically allow “discretionary cover” for criminal acts related to an oil spill if those acts are based upon negligence or strict liability. P&I Cover is typically not available for grossly negligent conduct, false statements during government interviews or conduct constituting obstruction of justice. Therefore, with respect to criminal charges and factual statements as part of a plea agreement, the vessel interests may be inclined to agree to terms that will benefit vessel interests rather than preserve the right to limit liability or mitigate potential damages in civil lawsuits. Aside from the tensions created with the insurers, a criminal prosecution can create tension between owners and managers depending on whether the government is seeking a strict liability crime against owners of the vessel which spilled oil or prosecuting crimes related to actions by individuals employed by managers.

The lesson to be learned by all of this is that the government is doing whatever it possibly can to (1) prevent vessel interests from their right to limit liability under OPA 90; (2) make responding to oil spills more difficult and expensive for vessel interests; and (3) create dissent between Responsible Parties and their insurers. It appears that the government’s actions collectively are greatly increasing the costs and difficulties of vessel interests involved in an oil spill in the U.S. We continue to believe that whenever possible vessel interests should take all necessary action to preserve their rights to a limitation of liability. When that is not possible, vessel interests must consider what potential there is to recover from other third parties, including the government under certain circumstances.