

TERRORISM, OIL SPILLS AND CRIMINAL SANCTIONS: THE HAMMER AND THE ANVIL

Richard H. Hobbie III

President

Water Quality Insurance Syndicate

80 Broad St.

New York, NY 10004

Andrew J. Garger

V.P., Legal

Water Quality Insurance Syndicate

80 Broad St.

New York, NY 10004

ABSTRACT

The Water Quality Insurance Syndicate has offices in lower Manhattan in New York City, and the events of September 11th remain vivid. However, in its aftermath it was difficult to envision the broad reaching ripple effects resulting from the event. Among the effects is the clash of two major issues: the increasing use of criminal sanctions in reaction to spills of oil and hazardous substances, and the practical and emotional consequences of both possible and actual terrorist events.

For the past several years, the responsible party and its insurer have faced the use of criminal sanctions when a spill occurs. Criminal sanctions are typically used to combat intentional environmental misconduct. In the realm of oil spills, common actions may include the deliberate dumping of oil and negligence or unintentional conduct leading to a spill.

In the post 9-11 United States, the first question presented at an oil spill is not how much oil has been spilled, but rather was the spill caused by an act of terrorism?. Government officials may treat the location of an oil spill as a crime scene, which will transform and complicate a pollution event.

A recent explosion on a gasoline barge at an oil and gas storage facility in Staten Island, New York illustrates the point. A leading national newspaper devoted the first five paragraphs of its lead story on the explosion to a discussion of whether or not there was a terrorist attack

Was the clean up of that spill hampered because of the terrorism investigation? We will probably never know, because the gasoline that escaped from the barge quickly evaporated so the cleanup was minimal. The next spill, however, might be a crude oil spill where every minute in response time counts. While the shipowner is trying to minimize the spill, the F.B.I. might have already taken control of the spill scene to conduct an investigation and effectively locked out the spill responders and their equipment, greatly increasing the cost and complexity of the cleanup, the environmental damage that is done, and the possibility that the shipowner's actions are found to be insufficient, increasing the possibility of criminal sanctions.

The threat of terrorism is real. But we must now work to integrate our response to the terrorism threat to our existing spill response infrastructure that has been developed under OPA, and not unnecessarily increase a shipowner's exposure to criminal liability.

DISCUSSION

The Water Quality Insurance Syndicate has offices in lower Manhattan in New York City, and the events of September 11th remain vivid. However, in its aftermath it was difficult to envision the broad reaching ripple of effects that would spread out from that event. Among the effects is the clash of two major issues: the increasing use of criminal sanctions in reaction to spills of oil and hazardous substances, and the practical and emotional consequences of terrorist events or possible terrorist events.

Criminal sanctions are an acceptable deterrent used to combat intentional environmental misconduct such as the deliberate dumping of oil. Since insuring against intentional criminal acts is against public policy, pollution insurers have not provided coverage. However, the growing use of strict liability and negligence statutes by the Department of Justice and other law enforcement agencies, and the corresponding lower culpability level necessary for criminal liability, has resulted in insurance coverage being developed for certain criminal liabilities.

New issues are now facing the responsible party and its insurer as a result of this increased use of criminal sanctions. When a spill occurs, the vessel operator, its management and crew need to be aware they may be a target of a criminal investigation. It may be necessary to assert their Fifth Amendment right against self-incrimination. However, the assertion of Fifth Amendment rights could hinder a cleanup response and could also be considered "lack of cooperation with responsible officials," which could result in a breach of a vessel's liability limits under the Oil Pollution Act of 1990 ("OPA").

The cost of providing a defense may also become an issue. It may be necessary to appoint several attorneys to represent divergent vessel and crew interests.

The Certificate of Financial Responsibility system under OPA may also be jeopardized by the prosecution of criminal liabilities for environmental crimes by the Department of Justice. Under OPA, a guarantor/insurer has certain defenses to claims arising out of a spill, including the willful misconduct of the insured. Willful misconduct established by a criminal prosecution may allow an insurer to recover from the Oil Spill Liability Trust Fund.

Some of the inequities in the use of criminal sanctions against responsible parties may eventually be addressed by legislation. However, unless there is legislation that results in major changes, the use of criminal sanctions must be considered by a responsible party and its insurer when planning oil spill response strategies and responding to a spill. This paper will examine the issues involved¹.

The trend to use criminal sanctions has firmly entrenched itself in government at all levels, and it has been the spiller who has under-estimated the government resolve. It seems at times that the government feels that it is better to punish any innocent spiller so as to instill fear if not caution in the regulated community.

At the same time that society is viewing spills as criminal issues with little or no proof of any negligence or intent, there are other implications for spill response where the event is possibly or actually the result of a terrorist act.

The Background of Criminal Liability

Criminal penalties for oil spills and other environmental violations have existed under U.S. law for over one hundred years. For most of the twentieth century, law enforcement agencies and the courts have exercised discretion by treating environmental violations as civil matters unless the violations were the result of obvious criminal intent. However, in the past several years, the number and severity of criminal sanctions against vessel owners, operators, crewmembers, and masters have increased dramatically. This increase is the result of several factors. Arguably, the most important of these include an increased awareness of environmental issues by the public and increased scrutiny of incidents by federal agencies such as the Environmental Protection Agency ("EPA"), the Federal Bureau of Investigation ("FBI"), and the United States Coast Guard. The Department of Justice has also been a major factor through the use of several laws to criminalize a strict liability statute that originally were not intended to be used in spill events. In this atmosphere, owners, operators, masters, and crew all face exposure to criminal.

Statutory basis for liability

OPA contains criminal provisions. For example, not reporting a spill is a crime under OPA. OPA also strengthened the criminal liability provision of other environmental statutes including the Deepwater Port Act, Intervention on the High Seas Act, the Port and Waterways Safety Act, and the Act to Prevent Pollution from Ships. For the most part, the OPA criminal provisions follow traditional concepts of criminal law, which require some showing of knowledge or intent, or at least a negligent act. This would include instances of deliberate dumping.

The problem arises in the use of strict liability criminal statutes (primarily the Refuse Act of 1899 and the Migratory Bird Treaty Act ("MBTA")). Under the MBTA, it is unlawful to, at any time, and by any means, or in any manner, to pursue, hunt, take, capture, or kill any migratory bird. Emphasis is added to the word "kill", as you will note that the language of the MBTA does not require that it be a negligent or intentional act. With this kind of interpretation in mind, it would be possible that a person could strike and kill a bird while driving a vehicle and then be found criminally guilty of "killing" the bird.

When Congress created the MBTA, they did so in response to the actions hunters. As a result of the EXXON VALDEZ spill, the MBTA was first used to support a criminal prosecution against

a shipowner in connection with a maritime oil spill. Another example of a piece of legislation that strays from its original intent and has been used to address oil spill issues from a vessel is the Refuse Act of 1899. This act makes it unlawful to discharge "refuse matter" from a ship into navigable waters.

Since the EXXON VALDEZ, prosecutors have increasingly been using these strict liability statutes, which do not require a showing of intent, as a basis for criminal prosecution in an oil spill incident, and it can be anticipated that a criminal prosecution could follow a spill of a hazardous substance. In other words, the shipowner, operator, and crew can be criminally prosecuted for their involvement in an oil spill even though all precautions were taken to avoid the spill. Moreover, the strict liability standard for environmental crimes has been repeatedly upheld under the rationale that environmental crimes are in the nature of a public welfare offense.

One high profile spill where the MBTA was used to prosecute a shipowner was the 1997 spill from the NORTH CAPE near Point Judith, Rhode Island. In that case, a tug caught fire, and the barge it was towing ran aground. The fact that there was no anchor windlass on the barge played an important role in the criminal prosecution of the case, even though a windlass—device used for raising an anchor, not lowering one,—was not required by federal regulations. The parties involved stipulated a settlement with the government rather than risk a criminal conviction.

Another basis to allege liability that has been used in connection with environmental crimes is the responsible corporate officer doctrine. Under this doctrine, a corporate supervisor or officer may be criminally liable when s/he has knowledge of an environmental violation committed by a subordinate. In essence, the responsible corporate officer doctrine serves as a means of imputing criminal knowledge to corporations in which environmental violations occur.

Planning for criminal liability issues

When a spill occurs, the person in charge, who normally is the captain of the vessel, must notify the National Response Center (part of the U.S. Coast Guard) in accordance with OPA statutory requirements. Once this notification is made, what type of involvement can the shipowner, operator, and crew expect to have with the U.S. criminal justice system?

As an initial matter, in a high visibility spill, it is highly likely that both federal and state officials will commence a criminal investigation immediately. On the federal level, this may involve the Coast Guard, investigators from the EPA and FBI, and the U.S. District Attorneys' office. At the local level, police, state police and an investigative unit from a state environmental enforcement agency will more than likely participate in any release. The investigation could also involve officials from more than one state if the spilled oil migrates into another state (a relatively frequent occurrence). Multiple states can mean multiple state officials and the possibility of conflicting laws or possibly different requirements under different state laws.

It is the responsibility of these law enforcement organizations to gather evidence to determine if a crime has been committed. While the Coast Guard plays a broader role, with many duties arising in relation to a spill, it is important to appreciate that the Coast Guard must also evaluate whether a criminal investigation is appropriate. By the sheer nature of the Coast Guard's mission, they enter many situations with more than one responsibility. The guidelines for the Coast Guard's criminal investigation are contained in the Commandant's Instruction for the Criminal Enforcement of Environmental Laws. The following must be kept in mind with respect to the Coast Guard's activities when there is a spill:

1. Once a casualty is reported, it is the Coast Guard's responsibility to investigate.

2. One of the purposes of the investigation is to determine whether there is evidence of a crime.
3. Where there is "reasonable cause" or a "serious marine accident" (including a serious threat to the environment), the individuals involved will be asked to submit to drug and alcohol test.

The Coast Guard may issue subpoenas to require persons to appear and to produce documents such as [or including] vessel log books, cargo manifests, and crew records.

Additionally, the Coast Guard has an obligation to turn over to the U.S. Attorney any evidence of criminal conduct it discovers during its investigation of an incident.

At the early stage of an environmental casualty, the crew, corporate officers and the corporation should be represented by criminal counsel. This requires some advance planning. Criminal defense counsel should be identified in the geographic areas where the company's vessels operate and then, if possible, put on retainer. At least a preliminary liaison should be established with defense counsel so that they can be sent to a spill scene as rapidly as possible. It may be necessary to retain individual criminal counsel for the company, officers, and crewmembers, since their interests may conflict during an investigation.

It is also advisable to conduct in-house training for crewmembers and corporate officers to educate personnel regarding their potential criminal liability, how to conduct themselves during a criminal investigation, and the numerous pitfalls that they may face. For example, individuals, including assigned defense counsel, have been threatened with obstruction of justice charges when suggesting to a crewmember that they should assert their Fifth Amendment rights. Basically, if you are not assigned defense counsel, you should not advise anyone else as to whether they should discuss an incident with investigators.

Another serious issue from an insurers perspective is the effect a criminal investigation has on ongoing response efforts. First, to efficiently respond to a spill, the spill response managers need access to the responsible party and its management for critical information to facilitate the spill cleanup. When there is a criminal investigation underway, the responsible party may be attending hearings or responding to questions from law enforcement agencies.

Even when individuals are not directly involved in the criminal investigation, they may be less than eager to discuss the spill, perhaps on the advice of criminal counsel. This lack of full cooperation could hamper the clean-up efforts. If a vessel is damaged and the responders need information, a question of how much product is left in a holed tank or other questions necessary for the mitigation of the event could be interpreted as incriminating by the responsible party's personnel. Additionally, a R.P.'s lack of cooperation with responsible officials could result in the loss of OPA's limitation on liability and open up the vessel owner and operator to a liability they had not anticipated.

If ultimately convicted, vessel interests face huge fines and criminal records. For example, the owner and operator of the Barge SCANDIA and Tug NORTH CAPE pled guilty to the negligent discharge of 830,000 gallons of diesel fuel near Pt. Judith, Rhode Island in 1996. While both companies were fined 9.5 million dollars, an ex-president of one company was fined \$100,000 and received three years probation. The tug captain was fined \$10,000 and received two years probation.

A criminal conviction can also carry some collateral consequences, such as being blacklisted from obtaining government contracts or onerous terms of probation where the company has to submit to regular or unannounced examination of its records by court appointed agents. Conviction under state law can also trigger a loss of both state and federal contracts.

Insuring against criminal liabilities

Another consideration for a vessel operator is whether it can get insurance for criminal liabilities. In general, insuring against criminal liability is against public policy and insurance policies that attempt to do so are void and unenforceable.

There are exceptions to this public policy that allow for coverage under various state and federal laws. These exceptions often turn on the degree of culpability for the alleged criminal conduct, in other words, whether to be convicted under a criminal statute you must have committed an intentional act or whether your negligence led to the conviction. For instance, Massachusetts has statutorily recognized the public policy against insuring against criminal liability. However, the state's statute is narrowly applied to cases involving a particular subjective intent to cause damage to the injured party. In Louisiana, one court has held that liability insurers must cover damages arising from criminalized "non-intentional" conduct, such as criminal negligence.

The specific provisions in an insurance policy may also preclude coverage. Many policies contain exclusions that either directly or indirectly prohibit insuring against criminal liabilities. A typical provision that might apply to criminal penalties would be where a policy does not provide coverage against the willful misconduct of an insured. With this type of exclusion, one would have to look at the degree of culpability of an insured to determine if there was coverage. For instance, if the insured were convicted of a violation of a strict liability statute, such as the MBTA, the policy exclusion would not preclude coverage.

Another insurance policy provision that would apply to criminal liability would be an exclusion for fines and penalties. In this instance, there would be no coverage even if there were a violation of a strict liability statute.

In sum, a coverage determination is made by reviewing the policy provisions, including exclusions that would preclude coverage for some or all criminal violations, and whether state or federal jurisdictions would preclude coverage on public policy grounds notwithstanding policy provisions.

The background of insurance and terrorism

The insurance industry has historically provided "war" coverage on hulls, cargos, aircraft and other properties, which are capable of moving, avoiding the war zone or fleeing the area of conflict. Until 1914, war coverage was written under the presumption that war had "rules". Concepts such as neutral prizes, contraband, blockade and rights of search applied. The First World War changed all of these concepts. A free of capture and seizure clause was developed, which effectively excluded war and in 1938 a separate war policy was developed. War was generally agreed to be acts of nations or agents of nations. Strikes, Riots and Civil Commotions (SRCC) were not considered to be acts of war and were also covered separately. SRCC is where terrorism generally fell, though there is little agreement or case law to clearly establish this one way or another. The concepts of rules of war have now evolved into the ultimate "the end justifies the means" philosophy.

In the event that an oil spill is potentially or actually the result of a terrorist act, there is a concern that government officials will treat the location primarily as a crime scene and take other actions that will transform and complicate a pollution event. The National Response Plan should help address this issue.

The Effects of Terrorism

Preventing the pollution of our waterways when there is a vessel casualty is of course a primary focus of governmental agencies. Oil spills were complex events prior to September 11, 2001 and they continue to be complex events today. However, one

key difference now exists. Before 9/11, the immediate focus of everyone's attention was the quantity of oil spilled. Today, the first question asked after a release is not how much oil has been spilled but rather what was the cause. More specifically, was the spill the result of an act of terrorism? A recent explosion on a gasoline barge at an oil and gas storage facility in Staten Island, New York illustrates the point. A leading national newspaper devoted the first five paragraphs of its lead story on the explosion to a discussion of whether or not there was a terrorist attack. FBI officials were interviewed for the story.

Was the clean up of that spill hampered because of the terrorism investigation? We will probably never know, because the gasoline that escaped from the barge quickly evaporated and the clean up was not conducted until the fire resulting from the explosion was extinguished. The next spill, however, might be a crude oil spill where every minute in response time counts. While the shipowner is trying to minimize the spill, the F.B.I. might have already taken control of the spill scene to conduct an investigation, possibly evacuating the crew and locking out the spill responders and their equipment. If this in fact occurs, the cost and complexity of the cleanup will increase dramatically, the environmental damage will be greater, and the possibility that the shipowner's actions are found to be insufficient could become a reality, resulting in criminal sanctions. What if it is determined that a spill occurs as a result of an act of terrorism? Will the same criminal liabilities apply? Will these liabilities apply even in those instances where the spiller failed in some way in their security efforts so that the spill in part could be attributed to that failure? If the event gets out of control, will the discharging vessel or facility be expected to pay for the additional costs?

Even if a spill scene is not in lockdown status, there could be a lack of access if spill response personnel do not have the appropriate identification. While a national standard for transportation worker security cards will be put in place at some point by the Transportation Security Agency, port facilities currently have individual requirements for proper identification. For spill response crews that may need access to multiple facilities even at a single spill, this could impede spill responders' ability to timely deal with an oil spill.

There is also the issue of which federal agency will be in charge of a pollution event. Historically, the Coast Guard is the lead agency and holds the position of authority as Federal On-Scene-Coordinator (FOSC) for most waterways and implements the National Oil and Hazardous Substances Pollution Contingency Plan, which is the federal plan for handling oil and hazardous substance spills. The government and industry have adopted the Incident Command System (ICS) and Unified Command System (UCS) to effectively respond to spills and mitigate their impact. The Department of Homeland Security is currently in the final stages of creating a single plan that would address all

hazards and would presumably include terrorism concerns in addition to spill response. The Federal Bureau of Investigation (FBI) would then be the lead agency that would investigate when there is a possible terrorist event, overriding the authority of the FOSC.

CONCLUSION

The threat of terrorism is real. But vessel owners, their insurers, and government entities must now work to integrate the response to the terrorism threat to our existing spill response infrastructure that has been developed under OPA, and not unnecessarily increase a shipowner's exposure to criminal liability. The National Response Plan that will be released by the Department of Homeland Security should help coordinate government agency actions following an incident and possibly help mitigate this exposure with clearer guidelines for all that are responding to an event.

BIOGRAPHY

Andrew Garger joined WQIS in 1997 as general counsel. His duties include supervising outside counsel in litigation matters, assisting WQIS management in various corporate and personnel matters, and overseeing WQIS' legislative efforts. Prior to joining WQIS, he clerked in the United States Court of Appeals for the Fifth Circuit and practiced admiralty law at law firms in Seattle and New York. He is a member of the Maritime Law Association, the American Corporate Counsel Association, the American Bar Association, the New York Bar Association, and is the Chairman of the Liability Committee of the International Union of Marine Insurance.

Mr. Garger is a graduate of New York University School of Law and the United States Merchant Marine Academy.

Richard Hobbie is President of WQIS. He is a graduate of Columbia University and has been involved with pollution matters since 1971 as a Coast Guard officer, response contractor, underwriter, and consultant. He is President of the Board of Commissioners of Pilots of the State of New York and is a member of the Liability Committee of AIMU, the Maritime Law Association, SNAME, American Society of Naval Engineers and the Association of Average Adjusters of the U.S. He has been an instructor at the USCG OSC Crisis Management School and has given numerous presentations on pollution liability and environmental issues.

- 1 While this article is written primarily from a vessel operator's perspective, most of it applies to facility operators and it should be noted that eight states in the US make cargo owners either jointly or contingently liable along with the vessels.