Two avenues to recovering Deepwater-related losses

TWO potential avenues for recovery of losses caused by the Deepwater Horizon-related oil spill were analysed in front of a capacity audience of the British Insurance Law Association on September 17 by Richard Mackowsky, a partner in the global insurance group of Coopers & Lybrand.

The Deepwater Horizon catastrophe resulted in a leak of up to 60,000 barrels of oil a day. By the time the leak was stopped on July 15, approximately 4.5 million barrels had escaped into the Gulf of Mexico, making it the worst release in history.

The spill has resulted in enormous damage to the Gulf's natural resources and economic losses by businesses and individuals along the US Gulf Coast. After analysing the fact of damage in some detail, Mackowsky addressed two potential avenues for recovery of losses caused by the spill.

The comprehensive federal statute, the Oil Pollution Act of 1990 (OPA), creates a strict liability scheme for damage caused by pollution discharges. The party deemed responsible is potentially liable for damages to natural resources and property, loss of subsistence use of natural resources and loss of profits or impairment of earnings capacity. BP has been designated a responsible party. Damages are capped at $750m, but BP has agreed it will not attempt to enforce that limitation.

BP established a claims process in compliance with its duties under OPA, since replaced by the Gulf Coast Claims Facility, which is responsible for all decisions relating to the processing of claims and must determine which losses should be deemed proximately caused by the spill.

Individuals or businesses suffering losses related to the spill may also seek recovery under the property insurance policies if they established coverage and sustained physical loss or damage as a result of a covered peril.

In addition to property that comes into direct contact with oil, potentially resulting in damage, it is also possible houses or businesses have been exposed to oil films. If the houses are expensive enough to impair the habitability of the dwelling or other structure, they may be deemed to have caused physical loss or damage.

Policy exclusions, such as those for pollution, contamination or flood, may also apply to bar coverage.

Finally, businesses may also seek coverage for lost income under their business interruption policies if they can establish their operations were suspended as a result of damage to covered property caused by a covered cause of loss.

Decision in Omega raises possibility of claiming liability on more than one basis

IN Omega Petroleum v Aspen Insurance, the English High Court has ruled, when presenting a claim against liability insurers, a decision is entitled to rely upon a basis of liability that was never argued against it, reports Neil Braund, a partner in Clyde & Co LLP's insurance department.

The case involved uranium by-products (Uranium) purchased from a cattle plant in a specialised sale. A government inspection made after the sale revealed the cattle plant had failed to comply with European Union rules designed to prevent the spread of bovine spongiform encephalopathy. Large quantities of material in the possession of Omega and its customers had to be destroyed.

Omega's customers claimed damages from Omega for breach of the implied term of satisfactory quality and Omega made the same claim against the cattle plant. A judgment in 2009 confirmed the claim of contractual liability made directly from Omega's customers to the cattle plant. Omega paid the claim made against it and pursued the liability insurers of the cattle plant (which had been the meantime ceased trading) under the Third Parties (Rights Against Insurers) Act 1930.

The insurers argued the cattle plant's only proving liability had been for breach of contract and this triggered a policy exclusion for liability "arising under any contract or agreement unless such liability would have been attached in the absence of such contract or agreement". In response, Omega argued the cattle plant was equally liable in tort.

Departing from the reasoning of Justice Tomlinson in LB Hanbury v Municipal Michael (2001), Justice Clarke held Omega could make its argument even though the judge hearing the liability issue had never been asked to consider the tort claim. The liability judgment should not have been treated as determinative because "there was no control over the allegations that were made against it. Clarke J also found to apply the exclusion, the insurer would need to prove:

1) The underlying liability arose from contract, and
2) The liability would not have attached without a contract.

The insurer was unable to discharge that burden because they had put forward no evidence to dispel the insurer's argument.

Clarke J was also satisfied, without hearing new evidence, the cattle plant was liable to Omega in tort. Based on a series of factual inferences drawn from the underlying judgment, Clarke J concluded the cattle plant had acted negligently in failing to comply with the relevant regulations. The insurer's liability was therefore covered.