

ALERT

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COURT ISSUES SIGNIFICANT RULING REGARDING PERSONAL INJURY CLAIMS IN THE DEEPWATER HORIZON LITIGATION

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In a recent [Alert](#), we advised of an important decision affecting maritime interests and their insurers in the multidistricted *Deepwater Horizon* litigation currently pending before Judge Barbier in federal court in New Orleans. (*In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, MDL No. 2179.) On October 4, 2011, Judge Barbier rendered yet another significant decision, this time relating primarily to personal injury claims.

The *Deepwater Horizon* was the mobile offshore drilling unit (MODU) that caught fire and exploded on April 20, 2010, killing 11 workers, injuring numerous others, and resulting in the discharge of tens of millions of gallons of oil into the Gulf of Mexico before the well from which the MODU was drilling was finally capped approximately three months later. The case pending in New Orleans involves thousands of claims, including those of the survivors of the 11 deceased individuals, numerous claims for personal injury, and many varieties of claims for environmental and economic damages. The October 4 decision relates to one of a series of master complaints that involves claims for personal injury due to exposure to the oil during cleanup operations and the use of dispersants. Essentially, the claimants assert federal and state law claims for negligence, negligence *per se*, strict products liability, nuisance, and battery. The claims include recovery of medical monitoring costs or an order requiring that the defendants implement and fund a medical monitoring program, as well as attorneys' fees. Certain defendants moved for a declaration that they are immune from suit, relying on the doctrine of "derivative immunity," which essentially holds that, because the federal government would be immune from liability arising from

decisions or actions taken in response to the oil spill, any "Clean-Up Defendants" — including one dispersant manufacturer — are similarly entitled to immunity.

Prior to reaching the immunity issue, the court first reaffirmed its previous rulings that a) maritime law applied to the claims asserted in the action, to the exclusion of state law and b) the state law claims for negligence, negligence *per se*, products liability, nuisance, and battery were preempted by maritime law. The court also reaffirmed its previous ruling, that the Oil Pollution Act of 1990 (OPA) preempted general maritime claims against Responsible Parties under OPA. Therefore, because OPA claims were not asserted against two of the co-lessors of the well, Anadarko and MOEX, the court dismissed all personal injury claims against them.

Next, the court addressed the immunity issue. Essentially it recognized the defense under a 1940 Supreme Court ruling that allowed a private contractor to assert immunity where it 1) performed acts pursuant to valid authorization of Congress and 2) did not exceed the scope of the authority. *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940). The court further cited *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) for the proposition that state law would be displaced only where "a 'significant conflict' exist[ed] between an identifiable 'federal policy or interest and the [operation] of state law,' or the application of state law would 'frustrate specific objectives' of federal legislation." *Id.* at 507 (internal citations omitted).

The court also looked to a recent Hurricane Katrina decision, *Ackerson v. Bean Dredging LLC*, 589 F.3d 196 (5th Cir. 2009), where private entities that had dredged the Mississippi River Gulf Outlet under a contract with the Army

Corps of Engineers were sued by victims of the flooding following Hurricane Katrina. In that case, the court held the defendants were immune from suit because it was not established that they were acting outside the scope of the authority given to them by Congress.

The plaintiffs' main contention to circumvent the immunity argument was that BP, rather than the government, actually directed the cleanup operations and had "taken control" of and directed all aspects of recovery and relief efforts (as alleged in the master complaint), as a consequence of which the immunity doctrine simply did not apply. Plaintiffs also contended that even if BP had authority to use certain brands of dispersant that were claimed to be toxic, it exceeded or deviated from the scope of that authority, defeating the second prong of the test set forth in *Yearsley*. As a consequence, the court refused to dismiss the claims against the contractors on the ground of derivative immunity. However, because the decision was not based on the merits of the defendants' arguments, the ruling was without prejudice to the defendants' right to reassert the defense at a later time.

Further construing certain provisions of the Clean Water Act (CWA), the court did leave the door slightly ajar by determining that if the facts revealed that the "Clean-Up Defendants" were using dispersants as directed by the federal government, they would in fact be entitled to derivative governmental immunity. Such reconsideration, however, would have to await the factual determinations at trial.

Another interesting aspect of the ruling dealt with the claim for medical monitoring costs. As a general rule, medical monitoring costs are not recoverable in the absence of physical injury. However, the court held that where the injury consists of a disease or symptom, or some sort of emotional distress that would qualify as an injury, plaintiffs might be able to recover medical monitoring costs as an element of damages. The court also referred to a Florida law that allows for medical monitoring damages, but it dismissed claims brought under that law because of its previous ruling regarding preemption of state law claims in the litigation.

Because numerous plaintiffs alleged some form of injury, including headaches, nausea, respiratory problems, rashes, and other physical effects of exposure to the oil, the court refused to dismiss the medical monitoring claims for those plaintiffs. However, any plaintiffs who did not allege physical injury failed to state a cause of action for medical monitoring costs and, as to those plaintiffs, the medical monitoring claims were dismissed.

The court also allowed maritime claims for negligence and gross negligence as well as maritime products liability claims against one of the dispersant manufacturers. Although, as above, any medical monitoring cost claims in the absence of physical injury were dismissed.

Turning to the punitive damage claims, the court made a distinction between plaintiffs who qualify as seamen under the Jones Act and non-seaman plaintiffs. As to seaman plaintiffs, the court ruled that no punitive damages could be asserted based on Supreme Court cases that hold that non-pecuniary losses are not recognized by the Jones Act. However as to non-seaman, the court reaffirmed its view that punitive damages are recognized under general maritime law and that therefore, claims for personal injuries by non-seaman could include claims for punitive damages. Of course, as indicated above, any claims against OPA Responsible Parties, which would not be under general maritime law, could still include punitive damage claims under the courts earlier ruling of August 26, because the court specifically held that OPA did not preempt the ability to assert punitive damage claims.

As always, there were several other rulings of less significance and we would expect that this decision will also be appealed, as a consequence of which the above rulings are anything but the final word on the subject.

To discuss any questions you may have regarding the issues discussed in this alert, or how they may apply to your particular circumstances, please contact Christopher B. Kende at 212.908.1242 or ckende@cozen.com or Caroline Morgan at 212.908.1213 or cmorgan@cozen.com.