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Risk Mitigation Post Macondo



Brendan Cook Houston

Risk Mitigation





Post Macondo

Overview

- Macondo Litigation Status.
- Risk Mitigation Programs.
- Contract Implications.
 - Indemnity and Insurance.

Tracking Macondo: Where Are We In 2015?

Developments in Multi-District Litigation

- MDL 2179 (focus)
 - "In re Oil Spill" cases.
 - Judge Barbier, Eastern District of Louisiana.
 - High-profile, complex, encompasses majority of litigation issues.
- MDL 2185
 - Judge Ellison, Southern District of Texas.
 - Securities class litigation set for trial January 11, 2016.
 - Re-pleading of certain claims allowed in ERISA litigation.

In re Oil Spill - MDL 2179

- Claims include wrongful death, personal injury, economic damages, environmental, insurance and indemnity coverage.
- Three Trial Phases:
 - Phase 1: Liability for Loss of Well Control.
 - Phase 2: Quantification of Oil Spilled and Source Control Efforts.
 - Penalty Phase: Amount of Civil Penalties Owed to the US under the CWA, per rulings in Phases 1 and 2.

MSJ (1/26/2012)

- Indemnity will cover gross negligence.
- Will not extend to punitive damages.
- Did not extend to CWA penalties, but did cover OPA.
- Can Breach of Contract vitiate indemnity?

MDL 2179 Phase 1: Liability Findings

- Feb. 22, 2012: District Court ruling on U.S. gov't MSJ re strict liability under Sec. 311(b)(7)(A) of CWA.
 - BP and Anadarko strictly liable for subsurface discharge.
 - Subsurface discharge from Macondo well rather than Deepwater vessel.
 - 5th Cir. affirmed District Court finding June 4, 2014.
 - Denied rehearing 7-6 on July 21, 2014.
 - Petition for cert. to SCOTUS filed April 9, 2015.

MDL 2179 Phase 1: Liability Findings

- Sept. 4, 2014: Liability and Fault Allocation Findings.
 - BP, Transocean entities (excluding Transocean Ltd.), Halliburton liable under general maritime law for blowout, explosion, and spill form Macondo.
 - BP's gross negligence, willful misconduct → subject to enhanced civil penalties (set at maximum of \$4,300/barrel).
 - BP "Operator" and "person in charge" for purposes of CWA.
- U.S. and BP now arguing re merit of interlocutory appeal.

MDL 2179 Phase 2: Quantification Findings

- First conclusive finding re barrels of oil spilled.
 - BP Estimate: 2.45 million barrels.
 - DOJ: 4.1 million barrels.
 - Judge Barbier: 3.19 million barrels.
- BP not grossly negligent in source control efforts
- Result:
 - 3.19 M barrels subject to CWA penalty.

MDL 2179 Phase 3: Penalty

- Trial commenced January 20, 2015.
- Post trial briefing concluded April 24, 2015.
- Court to determine amount of civil penalties owed under CWA.
 - Application of CWA penalty factors to Phase 1 & 2 findings.
 - Efforts to mitigate, seriousness of violation, degree of culpability involved, extent already penalized, etc.
 - Great discretion given to District Court.

Risk Mitigation

What Should An Effective Risk Management Strategy Include?

- A holistic plan that spans all stages of project development and operation.
- A balance between technical and human factors.
- A balance between leading and lagging "indicators".
- Coordinate with third parties.

Preventative Maintenance

- Improve/assure safety.
 - Corporate culture.
 - Hazard awareness training.
 - Technical/regulatory compliance.
- State of the art training.
- Improved well control.
- Aggressive risk management strategy.

Contractual Implications

Contractual Liability Post-Macondo

- Departure from past regime of "knock for knock" indemnity
 - The cause or degree of fault matters: limits indemnity.
- Increased need to expressly state all possible terms so as not leave anything open to interpretation.
 - Indemnity for legal costs, defense costs, and gross
 negligence must be expressly stated to be valid in the U.S.
- When drafting indemnity and limited liability clauses, must account for the differences of enforcement in various jurisdictions.
 - Ex: U.S. Circuit split over limited liability clauses.

Contract Negotiation: Operators v. Contractors

- "Tug of war" between operators and contractors.
- Contractors favoring increasingly specific indemnity provisions that include:
 - Legal fees, defense costs, gross negligence, strict liability--must be expressly stated to be effective.
- Operators, on the other hand, likely to prefer more general clauses.
 - Legal fees, defense costs, gross negligence not mentioned → U.S. court likely to find no indemnity.

Contract Negotiation: Operators v. Contractors

- Now that there is no guarantee of indemnity or limited liability for certain damages (i.e. punitives), more and more likely that contractors will desire increased oversight and control.
 - However, increased involvement in operators may → increased exposure to liability.
- Realization that damages, liabilities (and resulting amount of indemnities) can be **enormous** may cause smaller operators, such as those in the North Sea, to stick to "safer" operations.

Indemnity Basics

- MSA is a building block for most operations.
- Must have valid "magic language" to obtain indemnity for one's own negligence.
- Indemnity (and "magic language") must be broad enough to extend to all intended beneficiaries.
- Anticipate and address possible restrictions on indemnity.
- Be aware of any issues relating to the scope of the indemnity or the scope of the MSA.
- Deepwater Horizon indemnity for gross negligence (as opposed to release) is not against public policy under maritime law-indemnity for punitive damages is.

Carefully Consider Who Should be the Indemnitees

- Use defined term such as "Company Group".
- Consider all parties you may want protected.
- Include contractors and subcontractors or use another approach to provide pass-through protection.
- Expand use of a "Company Group".
 - Allows consistent and uniform risk allocation scheme.
 - Use same definition in insurance requirements and certificate of insurance.
 - Use same definition in other contracts if at all possible.

Insurance Basics

- Named as additional insured.
- Waiver of subrogation.
- Coverage must be primary (at least for risks assumed by naming party).
- Insurance not a limit on indemnity.
- Dovetail insurance with indemnity-extend to same parties.
- Insurance may provide more protection in some instances.

Keys to Contractual Risk Allocation

- Understand big picture
 - Recognize the impact of drilling contracts.
 - Consider different reciprocal indemnity approaches.
- Prepare your "pass-through" protection plan.
- Develop your master service agreements (MSA's) and analyze how other contracts will come in to play.
- Devil is in the details: Focus on the indemnity, insurance and limitation of liability.
- Coordinate with your risk management department and insurance broker.