

Significant Rulings From the Deepwater Horizon Court on Discovery and Evidentiary Matters

Toxic Tort and Environmental Law Update

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The U.S. District Court for the Eastern District of Louisiana has been handling hundreds of consolidated cases (involving more than 100,000 individual plaintiffs) brought in the wake of the explosion, fire and capsizing of the Deepwater Horizon mobile offshore drilling unit in the Gulf of Mexico on April 20, 2010. (See *In re Oil Spill by the Oil Rig "Deepwater Horizon,"* E.D.LA Case 2:10-md-02179.) As a result of the explosion, millions of gallons of oil were released into the Gulf from the Macondo oil well before it was capped three months later. On March 2, 2012, BP plc, which contracted with Transocean to operate the Deepwater Horizon, announced a proposed settlement that would resolve many of the individual and business claims but not claims brought by the federal, state or local governments. Although the case has not proceeded to trial, the court has already issued many important discovery and evidentiary rulings, some of which we summarize here.

Court Precludes Admission of Evidence Regarding BP's Prior Accidents

The court recently issued a pivotal pretrial order excluding evidence of prior oil refinery accidents, oil spills, and similar incidents involving BP, as well as evidence of prior criminal, civil or regulatory proceedings against BP. (Order and Reasons Regarding Motions *in Limine* to Exclude Instances of Prior Alleged Improper Conduct and Prior Adverse Criminal, Civil or Regulatory Proceedings, Document 5634, dated February 9, 2012.)

The plaintiffs, defendant Halliburton Energy Services, and the United States had indicated their intention to offer evidence concerning three prior industrial accidents involving BP: an explosion at BP's Texas City oil refinery, the rupture of a corroded pipeline in Prudhoe Bay, Alaska, and system failures at a BP petrochemical facility in Scotland. They also intended to offer evidence of prior legal proceedings and fines levied against BP, as well as BP's settlements of such proceedings.

Federal Rule of Evidence 404 explicitly excludes evidence of prior acts or occurrences to prove a person's (including a company's) character or to show that the person acted in conformity with the alleged character. Commonly known as evidence of "prior bad acts," such evidence is often excluded because it improperly turns the fact finder's focus from whether the defendant acted in such a way as to cause the harm at issue in the case, to consideration of other, allegedly similar "bad acts" in the past. Courts are well aware of the prejudicial nature of such evidence, and how it can be used to persuade a jury to improperly impose liability and punish a defendant for past occurrences.

However, Rule 404 allows evidence of prior acts if intended to prove some other relevant matter, such as motive, knowledge or lack of accident or mistake. Such admissible prior acts must be substantially similar to the incident at issue in the case in order for them to be relevant to proving these other matters.

The Deepwater Horizon parties offering the evidence all denied intending to use it to prove BP's "bad character." Rather, they argued that the evidence would show that alleged deficiencies in BP's process safety system led to the Deepwater Horizon oil spill. They also argued that the prior incidents were relevant to showing BP's knowledge of past failures and its motives for failing to take costly steps to prevent the oil spill, such that the Deepwater Horizon spill could not be considered an accident or mistake.

In the end, the court agreed fully with BP, and ordered that all of the evidence of prior incidents and proceedings that the parties wanted to use against BP would be excluded from trial. The court found that none of the three prior accidents were similar enough to the Deepwater Horizon spill to be relevant to the issues of the case, as they were remote in time, occurred at land-based facilities, and involved different process safety issues. The court also excluded the evidence because its use at trial would waste large amounts of the court's time.

Although the court left open the possibility that such evidence would be admissible at a later stage of the trial involving penalties under the Clean Water Act or punitive damages, this important order

would preserve fairness in the liability phase and helps ensure that the court during the bench trial remained focused on the spill at issue rather than irrelevant prior industrial accidents.

Transocean Waived Work Product Doctrine Regarding Documents Related to Post-Incident Investigation

BP moved to compel production of numerous documents withheld by Transocean under the work product doctrine, which generally precludes production of documents prepared to assist with trial preparation. Many of these documents were written summaries of witness interviews conducted by paralegals and other members of the Transocean "investigative team" following the oil spill. BP argued that Transocean waived the work product doctrine by publishing, both to opposing parties and to the public, its investigation report, which relied upon the disputed privileged documents. The report was alleged to be the culmination of Transocean's findings into its investigation regarding the causes of the well blowout. BP argued that, as a matter of fairness, when a party produced a report that presents findings of an internal investigation, the underlying investigative materials lose work product protection. BP also argued that Transocean cannot selectively disclose the favorable results of its investigation, while simultaneously withholding its unfavorable findings. BP argued that the report was entirely favorable to Transocean's position that the spill was caused by BP.

Over Transocean's objections that it never intended to use the report "offensively," and that it never intended to waive any work product privileges, the court held that Transocean waived any such privileges by disclosing the report. (Order, Document 3894, September 1, 2011.) The court noted that it was immaterial whether Transocean intended to make offensive use of the documents because other parties were still at liberty to make offensive use of the report, which would benefit Transocean. However, the court held that other documents, namely checklists for draft reports, were prepared "at the direction of counsel," and thus remained protected by the attorney-client privilege from disclosure. This ruling appears to draw a fine line between documents that contained factual statements that underlie the disclosed report, which no attorney was directly involved in preparing, and documents prepared by an attorney that directed their client's representatives on how to conduct such an investigation.

Plaintiffs Lack Standing to Bring Claims for Injunctive Relief

The plaintiffs' complaints included claims for injunctive regarding the spill based on the Clean Water Act (CWA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Emergency Planning and Community Right to Know Act (EPCRA) and the Endangered Species Act (ESA). BP and Transocean brought motions to dismiss these claims, and basing much of their argument on a number of narrow, technical considerations, such as failure to give proper presuit notice of the claims under the federal statutes, petroleum exclusions in the statutes, failure to allege irreparable harm, failure to join indispensable parties, etc.

In granting the motions to dismiss, the court entirely ignored these narrowly focused grounds. (Order, Document 2784, June 16, 2011.) Instead, the court grounded its ruling in the Constitution's fundamental requirement that a federal court can adjudicate only an actual "case or controversy," as to which it can provide substantive relief to the plaintiffs for their claims. Based on this constitutional requirement, the court held that the plaintiffs lacked standing to pursue these claims, and that in some instances the claims themselves had become moot. In order to have standing, the plaintiffs must be able to show that the injuries they claim can be addressed and in some fashion remedied by the court if they prevail. However, the court stated that under the facts of this case, it would not be able to provide any injunctive relief that would provide a remedy to the plaintiffs. The court found that the Macondo well was no longer functioning, the Deepwater Horizon vessel had been destroyed during the spill, and there was no ongoing release of oil into the Gulf or facility from which a release could occur. The court further found that remediation efforts were already underway, there was no claim that those efforts were insufficient, and in any case the efforts were controlled by various federal agencies rather than the defendants. Thus, it was impossible for the court to fashion any sort of injunctive remedy that would provide redress for the plaintiffs' claims. Accordingly, the court found that the plaintiffs lacked standing under the Constitution to bring these claims for injunctive relief against the defendants. The court also held that the claims for injunctive relief were moot, again because the Macondo well was no longer discharging oil into the Gulf and an injunction was not needed to stop discharges that had ceased in July 2010. This ruling highlights the ongoing importance at the trial level of fundamental rules, grounded in the Constitution's "case or controversy" language, governing who has standing to bring a suit based on federal law.

Testing of Non-Rig Cements Found to Be Relevant

Halliburton filed a motion to exclude any evidence of testing of cement blends after the well blowout that did not come from the blend maintained on the Deepwater Horizon and actually used in the Macondo well. Halliburton argued that testing of non-rig blends was irrelevant to the case under Federal Rules of Evidence Rules 402 and 403 because they were not sufficiently similar to the cement actually used. Halliburton argued that cement blends are unique and develop their own chemical properties over time based on their environmental and storage conditions. They further argued that there would likely be significant variability between tests conducted on non-rig cements and tests conducted on actual rig cement. Halliburton also noted that their contract with BP required that tests be conducted solely on rig samples.

The court denied the motion, citing to the arguments raised by BP, Transocean and the U.S. for the admissibility of this evidence. (Order, Document 5551, February 1, 2012.) Their main argument was that even if such evidence was not the *best* evidence regarding the stability of the cement used in the well, it was still relevant evidence regarding that issue. They noted that Halliburton could still argue the weight of that evidence to the jury – that is, that the evidence as a whole showed that the cement that was tested was sufficiently different from the cement actually used in the well for it to be of any real evidentiary value. Halliburton could also argue that such testing should be ignored in favor of its own evidence – including testing on rig cements – that the cement was stable. The court also based its ruling on the fact that Halliburton itself performed and relied on post-incident testing of non-rig cements, thus suggesting that such cements were probative of the stability of the cement located in the well. This ruling indicates that federal trial courts will give broad latitude to the offer by any party – defendants as well as plaintiffs – of arguably relevant evidence and leave it to the jury to determine the weight, if any, that should be given to the evidence.

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