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Major Maritime Reform Efforts Advancing in the U.S. Congress Go Well Beyond the DEEPWATER HORIZON Incident

Introduction

Since shortly after the DEEPWATER HORIZON incident on April 20, 2010, the U.S. Congress has had under consideration numerous measures addressing not only drilling operations in the U.S. Gulf of Mexico, but also a host of other changes that could affect many other aspects of U.S. maritime commerce. We focus here on prospective changes in the law as already passed by the U.S. House of Representatives that could have significant maritime industry impact beyond drilling operations, such as proposed changes to the Shipowners' Limitation of Liability Act and efforts to "Americanize" the U.S. Exclusive Economic Zone (EEZ).

On July 30, 2010, the House of Representatives passed a package of maritime reform measures in a bill (H.R. 3534), known as the CLEAR Act, that was developed by several committees, particularly the Natural Resources, Transportation and Infrastructure and Judiciary Committees. The Obama Administration has indicated strong support for the CLEAR Act in general.

Earlier, on July 1, 2010, the House had also passed a focused maritime liability bill (H.R. 5503). Although similar changes have been under active discussion in the U.S. Senate, no bills were adopted by the Senate on the subject before the Senate left for its August recess.

The changes being contemplated in these potential laws that go beyond dealing with a future DEEPWATER HORIZON-type incident relate to three general categories—pollution liability, general liability, and regulatory changes.

1. Pollution Liability

One of the key laws governing oil pollution liability in U.S. waters is the Oil Pollution Act of 1990, or OPA 90, enacted in response to the EXXON VALDEZ incident. Many of the problems thought to have been addressed in OPA 90, such as the trade-off between strict liability of responsible parties and a limitation of liability for certain types of damages, have been revisited in the CLEAR Act. Most of those changes affect only mobile offshore drilling units like the DEEPWATER HORIZON and generally offshore exploration, development, and production of oil and gas. Many changes, however, also will affect vessels – both tank vessels and non-tank vessels – entering U.S. waters without any connection to offshore drilling.

OPA 90 Liability Cap. One of the prospective changes that has received widespread publicity is the potential increase or elimination of the $75 million cap on certain damages by a facility spill under OPA 90. Related changes have been proposed with respect to Certificates of Financial Responsibility (COFR) by which vessel owners and facility owners must provide evidence of financial responsibility up to certain limits. The CLEAR Act would eliminate the $75 million cap altogether for all offshore facilities (but not the corresponding vessel limits) and dramatically increase COFR limits for facilities (but not for vessels).

However, the CLEAR Act does leave open the door for future administrative changes to the liability cap and COFR guarantees applicable to vessels as it directs the president to review

at least once every three years whether the cap is sufficient and to increase that cap by regulation "commensurate with the risk of discharge of oil presented by a particular category of vessel, facility, or port."

Permissible Damages Expanded. The CLEAR Act would also expand the scope of permissible damages recoverable from both ship owners and facility owners under OPA 90. Currently, those damages consist of damages to natural resources, real or personal property, subsistence use, government revenues, profits and earning capacity, and public services. The CLEAR Act would add a new category relating to damages to human health to include fatal injuries and mental health impacts. As with other proposed OPA 90 changes, the inclusion of human health damages would be effectively retroactive to April 19, 2010 without regard to whether such claims were connected to the DEEPWATER HORIZON incident.

Responsible Party Definition Expanded. A key OPA 90 concept is the establishment of a "responsible party" with respect to every potential discharge source, including vessels and facilities, with a responsible party having strict liability for certain damages. In the case of a vessel, the responsible party is "any person owning, operating, or demise chartering the vessel." The CLEAR Act would expand the concept of the responsible party to include minority owners of the responsible party so long as they owned at least 25 percent of that entity (directly or indirectly) and the assets of the responsible party proved to be insufficient to pay claims against the "responsible party." This amendment would be effective for any incident occurring on or after Jan. 1, 2010.

Oil Spill Liability Trust Fund Recovery Authority Strengthened. OPA 90 permits the Oil Spill Liability Trust Fund to recover in federal court from a responsible party or other person liable for any compensation paid by the Fund for removal costs or damages. The CLEAR Act would make recovery easier for the government because it provides that "the Fund shall recover all costs and damages paid from the Fund unless the decision to make the payment is found to be arbitrary and capricious." This provision appears to free the Fund of its existing burden to prove the underlying damages in the federal court proceeding and would heighten the importance for a responsible party to challenge payments by the Fund during the administrative process.

Standard of Review Made More Favorable for Natural Resource Damage Claims. OPA 90 permits recovery from the responsible party for natural resource damages. Such damages may be recovered by a trustee appointed by the president, a state governor, or an Indian tribe or foreign government. The CLEAR Act would make any determination or assessment of such a trustee subject only to the deferential standard of judicial review afforded to U.S. government agencies by the Administrative Procedure Act. This could have the effect of increasing the already significant leverage natural resource trustees have to extract settlements from responsible parties.

Federal Role Strengthened in Claims Processing. The CLEAR Act seeks to strengthen the role of the federal government in ensuring that the processing of claims occurs locally for any spill of national significance and in obtaining information from any responsible party regarding the processing of claims such as average processing times. The Act also seeks to prevent a responsible party from securing a meaningful release from a claimant without compensating the claimant for its OPA 90 damages.

Federal Government Enforcement Costs Made Expressly Recoverable. The CLEAR Act would add the federal government's cost of enforcing OPA 90 as a "removal cost" payable by the responsible party. In other words, a responsible party might have to pay the cost of its prosecution.

Response Plans Strengthened. One of the key changes made by OPA 90 was to require individual vessel and facility spill response plans. Many in Congress have criticized the DEEPWATER HORIZON response plan as being a "cookie cutter" plan that proved to be grossly inadequate. The CLEAR Act responds to this criticism by, among other things, requiring redundancies in response plans, limiting the ability of the federal government to grant plan waivers (except with respect to non-tank vessels), requiring "a probabilistic risk analysis for all critical engineered systems of the vessel or facility," making such analysis available to the public, and increasing significantly administrative penalties for failure to comply with response plan requirements.

2. General Liability

Congress has also focused on several laws that have long governed liabilities of vessel owners to potential claimants, such as the Death on the High Seas Act, the Shipowners' Limitation of Liability Act, and the "Jones Act" governing worker's compensation claims. H.R. 5503, passed by the U.S. House of Representatives on July 1, 2010, would repeal the Shipowners' Limitation of Liability Act and significantly expand available damages under the Death on the High Seas Act and the Jones Act without limiting those changes to the DEEPWATER HORIZON incident. The repeal and expansions are likely to have significant vessel owner insurance impacts.

The Death on the High Seas Act (DOSHA), enacted in 1920, provides for liability for wrongful deaths occurring outside U.S. territorial waters. Although DOSHA was an enabling statute at the time, it has come under criticism in the past and now in connection with the DEEPWATER HORIZON incident because it limits recovery to pecuniary damages only and does not provide

for recovery of pre-death pain and suffering or for non-pecuniary loss of care, comfort, and companionship (as would be generally available for a wrongful death occurring within U.S. territory).

Similarly, Section 33 of the Merchant Marine Act, 1920, referred to as the "Jones Act" (and not to be confused with Section 27 of that act governing cabotage which is also referred to as the "Jones Act") grants merchant mariners a right of action that is similarly limited to pecuniary damages.

H.R. 5503, passed by the House on July 1, 2010 would permit the recovery of non-pecuniary losses including "fair compensation for the decedent's pain and suffering" and "loss of care, comfort, and companionship" under DOSHA. H.R. 5503 would also amend the Jones Act to permit "recovery for loss of care, comfort, and companionship."

The Limitation of Liability Act (LOLA), enacted in 1851, limits a vessel owner's liability to the post-accident value of the vessel and her pending freight. LOLA also provides a very important procedural method – referred to as "conscursus" – that grants the ship owner the right to require all claims against the vessel (other than OPA 90 claims) to be brought within a single jurisdiction of the vessel owner's choosing (given jurisdiction and venue requirements) within a limited period of time as set by the court. Transocean, Ltd., the owner of the DEEPWATER HORIZON, sought to consolidate all state and federal claims as permitted under LOLA in a single federal court in Texas after the incident.

H.R. 5503 would repeal LOLA because, according to the accompanying report, the law "has clearly outlived any legitimate purpose it may once have served" thereby eliminating LOLA as a substantive and procedural defense available to vessel owners. All of the amendments sought by H.R. 5503 would be effective upon enactment including for pending cases.

3. Regulatory Changes

In addition to making changes affecting general vessel owner liability, the House of Representatives has passed a number of regulatory measures that will affect vessel owners beyond those directed to drilling operations.

OCSLA Extension to Affect Offshore Wind Farms. Federal law was extended to offshore activities beyond U.S. territorial waters via the Outer Continental Shelf Lands Act of 1953 or OCSLA. OCSLA was originally written primarily to facilitate offshore oil and gas production and is written in terms of such activities. As the offshore development of alternative energy sources such as wind power has progressed in the United States, issues have been raised about the application of OCSLA to such activities. In particular, the Jones Act has uncertain application beyond the territorial waters of the United States based on current law.

The CLEAR Act addresses this issue by amending the jurisdictional section in OCSLA to encompass not only exploration, development and production of oil and gas, but also such activities with respect to "energy from sources other than oil and gas."

Americanization of the U.S. EEZ. Many activities undertaken in the U.S. exclusive economic zone require the use of a Jones Act qualified vessel. A Jones Act qualified vessel is one that was built in the United States, documented in the United States, and owned by a Jones Act qualified U.S. citizen (which requires 75 percent U.S. citizen beneficial ownership and U.S. management). Certain activities, such as drilling, construction activities, and pipe and cable laying have historically not required the use of a Jones Act qualified vessel outside U.S. territorial waters.

The CLEAR Act extends Jones Act-like restrictions to any such activity engaged "in support of exploration, development, or production or resources in, on, above, or below the exclusive economic zone." Specifically, the bill requires such activities to be undertaken by a U.S.-flag vessel, which may be constructed abroad and re-documented in the United States, and owned by a Jones Act citizen person which requires, among other things, 75 percent U.S. citizen beneficial ownership.

The Americanization amendment, if enacted, would take effect "only with respect to exploration, development, production, and support activities that commence on or after July 1, 2011." The Americanization amendment does not affect activities for which a Jones Act vessel (one constructed in the United States) would already be needed.

The Obama Administration has expressed international trade reservations with regard to the Americanization amendment.

U.S. Build Requirement for Offshore Facilities. The CLEAR Act would require that any "offshore facility" used to "engage in support of exploration, development, or production of oil or natural gas in, on, above, or below the exclusive economic zone" of the United States would have to be built in the United States. The requirement would be effective upon enactment. A waiver provision is provided whereby the Secretary of the Department of Homeland Security for facilities already under contract upon the date of enactment or a U.S.-built facility would not be available in a reasonable time or in the event of an emergency.

Repeal of Single Hull Tanker Exception. OPA 90 contains an exemption permitting the use of single-hull tank vessels in U.S. waters until Jan. 1, 2015 serving the LOOP and engaging in lightering activities. The CLEAR Act would repeal this exemption effective Jan. 1, 2011.

Conclusion

The CLEAR Act and similar laws being considered in the Senate could have major liability and therefore insurance impacts on vessel owners who have no connection to deep water oil and gas exploration, development and production. The CLEAR Act would also, for the first time, close U.S. waters to foreign vessels of all kinds engaged in oil and gas work and require all offshore oil and gas facilities to be built in the United States. When Congress returns from its August recess, it is quite possible, if not likely, that Congress will act on some form of the DEEPWATER HORIZON bill, which may include many of the measures included in the CLEAR Act and H.R. 5503.

If you have any questions regarding this briefing, please contact one of the following Winston & Strawn LLP partners.

Washington, D.C.

H. Allen Black III	hblack@winston.com	(202) 282-5821
Lawrence I. Kiern	lkiern@winston.com	(202) 282-5811
Constantine G. Papavizas	cpapavizas@winston.com	(202) 282-5732

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