STATEMENT OF
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ON
LEGAL LIABILITY ISSUES
SURROUNDING THE GULF COAST DISASTER
BEFORE THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
MAY 27, 2010

Good morning, Mr. Chairman and distinguished members of the Committee. This statement is submitted in response to an invitation from the Committee dated May 21, 2010 to testify concerning "Legal Liability Issues Surrounding the Gulf Coast Disaster." I am Vincent Foley, a partner in the maritime practice group of Holland & Knight LLP. My specialty within the practice group is environmental liability and oil spill litigation. In practice, I have represented ship owners, charterers, oil companies, and insurers of maritime risks. During the period of 2003-2008, I also represented a sovereign, the Kingdom of Spain, in litigation in New York arising out of the sinking and oil spill from the *M/V Prestige* off the Northwest coast of Spain on November 13, 2002.

Oil Spill Liability – Federal Law

The Oil Pollution Act of 1990 (OPA) is the primary federal statute dealing with liability and compensation for the discharge of oil in navigable waters of the United States. The statutory scheme for oil pollution also includes the Federal Water Pollution Control Act (FWPCA) which provides for both mandatory and discretionary civil and criminal penalties against the owner, operator, or person in charge of a vessel that discharges a prohibited amount of oil or hazardous substances into navigable waters. In addition to the OPA limits described below, the FWPCA provides for civil and administrative fines on a per- day per-barrel basis under with no limit of liability.

There are several other federal statutes which provide for criminal penalties arising out of an unlawful discharge of oil. Criminal prosecutions can have a decisive impact on enforceability of limitations of liability for two reasons. First, if the company is convicted, the civil standard to pierce limits of liability is often met. Second, if the company seeks to enter a guilty plea, the company will usually have to acknowledge facts which undermine what would otherwise be a right to limit liability. This statement will focus on the civil liability and compensation scheme created by OPA.

The primary objective of OPA is to provide compensation to claimants from oil spills in U.S. navigable waters. Under OPA, strict, joint and several liability is imposed up to statutory limits against the Responsible Party (RP) for a vessel or facility from which oil is discharged or which poses a substantial threat of discharge into navigable waters of the United States. For a vessel, the RP means any person owning, operating or demise chartering a vessel. Basically, this "operator" liability may be imposed on any person or corporation which exercises the day-to-day management or control over the vessel. For an offshore facility, the RP means the lessee or

permittee of the area in which the facility is located or the holder of a right of use or easement under applicable state law or the Outer Continental State Lands Act for the area in which the facility is located.

OPA Compensation Scheme and Claims Process

OPA also created the Oil Spill Liability Trust Fund (the Trust Fund) which provides compensation to injured parties for removal costs and damages resulting from an oil spill. The Trust Fund is managed by the National Pollution Funds Center (NPFC), an administrative agency of the United States Coast Guard. The NPFC administers the Trust Fund and acts as the implementing agency of OPA. The Trust Fund is primarily sourced by an eight cents per barrel tax on petroleum produced in or imported to the United States. In addition, the Trust Fund receives income from transfers from other pollution funds, fines, penalties, accrued interest and cost recovery from RPs.

Upon receiving notice of an oil spill, the NPFC designates one or more RPs for the oil spill, and provides notice to potential claimants of the RP's claims process in order to facilitate and expedite payments to injured parties. OPA provides a two step process for claimants seeking compensation. First, a claimant may seek compensation directly from the strictly liable RP or its guarantor. Second, if the RP does not settle the claim within 90 days, the claimant can either seek compensation through litigation against liable parties (including the RP) or submit the claim to the NPFC for adjudication and payment from the Trust Fund. Upon payment, the Trust Fund will be subrogated to the rights of the claimant against the RP. The Trust Fund has a fiduciary duty to ensure that when payments are made it is done on the basis of adequate supporting documentation. Claimants requesting compensation for lost profits or earning capacity must establish that property or natural resources were injured or lost and that the claimant lost income as a result of the oil spill.

In the event a RP is not immediately identified, the NPFC itself starts the claims process for potential claimants. The NPFC is also available for RPs to submit claims under circumstances where payments have been made by the RP in excess of its statutory OPA limits. In general, the maximum payout available from the Trust Fund for any one incident is $1 billion or the balance of the Trust Fund, whichever is less.

OPA Liability of RP for Removal Costs and Damages

Subject to certain statutory limitations addressed below, the RP is liable for all removal costs including the costs to prevent, minimize, or mitigate oil pollution, and the following categories of damages (including interest accrued on OPA claims prior to judgment):

(i) injury to natural resources,

(ii) injury to real or personal property (including economic losses resulting from that injury, and loss of subsistence use of natural resources);

(iii) loss of revenues on the use of natural resources or real or personal property and

(iv) loss of profits or impairment of earning capacity resulting from such pollution, and the costs of providing additional public services during or after removal activities. 33 U.S.C. 2702 (b).

A RP has very limited defenses to liability, which are available only if the RP can establish, by a preponderance of the evidence, that the oil spill was caused solely by (1) an act of God, (2) an act of War, or (3) an act or omission of a third party (other than an employee, agent or contracting party of the RP). The RP is not entitled to these defenses if it fails to report the incident, fails to provide all reasonable cooperation in response to the spill, or fails to follow a governmental order. Even if the RP has a defense, it still must pay the removal costs and damages to any claimant, and may only recover its expenditures through subrogation against a third party or the Trust Fund after payment. In addition, an RP is not liable to a claimant if the injury resulted from the claimant's gross negligence or willful misconduct.

OPA Limits of Liability

OPA imposes strict liability for removal costs and damages against an RP up to the statutory limits set forth in the statute. Pursuant to the statute, OPA's liability "shall be imposed notwithstanding any other provision or rule of law." This has been interpreted to mean that the Shipowner's Limitation of Liability Act of 1851 (which limits liability of the owner to the post-incident value of the vessel plus pending freight and creates a separate fund for personal injury claims) does not apply to limit or circumscribe OPA removal costs and damages claims. This Act may, however, be invoked by the vessel owner to limit non-OPA claims such as property damage or personal injury caused by the incident (as opposed to resulting from the oil spill).

A Mobile Offshore Drilling Unit ("MODU") like the Deepwater Horizon may be considered a vessel under OPA. The OPA limit of liability for a vessel is calculated based upon its gross tonnage. The OPA limit for a MODU which is a vessel would be $1,000 per gross ton. The Deepwater Horizon may also be an offshore facility. OPA's definition for "facility" includes any structure used for the purpose of "exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil." For an offshore facility, the overall OPA limit is $75 million for damages plus the total of all removal costs. Although liability for removal costs for an Offshore Facility is unlimited, the limit of liability for damages of $75 million for an offshore facility has not been adjusted since OPA was enacted in 1990. The current OPA limit for onshore facilities and deepwater ports is $350 million.

In contrast, the OPA limits of liability for vessels have been the subject of two recent increases. The first was the Delaware River Protection Act of 2006 which increased existing OPA limits for vessels and increased payments to the Trust Fund by responsible parties. This Act also provided for inflation-based increases to the OPA limits to be implemented by regulation every three years and imposed additional reporting requirements to the Congress by the executive branch on the effectiveness of these increases. The second increase came into effect when the Coast Guard adopted its final rule on February 2, 2010 to increase the limits of liability for vessels that apply under OPA to reflect significant increases in the Consumer Price Index. ("CPI").

A RP may lose its OPA limits of liability under the following circumstances:

(1) gross negligence or willful misconduct;

(2) violation of applicable federal safety, construction or operating regulations by the RP, its agent or employee, or a person acting pursuant to a contractual relationship with the RP.

There are a multitude of very specific federal safety, construction and operating regulations applicable to vessels and facilities which provide a basis to deprive an RP of the OPA limits for breach of a regulation which caused the oil spill. This broadly worded exception to the OPA limits has the potential to subject an RP to unlimited liability albeit without the financial guarantee in place to pay the excess liability.

In addition, a RP may be considered to have waived its OPA limits for failure to report an oil spill, or failure to provide all reasonable cooperation requested by a responsible official, or failure to comply with an order issued by a governmental authority.

Evidence of Financial Responsibility for OPA limits

OPA requires vessels and offshore facilities to establish and maintain evidence of financial responsibility sufficient to meet the maximum amount of liability resulting from an oil discharge imposed under the statute. Financial responsibility may be established by one or any combination of the following methods: (1) evidence of insurance; (2) surety bond; (3) guarantee; (4) letter of credit; (5) qualification as a self-insurer. For guarantors, OPA requires a statement agreeing to be subject to direct action claims from the government or injured claimants who have been denied payment by the RP. A vessel typically meets the financial responsibility requirement by carrying, and filing with the U.S. Coast Guard, a Certificate of Financial Responsibility (COFR) which identifies an approved guarantor to be liable up to the vessel's OPA limit. For an offshore facility, the Marine Mineral Service (MMS) has issued Oil Spill Financial Responsibility (OSFR) rules which extend the OPA requirements of financial responsibility to offshore facilities.

Supplemental State Law Liability for Oil Spill

OPA expressly preserved the rights of states to legislate beyond the federal limits proscribed by the statute. Any state or its political subdivision may impose additional liability or requirements with respect to the discharge of oil or removal activities. As a result, there are local spill statutes which exist in twenty-six states and territories which contain liability provisions for oil spills. Several of the state oil spill laws contain provisions for unlimited strict liability for clean up and removal costs, for example Alaska, California, and Maine. Of the states potentially affected by the Gulf Coast Disaster, Texas, Louisiana, and Florida have laws imposing strict joint and several liability. Conversely, Mississippi and Alabama do not impose limitations on liability, nor do they have oil pollution laws imposing strict liability.

Adequacy of OPA Federal Liability Scheme supplemented by State Law

The industry experience with oil spill litigation under the above described federal and state law scheme has been positive. The federal OPA limits of liability in the vast majority of oil spill incidents provide adequate funds from the RP to compensate claimants injured by the oil spill. In the exceptional cases where liability exceeds the OPA limits, the NPFC is in place to make payments from the Trust Fund (sourced primarily by a petroleum tax) which becomes subrogated to the rights of such claimants to recover from RPs or third parties who may be responsible for the damages.

A U.S. Coast Guard report on implementation of OPA 90 during the period of FY 1993-FY 2004 indicated that there were seventeen (17) incidents during this period for which the costs of the incident are known to have exceeded OPA limits. All of the incidents involved vessel spills. Seven (7) of the Seventeen (17) incidents generated claims to the Trust Fund for reimbursement from the RP for payments made in excess of OPA limits. The remaining ten (10) incidents did not result in a reimbursement request from the RP due to criminal liability, DOJ settlement, gross negligence, and/or violation of federal regulations.

Comparison of OPA Regime to International Civil Liability and Fund Conventions

OPA limits compare favorably to similar provisions of the Civil Liability and Fund Conventions (CLC), which have been adopted by most other jurisdictions worldwide (104 as of May 4, 2010) with the U.S. being a notable exception. One reason for the U.S. not acceding to the amendments to the CLC and Fund Conventions in 1992 was the higher OPA limits already in place at the time the conventions were amended.

By way of example, the OPA limit for a 50,000 ton vessel (other than a tanker) would be $50 million (50,000 gross tons at $1000 per gross ton) and the CLC limit would be approximately $42 million (Special Drawing Rights (SDR) 4.51 million plus SDR 631 per every ton over 5,000 tons). In both the OPA and CLC regimes, the Emergency Funds (i.e. Trust Fund and CLC Fund) which provide compensation to injured parties over and above the limits of liability are sourced by an industry tax on petroleum products. As noted above, for the Trust Fund, the maximum payout per incident is $1 billion while the CLC Fund has a multi-tiered compensation system providing compensation up to $305 million with a supplementary fund available (for certain signatory states) for up to $1.126 billion.

Consideration for Increase in OPA Limits

In considering whether to increase the OPA limits of liability, it is important to thoroughly study the implementation of OPA and the overall liability and compensation regime. Industry participants including owners and operators of vessels, agencies such as the U.S. Coast Guard, and various stakeholders in the aftermath of an oil spill could be adversely affected by a precipitous change in existing OPA limits with no corresponding benefit in terms of victim compensation or deterrence of future spills. If such changes are not carefully studied and slowly implemented, the reaction from industry participants could have unintended consequences including disrupting U.S. oil imports. An increase in the OPA limits would require vessel

owners to pay additional insurance premiums in order to continue to provide and maintain evidence of financial responsibility to meet the new increased limitations. As a practical matter, small and mid-sized independent tanker owners transport a majority of all imported petroleum products to the United States. For these owners and operators, insurance and other evidence of financial responsibility required by OPA are affordable only because of the relatively inexpensive and generally available mutual protection and indemnity pollution insurance of up to $1 billion per incident. Protection and indemnity clubs are associations of vessel owners joined together to pool mutual liabilities falling on their individual members. Mutual insurance provides security and stability to maritime trade because the claims of individual owners are not secured by a single insurer, but instead are collectively insured by the owners of 92% of the world's ocean-going tonnage if a claim exceeds a certain amount.

A dramatic increase in OPA limits and the concomitant requirement for these owners and operators to provide evidence of financial responsibility for higher limits could result in this insurance coverage not being available through protection and indemnity clubs, and therefore the necessary pollution insurance would not be available at all to small and mid-size operators. Such excessive additional insurance costs would force many of these operators out of business leaving only major players (to the extent any are willing to engage in oil transport) who can self-insure or otherwise afford to meet the financial responsibility requirements. Ultimately, the additional premiums for increased liability limits will have to be passed on to consumers in the form of increased prices for oil products in the United States.

Careful consideration should be given prior to legislating an increase in the present OPA liability limits which, based on industry experience, are an essential part of a functioning and reliable system for compensation of injured claimants. OPA has built-in mechanisms to supplement liability for the exceptional oil spills including broadly worded exceptions to OPA limits for violation of federal safety, construction, and operating regulations and the potential for unlimited supplemental state law liability.

Thank you for the opportunity to testify today. I look forward to your questions.

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