Westlaw Journal Formerly *Andrews Litigation Reporter*

TOXIC TORTS

Litigation News and Analysis • Legislation • Regulation • Expert Commentary

VOLUME 28, ISSUE 15 / SEPTEMBER 8, 2010

WHAT'S INSIDE

PLEADING REQUIREMENTS

5 Delaware court allows 'clean room' suit to go forward

Garcia v. Signetics Corp. (Del. Super. Ct.)

GULF OIL SPILL

9 Oil spill MDL judge issues pretrial order, sets hearing

In re Oil Spill by the Oil Rig Deepwater Horizon (E.D. La.)

INSURANCE

10 No duty to defend against parents' claims in baby-bottle cases

Medmarc Cas. Ins. Co. v. Avent Am. (7th Cir.)

CLEAN AIR ACT

11 $10 billion lawsuit filed over BP's Texas City refinery

Fontenot v. BP Prods. (S.D. Tex.)

MICHIGAN OIL SPILL

12 Families affected by Michigan oil spill file class action

Watts v. Enbridge Inc. (W.D. Mich.)

BENZENE

13 Negligence claim in benzene suit was properly pleaded

Wagoner v. Exxon Mobil Corp. (E.D. La.)

GULF OIL SPILL (PAYMENTS)

14 Oil spill claims administrator issues guidelines for payment

Woods Hole scientists locate oil plume in Gulf

NEWS IN BRIEF

40857793

COMMENTARY

Natural resources damages: A challenge for states affected by the Gulf oil spill

Louisiana attorney J. Burton LeBlanc IV of Baron & Budd discusses how states can assess and establish the extent of natural resources damages stemming from the Deepwater Horizon oil disaster.

SEE PAGE 3

REUTERS/Sean Gardner

Oil-covered pelicans sit in a pen waiting to be cleaned at a facility set up by the International Bird Rescue Research Center in Fort Jackson, La., June 7.

COMMENTARY

The big (data) spill

Printouts of digital files could blanket … well, the Gulf of Mexico

William W. Belt Jr. of LeClairRyan explores the hurdles attorneys will face reviewing electronic discovery while preparing for trial in litigation involving the BP oil spill.

SEE PAGE 6

THOMSON REUTERS™

Westlaw®

Westlaw Journal Toxic Torts

Published since June 1983

Publisher: Mary Ellen Fox

Executive Editor: Jodine Mayberry

Production Coordinator: Tricia Gorman

Managing Editor: Jodine Mayberry

Editor: Rita Ann Cicero
RitaAnn.Cicero@thomsonreuters.com

Westlaw Journal Toxic Torts
(ISSN 2155-093X) is published biweekly by Andrews Publications, a Thomson Reuters/West business.

Andrews Publications
175 Strafford Avenue
Building 4, Suite 140
Wayne, PA 19087
877-595-0449
Fax: 800-220-1640
www.andrewsonline.com
Customer service: 800-328-4880

For more information, or to subscribe, please call 800-328-9352 or visit west.thomsom.com.

Reproduction Authorization
Authorization to photocopy items for internal or personal use, or the internal or personal use by specific clients, is granted by Andrews Publications for libraries or other users registered with the Copyright Clearance Center (CCC) for a fee to be paid directly to the Copyright Clearance Center, 222 Rosewood Drive, Danvers, MA 01923; 978-750-8400; www.copyright.com.

How to Find Documents on Westlaw
The Westlaw number of any opinion or trial filing is listed at the bottom of each article available. The numbers are configured like this: 2009 WL 000000. Sign in to Westlaw and on the "Welcome to Westlaw" page, type the Westlaw number into the box at the top left that says "Find this document by citation" and click on "Go."

TABLE OF CONTENTS

Commentary: By J. Burton LeBlanc IV, Esq.
Natural resources damages: A challenge for states affected by the Gulf oil spill 3

Pleading Requirements: *Garcia v. Signetics Corp.*
Delaware court allows 'clean room' suit to go forward (Del. Super. Ct.) 5

Commentary: By William W. Belt Jr., Esq.
The big (data) spill 6

Gulf Oil Spill: *In re Oil Spill by the Oil Rig Deepwater Horizon*
Oil spill MDL judge issues pretrial order, sets hearing (E.D. La.) 9

Insurance (Duty to Defend): *Medmarc Cas. Ins. Co. v. Avent Am.*
No duty to defend against parents' claims in baby-bottle cases (7th Cir.) 10

Clean Air Act: *Fontenot v. BP Prods.*
$10 billion lawsuit filed over BP's Texas City refinery (S.D. Tex.) 11

Michigan Oil Spill: *Watts v. Enbridge Inc.*
Families affected by Michigan oil spill file class action (W.D. Mich.) 12

Benzene: *Wagoner v. Exxon Mobil Corp.*
Negligence claim in benzene suit was properly pleaded (E.D. La.) 13

Gulf Oil Spill (Payments)
Oil spill claims administrator issues guidelines for payment 14

Gulf Oil Spill
Woods Hole scientists locate oil plume in Gulf 15

News in Brief 16

Case and Document Index 17

HOW TO SUBMIT A COMMENTARY OR BYLINED ARTICLE

West Publishing, a Thomson Reuters business, encourages its readers to submit commentaries or expert analysis on a variety of topics. Our focus includes trends affecting the legal community, as well as issues arising from court rulings or legislative initiatives. Articles between 2,000 and 2,500 words are preferred but other lengths will be considered. Please contact the editor of this publication, or contact Phyllis Skupien, Managing Editor, at phyllis.skupien@thomsonreuters.com for more information.

ABOUT ANDREWS

Andrews Publications is a specialized information publisher focusing on litigation developments. A division of Thomson Reuters, Andrews produces newsletters and Westlaw databases tightly focused on more than 45 individual practice areas. Andrews' softbound books and online continuing legal education courses draw on the expertise of legal practitioners and experts across the country to create a knowledge-sharing community. Andrews' customers are lawyers, insurers, corporate counsel, medical groups, academics, government agencies and other professionals whose work requires up-to-date litigation information.

© 2010 Thomson Reuters

Natural resources damages: A challenge for states affected by the Gulf oil spill

By J. Burton LeBlanc IV, Esq.

The oil spill in the Gulf of Mexico has had devastating consequences for communities along the Gulf Coast, particularly for the region's natural resources. The oil spill has invaded coastal wetlands and marine breeding grounds, killing wildlife and leaving widespread contamination. Under the Oil Pollution Act, 31 U.S.C. § 2701, states have claims for natural resources damages caused by the oil spill in addition to claims for cleanup costs and other spill-related damages. Assessing the extent of these damages will be far from easy, but there are objective measures that can be used to provide a picture of the damage that has been — and is being — done to these natural resources.

WHAT'S HAPPENED TO OUR NATURAL RESOURCES?

In the early days of the spill, while touring the staging area for spill response efforts, President Obama declared, "We're dealing with a massive and potentially unprecedented environmental disaster." Today, more than four months after the ill-fated wellhead blew, scientists, government officials and coastal residents who rely on the Gulf for their way of life are still struggling to comprehend the breadth of its impact.

Certainly, in the past few months we have all witnessed in horror the mounting damage the spill has wreaked on fragile Gulf Coast lands, especially in my home state, Louisiana. Coastal marshes and wetlands are incredibly important ecosystems, providing breeding grounds and nurseries for innumerable marine animals and wildlife, as well as vital food and shelter for millions of migratory birds. They also provide a natural buffer that protects the mainland from storm surge during hurricanes.

The wetlands are also a vital economic resource for Louisiana. About 75 percent of U.S. commercial fish and shellfish species, and fully 98 percent of the species harvested from the Gulf of Mexico, rely on estuaries (coastal areas were fresh water from rivers and streams blend with seawater) at some stage of their life cycles. Estuaries in turn depend on coastal wetlands to filter pollutants, maintain water quality and provide the basis for aquatic food chains. The Gulf Coast is home to the seventh largest estuary in the world and supports Louisiana's $2.4 billion fishing industry, producing one-third of the domestic seafood consumed in the U.S. There is no question that the wetlands are vital not only environmentally, but economically as well.

But over the past several decades, Louisiana has lost much of its coastal wetlands at alarming rates, and the crude oil that has recently penetrated these vital ecosystems threaten to accelerate their demise. Since the 1930s, when oil drilling off Louisiana shores led to massive dredging of wetlands to lay pipelines and build canals, the state has lost about one-third of its coastal wetlands — about 1.2 million acres, roughly the size of Delaware. By some estimates, marsh losses over the past 40 years could raise the height of a Category 3 storm surge by 10 feet; indeed, marsh loss is partly responsible for magnitude of destruction wrought by Hurricane Katrina.

The oil spill threatens to exacerbate this loss of marshland. Sensitive marshes and mangroves are virtually impossible to clean of oil, and some fear that large expanses of Louisiana's already-shrinking wetlands may be permanently destroyed by the spill. If they are destroyed, we may never get them back: Wetland restoration is incredibly expensive and agonizingly slow.

Indeed, we may not be able to fully appreciate the spill's environmental impact for a long time. Because of the depth of the spill, plumes of oil remain far below the surface, where they might otherwise partially evaporate or be skimmed off the top. As of early August, scientists with the Georgia Sea Grant program estimated that 70 percent to 75 percent of the oil remained in the Gulf. They also noted that methane gas, which made up one-third of the hydrocarbons escaping the well and can deplete oxygen and lead to "dead zones" in Gulf waters, remains unaccounted for.

And marine scientists with the University of South Florida recently made the startling discovery that chemical dispersants used to clean up the spill may have done much more harm than good: Microscopic oil particles were found in an underwater canyon far from the spill site and proved toxic to microorganisms that comprise the foundation of the marine food chain. If such organisms are killed off in sufficient quantities, the very foundation of the food chain supporting s most Gulf marine life is threatened.

> The Gulf Coast is home to the seventh largest estuary in the world and supports Louisiana's $2.4 billion fishing industry, producing one-third of the domestic seafood consumed in the U.S.

The dispersants may have caused yet another problem: Because they disperse the oil into microscopic droplets, the droplets could potentially travel long distances in deep water instead of rising to the surface or evaporating. Oil in deep, cold water degrades much more slowly than oil in warmer, shallower waters. If tiny droplets of oil remain in the water and travel as feared, they could ultimately contaminate the root systems of marsh grasses and mangroves even far from the spill site and kill them off.

The potential impact of the spill along the Gulf beaches, including some of the most popular tourism destinations in the country, also remains worrisome. Despite the crews of workers we've all seen on TV trolling the beaches for tar balls, the changing tides can

© 2010 Thomson Reuters

quickly bury expanses of oil in the sand. Even 10 years after the infamous Exxon Valdez spill, for example, oil was still found trapped under the sand in Alaska. Such oil not only affects tourism and the nesting grounds of shore birds, but can leach into streams where fish breed, which continued to happen years after the Valdez spill in 1989.

WHAT CLAIMS DO STATES HAVE FOR DAMAGE TO NATURAL RESOURCES?

The Oil Pollution Act gives public entities, such as the Gulf Coast states, a claim for damage to natural resources in addition to claims for cleanup costs, lost revenues and the costs of public services needed to reduce the impact of the oil spill, "including protection from fire, safety or health hazards."[1] The OPA is expected to be a basis for state claims against BP, rig owner Transocean, cement contractor Halliburton and others for the damages caused by the oil spill. There are also other sources for these claims under federal and various state laws, but because of the OPA's prominence, this article will focus on that law.

Natural resource damages are separate from cleanup damages. Oftentimes, cleanup efforts cannot return natural resources to their original state. Even when cleanup is possible, there are a variety of other losses, such as death among wildlife and loss of use of these resources during their recovery, that are not addressed by cleanup damages.

The recovery of natural resources damages can assist states in funding restoration projects that go beyond cleanup to renew and revive fragile ecosystems. With these funds, sustainable restoration projects on a larger scale can be pursued. These projects are crucial to maximizing the recovery of the Gulf Coast's natural beauty and minimizing the long-term harm of the oil spill.

Claims for natural resources damages that are filed in federal court are likely to be transferred to the multidistrict proceedings now before U.S. District Judge Carl Barbier of the Eastern District of Louisiana in New Orleans. The Judicial Panel on Multidistrict Litigation selected Judge Barbier Aug. 10 to oversee the consolidated MDL proceedings of claims for damages caused by the oil spill.[2] Later-filed cases that involve oil spill damages, such as state claims for natural resource or other damages, are likely to be transferred to the MDL court in New Orleans as tag-along cases.[3]

HOW CAN STATES ASSESS AND ESTABLISH THE EXTENT OF NATURAL RESOURCE DAMAGES?

To make an adequate claim for damage to natural resources, public entities need to consider damage to a variety of natural resources and develop a model for assessing the extent of damage to:

- Shorelines
- Aquatic fauna
- Submerged aquatic vegetation
- Birds
- Water column and sediments
- Recreational opportunities

Shoreline damage

Damage to the wetlands, barrier islands and beaches along the shoreline may have devastating consequences, and it's not clear what should be done about it. Concerns have been raised about whether the oil can be cleaned out of the coastal marshes or whether efforts to remove the oil may actually cause more harm to the wetlands than leaving it alone. Because of this uncertainty, the bulk of cleanup efforts on the shore have focused on the beaches. But as noted above, oil can be buried in the sand by changing tides and evade cleanup for years.

To establish the extent of damage to the coastal wetlands and shoreline, there are a number of measures to consider, such as the degree of oiling (both the amount and distribution of the oil will be important), the expected recovery time (including whether the natural resource is expected to recover), the concentrations of oil in sediments, and observation of the effect on plants and animals in the area.

Aquatic fauna

The continuing presence of oil in the Gulf waters is a serious threat to a wide variety of aquatic fauna, either from direct exposure or because of the affect of the oil on their food supply. Fish, shellfish, marine mammals, sea turtles and coral beds are at risk of contamination. Estimates of mortality levels for populations of concern are an important measure of harm, but these estimates are incomplete. To get a more accurate idea of the real harm being done, a picture of the exposure levels must also be developed. What level of contamination is being found in members of target species? What level of contamination is present in the area sediment? What dietary exposure are larger species receiving, and what food sources have been lost to the oil exposure?

Submerged aquatic vegetation

Submerged vegetation is also at risk from oil contamination. Grass bed density and area and species concentrations provide a more direct measure of immediate impact on vegetation. The level of contamination in water and sediment provides information about the exposure levels in the area that will continue to affect plant life. The types and number of fish found in the area provide additional evidence concerning the health of the vegetation these animals rely on for food, shelter and breeding grounds.

We may not be able to fully appreciate the spill's environmental impact for a long time.

Birds

The oil spill has wreaked serious harm on bird populations, including pelagic, colonial, secretive and shore birds. Kill counts are a critical, but incomplete, measure of damage. To determine the true threat to bird populations, contamination levels in the affected habitat (in water and sediment), as well as estimated dietary exposure, can provide a better long-term picture of the expected harm.

Water column and sediments

Despite the months of cleanup, the bulk of the oil that was released into the Gulf is still in the water. Evidence of oil in the water, including water column measurements at various depths, give a picture of the ongoing contamination. Intertidal and sub-tidal sediments should be examined for oil contamination as well. And again, because these systems are so interconnected, observation of aquatic and intertidal fauna will provide additional clues about water quality and ongoing damage.

Recreational opportunities

The states have a considerable interest in the recreational opportunities provided by

© 2010 Thomson Reuters

their natural resources. Oil contamination has burdened the economic and cultural resources of the Gulf states in lost fishing days, beach time and other recreation opportunities. These losses can be demonstrated through data on the use of these natural resources over time.

FINAL THOUGHTS

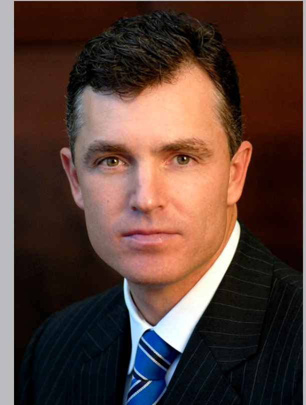
State claims for natural resource damages should have a prominent place in litigation arising from the oil spill. The damage that has been done to these valuable, and perhaps irreplaceable, natural resources cannot be ignored, and damages recovered by the states provide our best hope of minimizing the harm that's been done. Of course, whatever we are able to accomplish in the litigation of these claims, the legacy of this disaster will be borne by all those who love the Gulf Coast and its native beauty for decades to come. WJ

NOTES

[1] 33 U.S.C. § 2701(b)(2).

[2] *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, MDL No. 2179, 2010 WL 3166434 (J.P.M.L. Aug. 10, 2010).

[3] *Id.* at 1 at n.1 (noting some 200 additional oil spill cases that had been filed and might be the subject of tag-along cases, citing Judicial Panel on Multidistrict Litigation Rules 7.4 and 7.5, 199 F.R.D. 425, 435-36 (2001)).



J. Burton LeBlanc IV, a shareholder of **Baron & Budd** in New Orleans, concentrates his practice in the areas of environmental law, securities litigation and asbestos litigation. He and his firm have recovered millions of dollars for injured working men and women in Louisiana, including multiple jury verdicts over $1 million.

PLEADING REQUIREMENTS

Delaware court allows 'clean room' suit to go forward

A Delaware state court judge has determined a second amended complaint filed by a man who says exposure to chemicals at a semiconductor plant damaged his reproductive system is sufficient to meet the pleading standard.

Garcia et al. v. Signetics Corp. et al., No. 09C-10-032, 2010 WL 3101918 (Del. Super. Ct., New Castle County Aug. 5, 2010).

Judge Jan Jurden of the New Castle County Superior Court denied the defendants' motion to dismiss, declining to apply an arbitrary "three strikes and you're out" rule.

Michael Garcia was employed at a semiconductor plant in Albuquerque, N.M., from 1982 until 1986. He worked in "clean rooms" and on the assembly line where semiconductor wafers, boards and microchips were manufactured.

Garcia claims he was exposed to toxic chemicals and substances used in the manufacture of the semiconductors, including toluene, methylene chloride, aluminum fluoride and arsenic compounds, as well as radio frequency radiation and ionizing radiation.

He sued plant operators Signetics Corp. and Philips Electronics N.A. Corp., alleging exposure to the substances damaged his reproductive system and, as a result, his sons developed physical disabilities, including blindness. He seeks damages for pain and suffering.

Rule 8(a)

A pleading must contain:

- A short and plain statement of the claim showing the pleader is entitled to relief.
- A demand for judgment for the relief to which the party deems entitled.

Rule 9(b)

In all pleadings of fraud, negligence or mistake, the circumstances constituting fraud, negligence or mistake shall be stated with particularity.

The defendants moved to dismiss, contending the second amended complaint failed to satisfy the standards set forth in Delaware Superior Court Civil Rules 8 and 9 (see box).

In support the companies cited *In re Benzene Litigation*, 2007 WL 625054 (Del. Super. Ct., New Castle County Feb. 26, 2007), in which the court held that in order to meet the pleading and notice requirements under Rules 8 and 9, a plaintiff must describe the "location and manner in which the product was used, a meaningful time frame, and details sufficient to identify the premises where the exposure took place."

The rule aims to give the opposing party fair notice of a claim.

Judge Jurden declined to dismiss the suit, finding the complaint meets the pleading standard. She said *In re Benzene Litigation* seems more supportive of Garcia's position.

The plaintiff put the defendants on notice of where he allegedly was exposed to the toxic chemicals and in what time frame, the judge said.

Garcia also put the defendants on notice that, but for their wrongful conduct, he would not have sustained the damage to his reproductive system, the judge concluded. WJ

Related Court Document:
Opinion: 2010 WL 3101918

The big (data) spill

Printouts of digital files could blanket … well, the Gulf of Mexico

By William W. Belt Jr., Esq.

Nearly two decades ago, as a young lawyer working on the Exxon Valdez case, I walked into a warehouse filled with documents and sat at a table. A box of papers was placed in front of me, and it was my job to sift through that box in search of discoverable documents that could help my firm's client, a navigation and steering manufacturer, fend off accusations that the ship's steering mechanism had somehow caused the disastrous oil spill in Prince William Sound.

When I finished with that box, I knew there was a warehouse full of others ready to take its place. For a moment, I thought of Sisyphus, the figure from Greek mythology who was condemned to the endless loop of pushing a boulder up a mountain, only to watch it roll down again — over and over, for all eternity.

The Exxon Valdez disaster, which unfolded in a matter of hours March 24, 1989, was at the time the largest oil spill ever to occur in U.S. waters. Images of dead and dying salmon, otters and seabirds outraged the nation, especially the thousands of Alaskans whose livelihoods were potentially threatened by the heavy sheen of oozing crude. Eventually, the pollutants fouled hundreds of miles of coastline and thousands of square miles of ocean. Like the 11 million gallons of oil that spewed from the Exxon Valdez itself, the volume of paperwork in the case was truly daunting in scope and scale.

Difficult as it might be to fathom, however, the discovery challenges in the Exxon Valdez litigation, which literally involved multiple warehouses full of documents, will look like child's play when weighed against what is sure to come in the lawsuits over the BP-Deepwater Horizon catastrophe. The BP case is more complex, yes. But the real reason this case will involve such a massive amount of information boils down to two words: electronic discovery.

In the Exxon Valdez case, Captain Joseph Hazelwood never sent a text message about whether or how much he had been drinking prior to the disaster. There was no instant-messaging back and forth between Exxon executives expressing concern about the ship's sonar navigation system, or an e-mail trail related to the overall safety of the iceberg-choked route. The third mate in charge of the Exxon Valdez's wheelhouse never "tweeted" his friends to complain of fatigue and excessive workload. No camera webcast the oil spilling from the tanker.

The Exxon Valdez disaster, which unfolded in a matter of hours in 1989, was at the time the largest oil spill ever to occur in U.S. waters.

In the Deepwater Horizon case, however, the potential for such digital smoking guns looms large. More to the point, the imperative to preserve and produce potentially relevant documents, whether they exist as ones and zeros on a server or as printed words on a page, is now the indisputable law of the land. And that means dealing with volumes of data so large that even conceiving of them can be difficult.

A 'MOUNTAIN RANGE' OF DATA

For some perspective, a gigabyte of data amounts to roughly a pickup truck full of books. Imagine sorting through 1,000 pickup trucks full of books. That's a terabyte. Now imagine a vast expanse, perhaps somewhere out in the Mojave Desert, in which a million pickup trucks full of books cover a parking lot that stretches as far as the eye can see in all directions. That would be a petabyte of data.

In speaking with colleagues from across the country on matters related to electronic discovery, I periodically hear of cases that actually approach this mountainous — a mountain range is more like it — volume of information. The four major lawsuits related to the Enron debacle, for example, are said to have involved 250 terabytes of data. By comparison, the entire print collection at the Library of Congress, the federal institution charged with sustaining and preserving "a universal collection of knowledge and creativity for future generations," stands at about 19 terabytes.

Exactly how massive the discovery challenges will be in litigation sparked by the BP disaster is anyone's guess, of course. But given the complexities, including the magnitude and duration of the spill, the regulatory and criminal questions, the finger-pointing and recriminations already occurring between the companies and shareholders involved, and the number and kind of potential plaintiffs from across the Gulf Coast, it would not be surprising if the volume of data in this case reached the mind-bending petabyte threshold.

Of course, reviewing this many files and documents one by one would be impossible. Attorneys working on the BP case will be forced to rely on methodologies typically associated more with government anti-terror and counterintelligence efforts than with mass torts or commercial litigation. Sophisticated data-mining technologies will enable them to search not just for keywords, but for relevant concepts and patterns, in much the same way the CIA and FBI now use database dragnets to ferret out potential spies and terror suspects. Leveraging this technology will significantly narrow the scope of what attorneys and criminal investigators will have to actually read and study as they pursue their cases.

But the effort will also require a level of discernment that only human intelligence can provide. People, not machines, will have to narrow the search parameters by identifying key players involved in all the

 © 2010 Thomson Reuters

relevant or potentially relevant events that occurred before, during and after the April 20 explosion of the Deepwater Horizon oil rig. That explosion killed 11 platform workers and injured 17 others, and the subsequent leak of BP's Macondo well gushed 4.9 million barrels of oil into the Gulf of Mexico before BP was successful in plugging the well Aug. 6.

DISCOVERY IN THE DIGITAL AGE

In theory, no attorney would consciously overlook a potential smoking gun just because the document in question happened to be on a hard drive. Faced with the prospect of sifting through an avalanche of e-mails, spreadsheets, text messages and other electronic files, however, many lawyers tried at first to pretend their profession could remain a proverbial "paper chase." Often they would talk to each other at the beginning of a case and agree to keep electronic discovery off the table. There was a huge problem with this strategy: 95 percent of the information involved in a case today will likely exist in a digital format. E-mail alone is virtually omnipresent in the American workforce. Evidence, in other words, *is* electronic. And ignoring evidence — whatever its form — is nothing short of professional misconduct.

Naturally, it has taken some time for legislatures and courts to adjust to the new demands of the digital age. Many states have moved to explicitly eliminate the false "option" of ignoring electronically stored information. For example, California's Civil Discovery Act, which Gov. Arnold Schwarzenegger signed into law in June 2009, requires attorneys to pay full attention to the digital dimensions of the cases they try.

At the federal level, meanwhile, a number of key decisions have reinforced the imperative to preserve and produce digital documents. The groundbreaking e-discovery case *Zubulake v. UBS Warburg*, which was heard between 2003 and 2005 in the U.S. District Court for the Southern District of New York, established definitive requirements for the way attorneys must handle electronic files. *Zubulake v. UBS Warburg*, 220 F.R.D. 211 (S.D.N.Y. Oct. 22, 2003); 229 F.R.D. 422 (S.D.N.Y. July 20, 2004). Judge Shira Scheindlin presided over the now-famous case, a discrimination lawsuit in which the defendant essentially sought to avoid producing relevant e-mails.

In the wake of that decision, several amendments to the Federal Rules of Civil Procedure went into effect that further cemented the place of electronic discovery in American jurisprudence. These guidelines have heavily influenced state measures like California's Civil Discovery Act.

More recently, Judge Scheindlin issued a lengthy decision detailing, among other things, the necessity of issuing written "hold" notices to employees whenever a company becomes involved in litigation or has reason to believe a claim will be brought. *Pension Comm. v. Banc of America Secs.*, 2010 WL 93124 (S.D.N.Y. Jan. 11, 2010). The intent of such notices is to make sure relevant documents, including e-mail and other digital data, are preserved.

The basic message of these cases is that electronic discovery is part of litigation and cannot be ignored. By now, this should be clear enough to everyone. However, exactly *how* litigants should handle potentially discoverable electronic documents is by no means black and white. In recent decisions, both Judge Scheindlin and Judge Lee H. Rosenthal (of the Southern District of Texas) have wrestled with some of the thorny questions related to proper behavior on e-discovery. Many other important questions have yet to be definitively answered. This legal uncertainty is likely to complicate the BP case in manifold ways.

> Exactly how massive the discovery challenges will be in litigation sparked by the BP disaster is anyone's guess.

A COMPLICATED DISASTER

Devastating as the Exxon Valdez disaster was, the basic facts of the accident itself were relatively straightforward: The ship ran aground on Bligh Reef, and its hull was torn open in an ill-fated attempt to back up and return to open sea. The Valdez spill was a one-time event that unfolded in a matter of hours, whereas the BP disaster dragged on for months.

In working on the Exxon case, attorneys were essentially dealing with the past tense. With the exception of damages, it was a backward-looking exercise. In the BP case, the possibility that key players might have gone "offline" in order to hide information that threatened to expose the company or themselves to civil or criminal liability will be far greater.

After all, real-time communications during the agonizingly long spill event were constant and ongoing. They involved a stunning array of public and private officials, experts, and stakeholders. A vast amount of this information will clearly be deemed potentially relevant to any ensuing investigation and/or litigation. Of critical importance, moreover, is the tragic fact that 11 people lost their lives in the explosion. The stakes in the BP case are simply higher.

Given all of this, the extent to which officials at BP and rig owner Transocean took immediate steps to preserve digital information will be under a microscope as the investigations and lawsuits commence. It is a safe bet that BP executives listened carefully to litigation experts in their in-house legal department. They know full well that their electronic communications will be under close scrutiny. These days, in fact, employees at nearly every level have a decent grasp of what data will be stored on company servers and desktop hard drives. Many know how to use software settings to get around these protocols.

Did company officials, during the three-plus months that oil was spewing into the Gulf, check the "turn journaling off" option on their instant messaging software? Did an official who, prior to the accident, sent and received an average of, say, 65 text messages per week suddenly stop sending and receiving texts once the accident occurred? These kinds of questions will preoccupy investigators and attorneys, but the implications of such behavior would be unclear. Under current e-discovery guidelines, there is an explicit responsibility to preserve information that is under the company's custody and control. But is "going dark" with electronic communications the same as actively shredding printed documents? Such issues could well be front and center in this case.

UNCHARTED WATERS

Indeed, even the limits of "custody and control" are unclear. In the case of BP, how

© 2010 Thomson Reuters

far does this responsibility extend? While digital messages and documents exchanged between BP and one of its subsidiaries would clearly be included, Transocean — a major player in the event — was, in fact, a contractor. The exact terms of the contractual relationship between these parties could play a role in determining the limits of e-discovery in the case. Another gray area is just how far companies must go in preserving information that tends to exist only temporarily.

When an employee uses a company-owned computer to visit a website, that unique address will be stored in random access memory that can be erased, either by the employee or someone in the IT department. Employee Internet searches could be relevant to a case, but judges are only now beginning to examine what information falls under a court's jurisdiction. After all, there is no requirement that each of us, upon walking into our cubes or offices, turn on an audio recorder to preserve all our oral communications with co-workers. There are limits to what constitutes discoverable information. Where those limits reside is of major concern to corporations and their lawyers.

When it comes to preservation of data, absolute positions, such as asking an IT department to stop overwriting all backup tapes and to cancel all automatic data-deletion protocols for e-mail, might actually be technically impossible. In some cases, it could clog servers and overwhelm the system.

> Employee Internet searches could be relevant to a case, but judges are only now beginning to examine what information falls under a court's jurisdiction.

And there are content-related questions. Given the rise of social networking for both personal and business uses, the line between public and private communication is becoming blurrier by the day. Employees' "personal" posts on Facebook, Twitter or websites like YouTube are sometimes carried out using company-owned equipment, leaving a data footprint on the company's servers and desktop hard drives. Should this information be included in a metadata search conducted during the course of litigation?

While the Federal Rules of Civil Procedure now provide some guidance on electronic discovery, the very first one of those rules is the directive to resolve cases in a timely fashion. These potentially conflicting imperatives will force attorneys working on the BP case to make some exceedingly difficult decisions. They must expedite the process by narrowing the volume of information to be reviewed, but in so doing they might well miss critical information that could have been important to the case. If they were to err too far on the side of caution, however, the litigation and appeals could drag on for an eternity. (Sisyphus, anyone?)

The last appeals in the Exxon Valdez case — litigation set in motion by an accident that occurred a full 21 years ago — were finally settled in 2009. Let's say Twitter (or some rough equivalent) still exists 40 years from now. It makes me wonder whether a future attorney will send her friends the following tweet: "OMG! They just settled the BP case — and it's 2050!" WJ

William W. Belt Jr. is a shareholder in **LeClairRyan** and leader of the law firm's Richmond, Va.-based discovery solutions practice. He has worked on major e-discovery projects as part of numerous mass tort and commercial litigation cases.

© 2010 Thomson Reuters

Oil spill MDL judge issues pretrial order, sets hearing

The New Orleans federal judge overseeing pretrial discovery in the litigation stemming from the Deepwater Horizon oil disaster will hold a conference Sept. 17 to set proposed trial dates and discuss other "housekeeping" duties.

In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010, No. 10-02179, 2010 WL 3269206 (E.D. La. Aug. 10, 2010).

U.S. District Judge Carl Barbier of the Eastern District of Louisiana said Aug. 10 that, until he names liaison counsel for the consolidated actions, he is appointing James Roy of Domengeaux Wright Roy & Edwards in Lafayette, La., and Stephen Herman of Herman Herman Katz & Cotlar in New Orleans interim liaison counsel for the plaintiffs.

Don Haycraft of Liskow & Lewis in New Orleans, one of the attorneys representing BP in the litigation, will serve as interim liaison counsel for the defendants.

More than 300 lawsuits have been filed since the April 20 BP oil well explosion and resulting spill. Most of the cases were filed in federal courts in Texas, Florida, Louisiana, Mississippi and Alabama, the states whose shorelines were closest to the spill and where the fishing and tourism industries are suffering.

On Aug. 10 the Judicial Panel on Multidistrict Litigation transferred 77 spill-related lawsuits from five states to Judge Barbier's court. More than 200 potential tag-along cases could follow.

BP, which leased the Deepwater Horizon rig from Transocean Ltd., is one of the companies being sued, but the list of the defendants is growing

Judge Barbier also named additional interim liaison counsel for the defense Aug. 12:

Defendants in Oil Spill Cases

- BP, majority owner of the Macondo deepwater oil well
- Transocean Ltd., the owner of the Deepwater Horizon drilling platform
- Cameron International Corp., the supplier of the device that was designed to prevent a blowout at the well site
- Halliburton Energy Services Inc., which did cement work on the well and well cap
- Anadarko Petroleum, which owned a 25 percent interest in the Macondo well
- MOEX Offshore 2007 LLC, which owned a 10 percent interest in the well

- Kerry Miller of Frilot LLC in New Orleans, counsel for Transocean.
- Donald Godwin of Godwin Ronquillo PC in Dallas, counsel for Halliburton Energy Services Inc., which did cement work on the well and well cap.
- Phil Wittmann of Stone Pigman Walther Wittmann LLC, counsel for Cameron International Corp., which supplied the device that was designed to prevent a blowout at the well site.
- Deborah Kuchler of Kuchler Polk Schell Weiner & Richeson in New Orleans, counsel for Anadarko Petroleum, which owned a 25 percent interest in the BP well, and MOEX Offshore 2007 LLC, which owned a 10 percent interest.

Judge Barbier said he intends to appoint a plaintiffs steering committee to conduct and coordinate the discovery stage of the litigation. Applications must be filed with the Eastern District of Louisiana clerk's office by Sept. 27.

The judge will also consider defense recommendations for membership on the defendants steering committee.

OTHER PROVISIONS OF THE ORDER

Judge Barbier said he expects counsel to familiarize themselves with the Manual for Complex Litigation (Fourth) before the Sept. 17 conference.

A website will be created for the oil spill MDL and will be accessible by going to the Eastern District of Louisiana's website and clicking on the link for MDL cases.

Finally, Judge Barbier stressed that all parties and their counsel have a duty to preserve evidence that may be relevant to the litigation. The duty extends to documents and data, including calendars, diaries, electronic messages, voice mail, e-mail, hard drives, films and charts. WJ

Related Court Document:
Pretrial order #1: 2010 WL 3269206

© 2010 Thomson Reuters

INSURANCE (DUTY TO DEFEND)

No duty to defend against parents' claims in baby-bottle cases

A manufacturer of baby bottles and other baby products is not entitled to a defense by its insurers in a series of class-action lawsuits involving the company's use of the chemical bisphenol-A in its products, the 7th U.S. Circuit Court of Appeals has ruled.

Medmarc Casualty Insurance Co. v. Avent America Inc., No. 09-3390, 2010 WL 2780190 (7th Cir. July 15, 2010).

The policies do not provide coverage because none of the underlying complaints allege the products caused bodily injury, the panel found.

The underlying suits, brought by parents who bought the products but stopped using them after learning of the presence of BPA, allege purely economic damages, claims that are not covered under the manufacturer's policies, the court explained.

According to the opinion, the class-action suits, pending in the U.S. District Court for the Western District of Missouri, allege Avent America Inc. failed to warn consumers that its polycarbonate plastic baby bottles, cups and other baby products contained BPA.

Citing studies linking BPA exposure with various health risks in lab animals, the plaintiffs in each case allege they bought something they would not have purchased had they known of BPA's presence and its potential danger.

The plaintiffs are seeking the return of the products' purchase price and punitive damages.

Avent sought a defense in the class-action suits from three commercial general liability companies that insured it during the period at issue: Medmarc Casualty Insurance Co., Pennsylvania General Insurance Co. and State Farm Fire & Casualty Co.

However, all three refused, saying the suits are not covered because the complaints did not allege bodily injury.

> "The theory of relief in the underlying complaint is that the plaintiffs would not have purchased the products had Avent made certain information known to the consumers and, therefore, the plaintiffs have been economically injured," the 7th Circuit said.

Each policy provided that the insurer would pay sums the insured becomes obligated to pay as damages "because of bodily injury."

U.S. District Judge Harry D. Leinenweber of the Northern District of Illinois, presiding over the coverage dispute, agreed the insurers have no duty to defend because there were no allegations of bodily injury.

Avent appealed to the 7th Circuit, arguing the plaintiffs' assertions in the underlying suits that they would not use the products out of fear of physical harm were claimed damages "because of bodily injury."

The appellate court disagreed.

"[T]he complaints allege that due to the risk of potential bodily harm from BPA exposure, the plaintiffs did not receive the full benefit of their bargain … and therefore incurred purely economic damages unrelated to bodily injury," the panel said.

Although acknowledging a duty to defend "should not be at the mercy of the drafting whims" of the plaintiffs' attorneys, the court said the plaintiffs' omission of bodily injury allegations was no mere whim.

Rather, the panel said, this was a "serious strategic decision to pursue only this limited claim" to make it easier to be certified as a class.

There is a ray of hope for Avent, however. The court noted the insurers' attorney admitted at oral argument that if the plaintiffs in the underlying cases amended the complaints to allege bodily injury, the insurers would be obligated to provide a defense.

Saying this statement constituted "a binding admission" that the insurers would defend Avent if the underlying complaints were amended to include allegations of actual bodily harm, the panel concluded the insurers owe no defense to Avent at this time. WJ

Related Court Document:
Opinion: 2010 WL 2780190

See Document Section A (P. 19) for the opinion.

© 2010 Thomson Reuters

$10 billion lawsuit filed over BP's Texas City refinery

BP is facing a class-action lawsuit over an equipment malfunction at its Texas City refinery that allegedly released 500,000 pounds of pollutants into the air between April 6 and May 15.

Fontenot et al. v. BP Products North America Inc., No. 10-00295, complaint filed (S.D. Tex. Aug. 3, 2010).

The suit, filed Aug. 3 in the U.S. District Court for the Southern District of Texas, charges BP Products North America did not inform city officials of the scale of the release until it was over.

Hamilton Fontenot and other named plaintiffs representing the class are seeking compensatory damages, as well as punitive damages in excess of $10 billion.

The complaint estimates the proposed class will number in the tens of thousands.

The class will consist of a subclass of people who worked at the refinery between April 6 and May 16 and a subclass of people who lived or worked within the Texas City limits during the release.

The named plaintiffs allege the release occurred because of a failure in the refinery's "ultra-cracker" unit, which converts petroleum products into high-octane gasoline. The hydrogen compressor in the unit is responsible for trapping noxious chemicals. When it went offline, BP sent the gases to a flare, the suit alleges.

The pollutants released from the refinery include benzene, carbon monoxide, propane and other toxic chemicals, according to the complaint.

The Texas City refinery, capable of producing more than 460,000 barrels per day, is the third largest petroleum refinery in the U.S. and the "largest single polluter" in the country, the complaint says.

"The refinery has a long history of violations that have resulted in nearly 20 deaths since 2005, hundreds of injuries, hundreds of toxic releases, and numerous environmental and safety violations," the complaint says.

In March 2005 a series of fires and explosions killed 15 workers and injured more than 1,000 people.

Investigators found the explosion was caused by organizational and safety deficiencies at all levels, the suit says.

Since the 2005 explosion, four more people have died at the refinery, the suit says.

Also, in a four-year period, there were more than 500 leaks, spills and releases at the refinery, especially benzene releases, according to the complaint.

In late 2009 the Occupational Safety and Health Administration cited BP for more than 700 issues, many of which had been outstanding for more than four years, the suit says.

REUTERS/Richard Carson

Flags fly at half staff outside the BP refinery in Texas City, Texas, March 24, 2005, the day after an explosion at the plant killed 15 workers.

Last year OSHA levied a fine of more than $87 million based on BP's conduct, the largest in the agency's history.

As for the recent discharge of pollutants, the complaint says, tens of thousands were injured and their long-term health was jeopardized after they were exposed to pollutants while working at the refinery or simply by living or working in Texas City.

The suit alleges negligence, common-law assault and battery, and private nuisance. WJ

Attorneys:
Plaintiffs: Anthony Buzbee, Houston

Related Court Document:
Complaint: 2010 WL 3134541

See Document Section B (P. 28) for the complaint.

© 2010 Thomson Reuters

REUTERS/Rebecca Cook

Cleanup workers tie absorbent booms to the shore of the Kalamazoo River in Battle Creek, Mich., July 31 after a pipeline owned by Enbridge Energy Partners leaked an estimated 820,000 gallons of oil into the river.

The plaintiffs estimate more than 800,000 gallons of oil have escaped so far, "creating a toxic stench in an area spreading over the more than 30 miles."

MICHIGAN OIL SPILL

Families affected by Michigan oil spill file class action

Three Michigan families living near bodies of water polluted by a leaking oil pipe have filed a class-action lawsuit against the pipe's owner.

Watts et al. v. Enbridge Inc. et al., No. 1:10-753, complaint filed (W.D. Mich. Aug. 2, 2010).

The suit filed in the U.S. District Court for the Western District of Michigan names as defendants Enbridge Inc. and subsidiaries Enbridge U.S., Enbridge Energy Co., Enbridge Energy L.P., Enbridge Pipelines Lakehead L.L.C. and Enbridge Energy Management L.L.C.

The plaintiffs are Cheryl and Darwin Watts, Rhonda and Gerald Stepp, and Ginny and Steven Lewis. They allege trespass, nuisance, negligence, violations of Michigan's Natural Resources Act and Environmental Protection Act, and strict liability for abnormally dangerous activity.

According to the suits, Enbridge owns and maintains a 30-inch oil pipeline that ruptured July 25 and leaked crude oil into Talmadge Creek, which flows directly into the Kalamazoo River in southern Michigan.

The plaintiffs estimate more than 800,000 gallons of oil have escaped so far, "contaminating the waters, coating and killing wildlife, and creating a toxic stench in an area spreading over the more than 30 miles."

The plaintiffs all own creek or riverfront property that has been contaminated with oil stemming from recent flooding of Talmadge Creek and the Kalamazoo River. This has affected their quality of life and, in some cases, business operations, the suits say.

The plaintiffs cite "news reports" that say the U.S. Department of Transportation, which oversees the pipeline, repeatedly warned the Enbridge defendants to address issues regarding the pipeline's safety and performance. Further, the Environmental Protection Agency reportedly has called Enbridge's long-term cleanup strategy "deficient."

Finally, the spill could spur the release of contained contaminants that were already on or near the riverbed from prior pollutant releases, the plaintiffs say.

They note many residents already have relocated.

The proposed class includes "all persons impacted by the oil spill who have suffered damage to property, loss of enjoyment of their property, damage to business, or loss of the use of their property and homes."

The District Court has subject matter jurisdiction under the Class Action Fairness Act, 28 U.S.C.A. § 1332, because diversity of citizenship exists and class members' claims in the aggregate exceed $5 million, the plaintiffs assert. WJ

Attorneys:
Plaintiffs: David H. Fink, E. Powell Miller and Mark L. Newman, Miller Law Firm, Rochester, Mich.

Related Court Document:
Complaint: 2010 WL 3235472

© 2010 Thomson Reuters

Negligence claim in benzene suit was properly pleaded

A federal judge in Louisiana has refused to dismiss a wrongful-death lawsuit against three makers of industrial solvents containing benzene, finding the plaintiff's claim was properly pleaded.

Wagoner v. Exxon Mobil Corp. et al., No. 09-07257, 2010 WL 3168382 (E.D. La. Aug. 9, 2010).

U.S. District Judge Eldon E. Fallon of the Eastern District of Louisiana rejected the defendants' argument that the plaintiff was alleging fraud, finding instead that she properly pleaded negligent misrepresentation.

Plaintiff Macie Wagoner blamed her husband's death on cancer caused by cleaning products manufactured by ExxonMobil, Radiator Specialty Co. and Shell Oil Products Co.

James Wagoner died of multiple myeloma allegedly resulting from long-term exposure to benzene.

According to the complaint, Wagoner was a home mechanic for more than 35 years. Over the course of his employment, he regularly came into contact with benzene products manufactured, supplied, distributed and sold by the defendants.

Wagoner used Varsol produced by ExxonMobil, Liquid Wrench produced by Radiator Specialty and Gumout Carb/Fuel Injector Cleaner produced by Shell, the complaint says.

Macie filed suit four months after her husband's death, asserting that although the defendants knew or should have known about the health hazards of benzene exposure, they failed to warn Wagoner of those dangers.

The complaint also alleges the defendants committed tortious acts by negligently misrepresenting, concealing, suppressing and omitting material information about the harmful health effects of benzene and by failing to take precautionary measures concerning its use.

ExxonMobil and Shell sought to dismiss those claims, contending Macie failed to plead her fraud claim with the particularity required by federal law.

REUTERS/Jessica Rinaldi

> Macie Wagoner argued that she had properly pleaded her claims with the limited information she had available.

She did not specify what alleged misrepresentations the defendants made or what information was concealed, suppressed or omitted, they argued. Thus, her claim was speculative and conclusory and failed to satisfy Federal Rule of Civil Procedure 9(b).

In response Macie said she properly pleaded her claims using the limited information she had available. She asserted she could not know the specifics because the facts were mostly within the corporations' knowledge.

In addition, she argued, her husband used a product supplied by an employer or seller who in turn purchased it from Shell or Exxon. Thus, she would be unable to identify the individual defendant employees responsible for investigating product safety and for failing to issue a warning on the benzene products.

Judge Fallon denied the dismissal motion.

Contrary to the defendants' argument, he found Macie was not stating a claim for fraud. Rather she alleges negligent misrepresentation, a different cause of action under Louisiana law.

This claim was adequately pleaded and thus will go forward, the judge held. WJ

Attorneys:

Plaintiff: L. Eric Williams Jr., Metairie, La.; Amber E. Cisney and Richard J. Fernandez, Richard J. Fernandez LLC, Metairie

Defendants: Gary A. Bezet, Allison N. Benoit, Barrye P. Miyagi, Carol L. Galloway, Gayla M. Moncla, Gregory M. Anding, Janice M. Culotta, Robert E. Dille and Vionne M. Douglas, Kean Miller LLP, Baton Rouge, La.; Lynn Marie Luker, Lynn Luker & Associates, New Orleans; James M. Riley Jr. and Stacy S. Yates, Coats Rose Yale Ryman & Lee, Houston

Related Court Document:
Opinion: 2010 WL 3168382

© 2010 Thomson Reuters

Kenneth Feinberg REUTERS/Yuri Gripas

GULF OIL SPILL (PAYMENTS)

Oil spill claims administrator issues guidelines for payment

Kenneth Feinberg, who is administering the $20 billion fund for Gulf Coast residents affected by the BP oil spill, released the protocol Aug. 23 for them to receive emergency advance payments.

Feinberg said individuals and businesses that have sustained damages can submit a claim for removal and cleanup costs, damage to real and personal property, lost earnings or profits, loss of subsistence use of natural resources, or physical injury or death.

The emergency claims can be filed until Nov. 23. Claimants can seek final payments through April 23, 2013.

Feinberg said anyone who receives a final settlement from the compensation fund will give up the right to sue BP. Claimants who receive short-term emergency payments will still be able to bring suit against BP or any other companies found responsible for the oil disaster.

Any emergency advance payment will be deducted from any final payment that is received.

Additionally unemployment or private insurance or other government benefits will be deducted from any final payment.

Feinberg said final payments for indirect economic damages will be calculated based on the claimant's geographic proximity to the spill, whether the damages are dependent on natural resources and the nature of the claimant's business.

Under the Oil Pollution Act, 33 U.S.C. § 2701, a responsible party must establish a claims process to receive claims by eligible parties.

The U.S. Coast Guard has designated BP as a responsible party under the statute, according to Feinberg.

The Gulf Coast Claims Facility replaces BP's claims facility for individuals and businesses. Many claimants criticized BP's slow response time. The oil company is still providing the money.

The claims previously filed with BP will be transitioned to the new facility for review, evaluation and determination. However, the claimants will be required to file new forms and receive a new claimant identification number.

Feinberg said he intends to get emergency six-month payment checks out the door within 24 hours for individuals and no more than seven days for businesses.

CRITICISM OF THE PROTOCOL

Some states affected by the oil leak criticized Feinberg's protocols.

In an Aug. 20 statement Florida Attorney General Bill McCollum said there were several major flaws in the guidelines.

He said the current process seems to be less generous to the people of Florida than the BP claims facility would have been. According to the protocols, the closer the claimant is geographically to the oil spill, the better chance there is of receiving compensation.

McCollum also criticized the limitation on the time and ability of claimants to file emergency interim claims.

He said that interim payments are a required part of the OPA claims process and "should not be at the complete discretion of the administrator." WJ

The guidelines

- Claims for emergency payments must be submitted by Nov. 23.
- Claimants have until April 23, 2013, to file for final payments.
- Any emergency payment that is received will be deducted from the final payment.
- Any unemployment or private insurance will be deducted from the final payment.
- Claimants who receive a final payment give up the right to sue BP.

© 2010 Thomson Reuters

Woods Hole scientists locate oil plume in Gulf

Scientists from the Woods Hole Oceanographic Institute have charted a plume of hydrocarbons, residue from the BP oil spill, at least 22 miles long and more than 3,000 feet below the surface of the Gulf of Mexico.

In the study released in the Aug. 19 issue of the journal Science, researchers said they found the plume during a scientific expedition aboard the R/V Endeavor in late June. They discovered the plume using an autonomous underwater vehicle and an underwater mass spectrometer.

The researchers measured petroleum hydrocarbons in the plume and determined the source of the plume could not have been natural oil seepage in the Gulf of Mexico but had to come from the blown out BP well.

An analysis of the chemical makeup of the plume indicates the presence of benzene, toluene, ethybenzene and total xylenes in concentrations in excess of 50 micrograms per liter, the report says.

One of the study's authors, marine geochemist and oil spill expert Christopher Reddy, said in a statement that the 1.2-mile-wide, 650-foot-high plume of trapped hydrocarbons provides at least a partial answer to where all the oil has gone as surface slicks shrink and disappear.

The authors reported that deep-sea microbes were degrading the plume relatively slowly and that it is possible that the plume will persist for some time.

The study contrasts with the findings of the National Oceanic and Atmospheric Administration, which said Aug. 10 that the vast majority of the 4.9 million barrels of spilled oil from the well has evaporated or been burned, skimmed, recovered from the wellhead or dispersed.

Another Woods Hole author and chief scientist on the expedition, Richard Camalli, said the researchers observed the plume migrating slowly at about 0.17 mph southwest of the source of the blowout. They began tracking the plume about three miles from the wellhead and out to about 22 miles.

"Whether the plume's existence poses a significant threat to the Gulf is not yet clear," the researchers say.

Reddy said the results from this study and more samples yet to be analyzed could refine estimates about the amount of spilled oil that remains in the Gulf. WJ

WESTLAW JOURNAL **ENVIRONMENTAL**

This reporter offers coverage of significant litigation involving how courts interpret the Daubert and Frye standards regarding the admission of expert and scientific testimony. It covers all stages of litigation, from complaint to final appellate decision and each issue. It is a source for determining which evidence courts are likely to allow and which evidence courts tend to disallow, which is especially important in situations where there may be conflicting opinions within the scientific community about the same subject. It covers both federal and state cases on all major issues in this area.

Call your West representative for more information about our print and online subscription packages, or call 800.328.9352 to subscribe.

© 2010 Thomson Reuters

BP HIT WITH $50.6 MILLION FINE FOR VIOLATIONS AT REFINERY

BP Products North America has agreed to pay a record $50.6 million fine for failing to make promised safety changes at a Texas refinery where 15 workers died in a 2005 explosion, the Occupational Safety and Health Administration said Aug. 12. In addition, the oil giant will spend at least $500 million on safety improvements at the Texas City plant. The penalty tops the previous record fine of $21 million OSHA imposed on BP in September 2005 after the explosion. The company agreed at that time to implement safety changes at the refinery but failed to comply with several important parts of that agreement, OSHA investigators found in 2009.

N.C. TOUGHENS OIL-SPILL LIABILITY LAW

North Carolina enacted legislation Aug. 2 that will lift the cap on damages that can be recovered as a result of an offshore oil spill. In a statement Gov. Bev Perdue said she signed S.B. 836 to protect the state's coastal communities from potential disasters such as the recent oil spill in the Gulf of Mexico. Under the legislation, liability applies regardless of the spill location and includes coastal fishing waters. Also, any damages stemming from cleanup are covered. Perdue said other states can use S.B. 836 as a model as they prepare legislation in response to the BP spill.

LA. LAW BARS CANCELING POLICIES OVER CHINESE DRYWALL

Louisiana Gov. Bobby Jindal has signed a bill that prohibits insurance companies from canceling policies because policyholders have Chinese drywall in their homes or have filed a claim related to the drywall. The drywall, made from waste material from coal-fired power plants, can damage wiring, plumbing and appliances; emit a rotten-egg smell; and even cause health problems for homeowners. Senate Bill 595, enacted July 8, only applies to drywall imported from or manufactured in China before Dec. 31, 2009. Under the law, insurers have 30 days to reinstate policies canceled because of Chinese-drywall claims. The maximum penalty is $15,000, plus attorney fees and costs incurred by the homeowner.

© 2010 Thomson Reuters

CASE AND DOCUMENT INDEX

Fontenot et al. v. BP Products North America Inc., No. 10-00295, *complaint filed* (S.D. Tex. Aug. 3, 2010)........ 11
Document Section B........ 28

Garcia et al. v. Signetics Corp. et al., No. 09C-10-032, 2010 WL 3101918 (Del. Super. Ct., New Castle County Aug. 5, 2010)........5

In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010, No. 10-02179, 2010 WL 3269206 (E.D. La. Aug. 10, 2010)........9

Medmarc Casualty Insurance Co. v. Avent America Inc., No. 09-3390, 2010 WL 2780190 (7th Cir. July 15, 2010) 10
Document Section A........ 19

Wagoner v. Exxon Mobil Corp. et al., No. 09-07257, 2010 WL 3168382 (E.D. La. Aug. 9, 2010) 13

Watts et al. v. Enbridge Inc. et al., No. 1:10-753, *complaint filed* (W.D. Mich. Aug. 2, 2010)........ 12

Reproduction Authorization

Authorization to photocopy items for internal or personal use, or the internal or personal use by specific clients, is granted by Andrews Publications for libraries or other users registered with the Copyright Clearance Center (CCC) for a fee to be paid directly to the Copyright Clearance Center, 222 Rosewood Drive, Danvers, MA 01923; 978-750-8400; www.copyright.com.

© 2010 Thomson Reuters