Hearing of the Senate Committee on the Judiciary:
"Exxon Valdez to Deepwater Horizon: Protecting Victims of Major Oil Spills"
Tuesday, July 27, 2010 at 2:30 p.m. in Room 226 of the Dirksen Senate Office Bldg.

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For 21 years, my legal career has been focused on a single episode of drunk driving: In March 1989, the *Exxon Valdez* ran aground in Alaska's Prince William Sound.

As an attorney for 32,000 Alaskan fishermen, Natives, and cities, I tried the *Valdez* case against Exxon for five months in 1994. Along the way, my colleagues and I took testimony from more than 1,000 people, looked at 10 million pages of Exxon documents, argued 1,000 motions, and went through 20 appeals. I argued many of the appeals. After years of appeals, we distributed $1 billion to 32,000 claimants. I learned some things that might come in handy.

FISHERMEN

Fishermen run significant small businesses. Fishing boats cost from $60 thousand to well over a million dollars. In areas of the country where limited entry permits exist, those permits can cost from $5 thousand to $300 thousand. Boats and permits tie up significant capital often financed through bank loans. That capital also provides the fisherman's retirement fund.

An oil spill may prevent a fisherman from catching fish. The spill may hurt the exvessel price of fish as many buyers do not want fish from an oiled fishery. And a spill may drastically devalue boats and permits.

Because a fisher's capital is illiquid, an interruption in fishing can drive him into bankruptcy in a year. A fisherman needs immediate cash after his fishery is oiled, to live on and to make the payments on his boat and permit. Because the effects of oil on a fisher's business may be unknown for years, any final accounting may have to wait for years. The uncertainties created by a spill can destroy a commercial fishery.

LAW OF OIL SPILLS AT THE TIME OF THE *EXXON VALDEZ*

When the *Exxon Valdez* ran aground in 1989, the primary remedy against an owner or shipper was the maritime common law, which allowed a remedy for negligence. In addition, companies were responsible in punitive damages for the reckless acts of their managerial level employees. People with oiled property and fishermen, processors, and tendermen could recover. Others were barred from recovery of economic losses under a doctrine referred to as Robins Dry Dock after the Supreme Court case of the same name in 1927.[1] Owners and shippers could attempt to limit their liability to the salvage value of the wreck under the Limitation of Liability Act of 1851.[2] However, Congress passed a special statute for Alaskan oil in 1973 that provided for a $100 million fund and repealed the Limitation of Liability Act for Alaskan oil.[3]

THE *EXXON VALDEZ* LITIGATION

In the early 70s, fishermen of Cordova, Alaska objected to the building of a pipeline across Alaska that had a supertanker terminal in Valdez. They argued to the Congress that a catastrophic spill was inevitable on the sea leg of the oil's journey through Prince William Sound to the lower 48 states. The Sound was one of the great fishing grounds in the world. A bitterly divided Congress authorized the pipeline. As predicted by the fishers of Cordova, on Good Friday, 1989, the Valdez ran aground, oiling Prince William Sound with the oil moving around the Kenai Peninsula to Kodiak, Cook Inlet and the Alaskan Peninsula.

In the *Valdez* case, Exxon set up a claims office right after the spill to pay fishermen part of their lost revenue. Fishermen initially were required to sign documents limiting their rights to future damages. After an outcry, that practice stopped. At the time, the full extent of their damages was not known. As time would tell, fishermen didn't fish for as many as three years after the *Valdez* spill. Their boats and fishing permits lost value. The price of fish from oiled areas plummeted. Prince William Sound's herring have never recovered and there hasn't been a herring fishery for over ten years. Alaskan Natives have seen their lands oiled and re-oiled over the years and to this day have oil on many of their beaches. In short, south-central Alaska was devastated.

Despite public outcry, the Coast Guard and Exxon declared victory and a cleanup over after two years. Exxon spent $2 billion dollars on the cleanup, picked up only 8 percent of the oil, and oil remains today.

Alaska and the federal government settled both criminal and natural resource claims with Exxon early on in the litigation. Exxon pled guilty to violations of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act, and was fined $25 million plus restitution of $100 million. The damage claims were settled for a little over $900 million. Both settled early, as the governments stated in the approval process, because they couldn't afford the legal fight that full compensation would entail and needed immediate money for restoration. In hindsight, the damages were much worse than expected, as they will be for the gulf spill. Although the agreement with Exxon had a reopener clause in it for future damages for $100 million, all it did was create more litigation. In the end, full damages to the public lands were never recovered. This left state and federal governments to foot the bill.

After a five-month trial in Anchorage, Alaska, on September 16, 1994, a jury found Exxon liable to private plaintiffs for $287 million in compensatory damages and $5 billion in punitive damages. With other settlements, the amount of compensatory damages eventually recovered by private plaintiffs was $507 million. In the end, Exxon paid $500 million in interest payments.

The appeals courts found that fishermen, fish processors, and fish tenders, as well as those who had oiled property were entitled to recover. Many other claimants, including area businesses and boat builders, were unable to collect because of Robins Dry Dock. Fishermen were able to recover lost catch and the impacts on fish price but, for the most part, were unable to collect diminution in the value of their fish permits and boats. The appellate courts reduced the amount of punitive damages to $2.5 billion.[4]

After 14 years of appellate litigation, the Supreme Court in *Baker v. Exxon*[5] affirmed the imposition of punitive damages but reduced the punitive award to $507 million, declaring for the first time in American law that there is a 1 to 1 limiting ratio for large punitive damage awards. At the same time, because of a split vote, the Supreme Court cast doubt on the imposition of punitive damages on vessel owners for the reckless acts of their managerial employees.

Many commentators view the decision as an unusually activist decision, this time in favor of big business.

We began to set up our claims processes in 1994. The design work on "who could collect for what" took two years, primarily because we attempted to achieve consensus on behalf of claimant groups and fairness. As we collected settlement money, and eventually $1 billion from Exxon, we disbursed it to claimants. It has taken us a number of years primarily because of Exxon's delaying tactics. Over the last 21 years we estimate that over 6,000 victims have died out of 32,000. We received our last $70 million payment from Exxon less than a year ago. We also have been impacted by IRS, state tax, and child support liens. Recently we have been slowed because of a need to deal with estates, bankruptcy estates, and divorces. We are about done.

As an aside, we started the litigation with 62 law firms. Most bailed out over the years due to expense. Most of the work over the last 21 years was done by 4 firms. My colleagues Dave Oesting, Matt Jamin, Gerry Nolting, Lynn Sarko and I have worked almost full time on this case since 1989.

LESSONS LEARNED FROM THE *EXXON VALDEZ* LITIGATION

The *Exxon Valdez* oil spill taught us that the extraction and transportation of oil will necessarily result in massive spills. Once oil is spilled, you cannot really clean it up. It goes in directions you never expect it to go. And a spiller will pressure the Coast Guard to declare victory and a cleanup over.

We also learned that the harm from a spill may be ongoing for years, and thus, the full extent of damage may be unknown five or ten years after the spill. For damage claimants, the unpredictable nature of an oil spill raises many questions. Will oil impact a fishery for a year or destroy the fishery? Will oil impact a specific species such as oysters or shrimp or will it impact the entire food chain? Will clean up activities and use of toxic dispersants cause more harm to natural resources? It also presents a need for immediate interim payments and a final accounting some years later.

Further, we learned that the traditional construct of maritime law is outdated and provides little relief to victims of the spill. Many fishermen were unable to recover the devaluation of their boats and fishing permits. Many area businesses were unable to recover at all. And Exxon used the inherent problems of proof regarding future damages to defeat many legitimate damage claims. Sadly, we also learned that a company as big as Exxon can bring the judicial system to a halt and delay payments to claimants until many of them are dead.

As to the state and federal settlements, in hindsight, they were hasty. The novel reopener clause now proves to be nothing but a license for more litigation.

Last, we learned that for whatever reason, the people who run claims funds treat fund money like it is their own, imposing rules so stringent that those injured have a hard time actually recovering money. The $100 million fund that Congress set up for Alaskan oil spills was designed to quickly and fairly pay claims but did little to solve the problems of fishermen, Natives, and damaged landowners. That fund only paid out about $37 million, even though the fund had $100 million to spend.

OPA '90

Congress passed the Oil Pollution Act of 1990 ("OPA '90")[6] in response to the *Exxon Valdez* oil spill, though the law did not apply retroactively. Under OPA '90, the states and the federal government are entitled to full recovery for their cleanup costs. Private claims and any other government claims, are artificially capped, for example at $75 million for the BP spill. However, there are exceptions, and if gross negligence or federal safety law violations are proved, there is no damages cap at all.

OPA '90 also preserves lawsuits under state law. In the BP spill, Texas, Mississippi, Alabama, and Florida either have no damages cap in their oil spill statutes or allow state law claims that are not subject to damages caps. So wise plaintiffs – states or fishermen – can avoid damage caps if they bring state law claims in Texas, Mississippi, Alabama, and Florida.[7] Louisiana's oil spill laws follow OPA '90 and cap damages at $75 million, but again, there are exceptions for gross negligence or violations of federal safety laws. However, it may very well be that Louisiana claimants are limited under the law to $75 million.[8]

OPA '90 tried to reform issues concerning the scope of recovery. In Section 1002 of OPA '90,[9] removal costs, natural resource damages and lost taxes are addressed. So are damages for property touched by oil. These sections provide little improvement from prior law. Economic damages for private plaintiffs are narrowly defined. For example, fishers can recover lost revenue but not the devaluation of their fishing permits or boats, substantial investments which can be worthless after a spill. Cities can recover only the "net costs" for spill response, a small fraction of diverted public services spent on an oil spill.

UNCERTAINTIES IN OPA '90

A plaintiff under OPA '90 may be in worse shape than before the passage of that Act. OPA' 90 has created many uncertainties that will serve to fuel and prolong litigation to the detriment of those impacted by the spill.

To begin, OPA '90's damages caps limit recovery for claimants. Prior to the spill there was no cap for a plaintiff who was able to prove mere negligence.

Second, for a plaintiff choosing a state law remedy, does the Limitation of Liability Act still apply?

Third, does OPA '90 allow a cause of action for simple negligence under general maritime law? That negligence claim was successfully tried with no damages cap in the *Exxon Valdez* oil spill case. But there is an unresolved question as to whether maritime negligence is preempted by OPA 90.[10]

Fourth, does the Robins Dry Dock doctrine apply, limiting the scope of plaintiffs who can recover?[11]

Fifth, assuming that Robins Dry Dock does not apply, who can collect and what can they collect? What laws of proximate cause apply? Fishermen can recover lost profits but what about resort hotels? What about the hotel with the oiled beach? Yes, but what about the one two blocks down the beach with no oil? And how about the hotel across town with no beach?

Sixth, do punitive damages still exist under federal law?[12] And what about the imposition of punitive damages on a company for the reckless acts of its managerial agents? If punitive damages are available, is the amount of punitive damages limited to a 1 to 1 ratio?

OIL SPILL FUNDS AS PROXIES FOR LITIGATION

OPA '90 established the Oil Spill Liability Trust Fund ("OSLTF"),[13] which has essentially no track record and is another source of uncertainty. Claimants from the gulf spill must first present claims to BP, and if they don't get full payment, they can present their claim to the OSLTF. OPA '90 limits the maximum payout from the OSLTF for the BP Gulf oil spill to one billion dollars. Claims are processed in the order received, and claims are paid out in the order approved. In other words, the OSLTF operates on a first come, first served basis. Up to now, the major claimant and beneficiary of the Fund is the fund administrator, the Coast Guard, and not shrimpers and other claimants.

The basic problem with any fund is its size. As we can see, the one billion dollar OSLTF is not sufficient to deal with a major oil spill, especially if state and federal trustees can claim against the fund.

A second problem is the need of victims for immediate economic relief from the disaster and at the same time, the need for a sufficient period of time after the spill to assess the full extent of damages. Quick time bars subvert the fairness of the claims process by forcing premature settlements that do not capture the full extent of damages. This applies to both natural resource trustees and private claimants. An effective payment scheme must have at least two different kinds of payments: quick interim payments and a fair, final payment calculated after all the effects of the spill are known.

Third, damage assessments in oil spills are complex, and claims programs cannot be cookie cutter operations run by people with little experience in natural resources damages or fisheries. Claims adjusters and damage forms limit damages to the most obvious and are tied to often misleading historical data. For example, a claims adjuster may limit a fishermen's claim to the harvest levels and price of a prior poor season. Lawyers are needed to develop fully what are

significant business claims. In the *Valdez* case, the claims program paid little of the ultimate recoveries.

Fourth, a claims administrator should not require releases; a claims administrator should not be acting as a defense attorney for the spiller. Even Exxon abandoned the practice of requiring releases. If claims monies move to a claimant, a receipt should be issued so that the spiller gets credit for the amount paid, but nothing more. As a matter of sound economics and simple justice, a victim ought to be able to take a payment for less than his full amount of damages and then move to the courts, if necessary, to be made as whole as money can make him whole. Claims payments should not be final settlements.

Fifth, claims administrators should not impose harsh rules that serve to prevent recovery for many of those legitimately harmed by the spill. As we saw with the $100 million fund that Congress set up for Trans-Alaska oil spills, nearly two-thirds of the money stayed in the fund due to crabbed claims rules. This problem is exacerbated when the fund is administered by institutions with ties to the oil industry.

It remains to be seen how Kenneth Feinberg will administer a claims facility and the new $20 billion escrow fund. Almost all we know about the administration of the $20 billion fund comes from the news. Mr. Feinberg has a track record of integrity and public service. However, all the claim funds he has administered were for defined populations of victims whose injuries resulted from a past and single event. An oil spill and its impacts are ongoing over a number of years. A recent ABA publication indicates he intends to be flexible as to the proof of a victim's claim. At the same time, he is using BP's claim adjusters and ESIS, which has direct ties to the insurance industry. Feinberg has announced that the $20 billion escrow will be available for cleanup costs, including BP's cleanup costs. If that's the case, the lion's share of the escrow would be used to reimburse BP for its cleanup costs – and not to pay claimants. The ongoing nature of a spill presents Mr. Feinberg with a unique challenge: as we sit here today, we have no idea how long the Gulf and its fishermen will be impacted. Mr. Feinberg, a lawyer, is encouraging claimants not to use a lawyer but at the same time to sign releases. His public pronouncements indicate he will attempt to roll up his operation in 3 years. How can fishermen without lawyers finally settle significant business claims? These are all problematic.

SOCIAL CONSEQUENCES

Oil spills have devastating impacts on people. Oil spills also tear the social fabric of communities. The obvious impact is the loss of tax revenues. But for fishing based communities the most serious impacts are in increased divorces, bankruptcies, alcoholism, tax liens, domestic abuse, stress-related disorders, depression and a loss of faith in American institutions like the Coast Guard, the courts, and corporate America.[14]

As people in the Gulf well know, when natural disasters hit, people are resilient. But people react differently to man-caused disasters. Hard feelings linger for years. You can go into a bar in rural Alaska and it is as if the *Valdez* spill happened last week. For many people, the *Valdez* spill destroyed a way of life. Family fishers left the business. Fishing communities are half the size they once were.

For people to move on from man-caused disasters, they need their full measure of justice. Yet the citizens of Alaska certainly didn't get justice when the Supreme Court of the United States cut their damage award by a factor of ten. Petroleum companies play down the size of their spills and have the time and resources to chip away at damages sought by hard-working victims.

The media and public attention will move on after the spill is plugged, but these real human issues will persist for years. There is great uncertainty going forward. Justifiable anger rules the day in resource based communities.

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[1] *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303 (1927).

[2] 46 U.S.C. App. § 183. The Limitation of Liability Act is now codified as amended at 46 U.S.C. § 30505. *See* Pub. L. 109-304, § 3, 120 Stat. 1513.

[3] Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1651.

[4] *In re* Exxon Valdez, 472 F.3d 600 (9th Cir. 2006); *In re* Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001).

[5] *Exxon v. Baker*, 128 S. Ct. 2605, 2634 (2008).

[6] 33 U.S.C. §§ 2701-2761.

[7] Tex. Nat. Res. Code § 40.256; Miss. Code Ann. § 49-17-1 *et seq.* (silent on whether the statute preempts other state law causes of action); Code of Ala. § 22-22-9; Fla. Stat. § 376.205.

[8] La R.S. 30:2479; La R.S. 30:2491.

[9] 33 U.S.C. § 2702(b).

[10] *National Shipping Co. of Saudi Arabia v. Moran Mid-Atlantic Corp.*, 924 F. Supp. 1436, 1447 (E.D. Va. 1996) ("Because OPA provides a comprehensive scheme for the recovery of oil spill cleanup costs and the compensation of those injured by oil spills, the general maritime law does not apply to recovery of these types of damages.").

[11] *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 631 (1st Cir. 1994) ("Robins Dry Dock remains the rule in this circuit for federal claims, we simply hold that Rhode Island is free to chart a different course.").

[12] *South Port Marine, LLC v. Gulf Oil Ltd. Pshp.*, 234 F.3d 58, 66 (1st Cir. 2000) ("For the reasons set forth above, we agree with the district court that punitive damages were not available to plaintiff and affirm the court's ruling on that issue.").

[13] 26 U.S.C. § 9509.

[14] J. Steven Picou, Duane A. Gill, & Maurie J. Cohen, *The* Exxon Valdez *disaster: readings on a modern social problem* (J.S. Picou, D.A. Gill, and M.J. Cohen, eds., Dubuque, IA: Kendall/Hunt Publishing Co., 1999).