

PARTICIPATION OF INSURERS IN THE UNIFIED COMMAND SYSTEM IN THE UNITED STATES

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ABSTRACT

The introduction and adoption of the Unified Command System ("UCS") /Incident Command System ("ICS") under the Oil Pollution Act of 1990 (Public Law 101-380, as amended) ("OPA '90") has been largely effective, the ongoing training of Federal On-Scene Coordinators ("FOSC") by the Coast Guard's Marine Safety School has raised the quality of spill response management, and the development of Spill Management Teams ("SMT") by the private sector has also significantly improved the effectiveness of spill response. However, the role that a Responsible Party's ("R.P.") insurance plays in an event is an aspect of marine casualty response that is not adequately addressed in the ICS or by the FOSC. More often than not, the true financial stakeholder during a casualty is not the R.P. under OPA '90 but rather its multiple insurers. The failure to consider multiple stakeholder interests in the ICS/UCS may result in a delayed, inefficient response or even paralysis on the part of the R.P. Many R.P.'s do not have the financial resources to fund the potentially high cost of a spill response and it is only through the cooperation and prompt funding by the insurer that the R.P. is able to respond at all. Yet the system and organization of the response recognizes the R.P., but it does not properly involve the insurers as the true stakeholders. It also fails to recognize the complexities and implications of multiple insurers.

Creating a mechanism within the framework of the ICS/UCS that recognizes the insurance stakeholder interests, and requires some level of participation by insurers, would improve casualty and spill response. This paper will examine the foregoing issues and discuss why the insurer stakeholder should be included in the ICS/UCS decision making process.

BACKGROUND

A. The Incident Command System

The Incident Command System ("ICS") has been adopted in the United States for federal, state and local oil spill response efforts (see figure 1). The ICS was originally established as a scheme for organizing fire-fighting groups to combat forest fires in the western United States. The ICS has over time been used in other emergency response situations, including floods, earthquakes, train wrecks, and airplane crashes. Because response forces often came from different agencies and had to work across jurisdictional boundaries, it was necessary to create a system capable of integrating diverse groups and to provide a coherent organizational structure. The ICS and its derivative, the Unified Command System ("UCS"), have been employed to accomplish these objectives. The ICS system furnishes a standard organizational structure and defines the organizational authority and responsibility. The UCS provides a command structure that defines and integrates command responsibility for the various jurisdictions involved. (For purposes of this paper, we will collectively refer to the UCS and ICS as "ICS."). In the context of the ICS, the OPA '90-mandated FOOSC is the Incident Commander.

B. The Marine Insurance Market

The insurance for a vessel can include many separate policies with different underwriters covering the cargo, containers, hull, total loss only, tower's liability, pollution, protection and indemnity, and excess liability. Not only can you have separate policies with separate companies, but you can also have multiple companies participating on any one given policy. Coverage for each of these policies may be placed in different or multiple countries around the world. The marine insurance market has grown in size and complexity during the past 300 years and has become an integral part of international trade and business. For example, capacity for specific risks was developed in the 1970's, involving the entire global marine insurance market, to allow the insurance of the massive North Sea platforms. This large insurance market for platforms continues to exist today.

As a result of the diverse and potentially numerous policies covering each vessel, marine casualties commonly involve more than one insurance coverage and more than one insurer. Thus, underwriters have traditionally worked together to solve any conflicting issues, such as whether an expense is chargeable to general average or particular average. This process, however, may involve drawn out negotiations over a lengthy period of time. Unfortunately, the emergency response phase of a pollution incident does not lend itself to slow analysis, deliberation, and negotiations by underwriters. Consequently, the traditional interrelationships among underwriters may not be effective in light of the inherent time limitations. To understand this relationship, and the possible overlap of insurance policies, a review of the various forms of marine insurance is helpful. Within the U.S., it should be remembered that the antitrust and restraint of trade laws make it virtually impossible for underwriters to agree in advance which elements of coverage will be provided by each of them and, accordingly, overlapping coverage is inevitable. While there are many different

types of coverage and as many ways of insuring risks as there are risks to be insured, the typical types of marine insurance which would provide coverage for a casualty are detailed below.

Hull Insurance

Typical hull insurance covers the vessel, her machinery, certain liabilities resulting from collisions, and general average and salvage charges. A hull policy on a commercial vessel will insure against physical damage and losses from certain "named perils," including errors in navigation or accidents caused by extraordinary action of the sea, fire, theft and barratry. Many casualties require dewatering of a vessel that is taking on water, removing a vessel from a strand, repairing a vessel, and other activities which save and protect the vessel and may prevent or contribute to the prevention of a substantial threat of pollution or serious pollution damage.

During the response to a casualty, the FOSC may demand that the R.P. develop a salvage plan, in part to prevent a substantial threat of pollution, but primarily to save and protect the vessel, prevent the vessel from sinking and obstructing a channel, and achieve other purposes which may have nothing to do with a pollution incident. To increase the odds of a successful salvage operation, technical input from the hull insurer and its surveyor may be desirable. It will also be the hull insurer's primary responsibility to conduct the salvage operation after the substantial threat of pollution from the vessel has been abated or brought under control, since the pollution liability underwriter would have already fulfilled its obligation to the assured.

In the event of a marine casualty that involves both pollution and physical damage to a vessel, the hull underwriter may also be required to arrange for temporary repairs and cleaning of internal spaces and tanks in order for repairs to be made. All of these actions by the hull insurer may have to be taken while spill response efforts are underway, so it is crucial that the hull insurer be readily available to make decisions on a 24-hour basis regarding salvage, safety and repair of a vessel in conjunction with the pollution insurer.

In some cases, the hull underwriter may be responsible for removing the oil cargo that, while no longer posing a substantial threat of pollution (e.g., when a vessel's tank vents are plugged), is required to be removed to conduct a salvage operation successfully.

Protection and Indemnity Insurance

Protection and Indemnity Insurance ("P&I") is an outgrowth of limitations contained in the hull policy, and covers most liabilities not provided for in the hull policy such as personal injury, illness, and loss of life, those collision liabilities that are excluded from the hull policy, fines, legal costs, and wreck removal. In many parts of the world, and in the case of the International Group of P&I Clubs, the pollution risks may be included in the P&I cover. In other cases, a separate

pollution cover is purchased and pollution liabilities are then excluded from the P&I cover. Most casualties will also result in non-OPA '90 damages covered by the P&I insurer, such as personal injuries.

Salvage under the hull policy is conducted when the cost of the salvage is estimated to be less than the value of the vessel after it is salvaged. Where the vessel is considered to be a total loss (i.e., the cost of salvage and repairs exceeds the insured value) the P&I underwriter will cover the wreck removal cost. Sometimes the vessel may be a total loss even though the vessel appears undamaged through the eyes of a casual observer. For example, if the engines of a ship are damaged and have to be replaced, the cost of replacement may well be greater than the insured value of the vessel. In this case, the vessel is declared to be a total loss and the hull underwriter pays the owner the full insured value. The responsibility for removal of the wreck then falls on the P&I underwriter. However, this determination may be occurring at the same time that the FOSC is seeking a salvage plan or other action and thus neither underwriter will be anxious to respond to the FOSC.

Other types of environmental damage are covered by P&I insurance. For example, where a vessel has grounded or stranded on a coral reef or comes into physical contact with any other natural resource and causes it harm, the resulting environmental damage will generally be covered by P&I and not by a separate pollution underwriter. In this scenario, it is the P&I insurer that will likely have a surveyor on-scene to address the environmental issues that arise. If there is a separate pollution policy in place, the pollution liability underwriter will also have a surveyor on-scene to work in conjunction with the P&I underwriter to address damage resulting directly from any oil spill that may have occurred.

Coverage for the vessel's liability to its cargo may also fall under the P&I cover where the damage to the cargo results from the fault of the vessel. In many cases, it may be the concern of the P&I underwriter that the cargo in undamaged tanks is removed in a safe fashion to prevent damage to the cargo.

Cargo/Container Insurance

As noted above, the P&I underwriter has an interest in the cargo and in the off-loading of the cargo. The owner of cargoes carried on board a vessel will also, in general, obtain insurance for the loss of the cargo. Ultimate payment for cargo loss expenses will be based on allocation of liability for the loss.

Since the offloading of cargo may also provide an incidental benefit to the pollution underwriter, the complexity of the coverage issues begins to mount. While the offloading of cargo may be to alleviate a substantial threat of pollution, in most cases it is also to protect the cargo and to empty the vessel so it can then be gas-freed and proceed to dry-dock for repairs. In many cases the cargo tanks are not damaged, the vessel is not obstructing a channel and there is no threat

that the vessel will spill. Yet, as part of a response to a casualty, it will still be desirable to offload the vessel so it may continue on its way.

The owners of the containers carried on board vessels may obtain insurance on the containers and, accordingly, they would become involved in casualties involving salvage or recovery of the containers.

Excess P&I Insurance

This coverage sits on top of the primary layer of P&I coverage, and responds when the limits of the underlying insurance have been depleted. Thus, excess underwriters are generally not prepared to respond to emergencies on a 24-hour basis. The larger the casualty, however, the more likely that the excess underwriters will be required to become involved in a casualty response.

Miscellaneous Insurance Coverage

There are a number of additional insurance interests such as tower's liability, freight, total loss only, and war and strikes, to name a few. Each of these may, given the right circumstances, have an involvement in a marine casualty. For instance, when a tug and tow are involved in a casualty, the tower's liability cover would respond on behalf of the tug in a manner similar to a P&I policy.

The Water Quality Insurance Syndicate

The Water Quality Insurance Syndicate ("WQIS") insures certain pollution liabilities for approximately 40,000 vessels, of which 300 to 400 are involved in pollution incidents in any given year. For U.S. inland vessels, assureds covered under the typical inland P&I policy containing a pollution exclusion must also obtain WQIS' coverage for pollution liabilities. WQIS coverage may also be provided in conjunction with traditional P&I Club coverage when the Club prefers not to insure the primary layer of pollution coverage.

OPA '90 requires vessel owners and operators to establish and maintain evidence of financial responsibility sufficient to meet the maximum liability to which it could be subjected under OPA. The provider of a vessel owner's evidence of financial responsibility is a "guarantor" and can have claims asserted against it directly by any party that has sustained damages under OPA '90. WQIS is one of the largest individual issuers of guaranties under OPA '90, providing its assureds with a method of complying with the financial guaranty requirements.

While a great deal of publicity is focused on large spills and spills of national significance, most oil spills are relatively small in size and do not require the activation and deployment of the entire ICS system. These smaller spills, however, can present a significant threat to the local environment and, if in the wrong place at the wrong time, they can create as much actual damage to the environment as the high profile spills. They can have a complex nature and involve far more than pollution issues.

Many of the companies insured by WQIS are small, with limited resources and a small number of employees, and thus are not able to devote significant corporate resources to a spill response. Even some of the larger companies that are prepared for an event may not have the capability to sustain a response for any period of time beyond a few days and have an overriding need to return their employees to their routine functions. Accordingly, at its assured's request and at no additional cost, WQIS provides spill management services to facilitate the response to a pollution incident. To achieve this end, WQIS has assembled the Marine Pollution Response Group ("MPRG"), to respond to the pollution incidents of its assureds on a national basis and work closely with the FOSC in the context of the ICS system. MPRG is an SMT comprised of independent marine response consultants and surveyors with many years of pollution response experience. As a result of the large number of spills attended by MPRG, WQIS has an ongoing opportunity to acquire information and knowledge regarding the use of the ICS in responding to oil spills.

DISCUSSION

Oil and hazardous substance spills vary in size and complexity and generally arise from a marine casualty such as an allision, grounding, equipment failure, collision, fire or the threat of sinking. OPA'90 imposes liability on an R.P. for costs and damages arising from a discharge of oil or a "substantial threat of a discharge" of oil. There are similar response requirements under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Public Law 96-510, as amended) ("CERCLA") with respect to a release or substantial threat of a release of a hazardous substance. In this paper, we will mostly limit our discussion to OPA '90 liabilities.

When an oil spill occurs, there are typically other casualty-related concerns, including cargo damage, salvage, wreck removal, lifesaving, and personal injury. In the international blue water market, hull, cargo and P&I underwriters will have in many cases negotiated an allocation of liabilities amongst themselves as a part of the basic placement of the insurance. However, it is important to remember that the issues raised here with respect to coordination of insurance coverages in response to a casualty may well be applicable to a casualty outside of the U.S. depending on what underwriters and which policies are involved. One should not assume that the relationships among underwriters that we are describing are limited to the U.S. In fact, disputes over coverage among underwriters is a global situation that requires constant negotiation and, in some cases, litigation.

In the U.S., a vessel owner R.P. will likely rely on its various insurers to either fund a casualty response or approve expenses that will later be indemnified. Coverage under some policies may actually be voided if prior approval of expenses is not obtained by a vessel owner. As previously noted, when an oil spill occurs in the U.S., there will often be a separate pollution liability underwriter involved, such as WQIS. Additionally, because casualties generally require

actions in addition to the OPA'90-driven response to a discharge or threat of a discharge, the cooperation and involvement of all of the R.P.'s insurers are critical to ensure clarity and timely funding of a response. This includes hull insurers, P&I insurers, pollution liability insurers, and any other insurer whose coverage is implicated in the casualty. On an operational level, the surveyors that are on-scene representing certain underwriters will also have to cooperate with the SMT that is assigned by either the pollution liability underwriter or, in the case of an insured that does not have separate pollution coverage, the P&I underwriter.

You can have more than one vessel involved in a casualty and more than one R.P. Of course, when the number of parties increase, the complexity of an event increases, and there is even a greater need to garner the cooperation of all the insurance stakeholders and their representatives.

An R.P.'s multiple insurers often have legitimate disputes over the allocation of expenses and the overlap of coverage. For example, the allocation of liabilities between pollution liability insurers and hull or P & I insurers with respect to whether certain expenses are for sue and labor, cargo removal, pollution response, or salvage is often an issue. However, insurers will not generally "step up to the plate" unless all other stakeholders are required to do so or they otherwise find a strong incentive.

While the ICS system and use of the FOSC has for the most part proven to be an effective way to deal with the controlled chaos that often surrounds a casualty response and oil spill, it has not been effectively used to integrate insurer stakeholders into marine casualty responses. This has probably occurred because the focus of the response has been placed on the R.P. as if the R.P. was in fact a solitary entity operating without numerous financial interests behind it, namely its insurers. The assured may be unable to commit or fund necessary response actions without the approval of its insurers. The FOSC must recognize that it is a complex financial event in which numerous underwriters may have exposure for expenses that are not attributable to oil pollution response measures required under OPA '90. The failure to integrate the insurer stakeholders into the ICS decision-making process can often result in significant delays in the ability of the R.P. to make response decisions, thus preventing the best possible global resolution of an event.

One possible explanation for this failure to integrate insurers into the ICS is that, under OPA '90, the FOSC is authorized to obtain access to the Oil Spill Liability Trust Fund ("OSLTF") (derived from taxing domestically produced and imported oil) for costs incurred in responding to an "actual or threatened discharge." While this is a necessary and potent weapon to respond to oil spills, access to such a fund is simply not available under other statutes. This has in some instances resulted in the FOSC declaring that all activities during a complex, multifaceted casualty event-- including the removal of cargo, salvage operations, and debris removal--result from a "substantial threat." The obvious problem with this

approach is that some of the actions required by the Coast Guard as a result of a casualty are not required to "respond to a threat or threatened release of oil" but rather to address other aspects of a casualty, such as the necessity to remove a vessel because it constitutes a hazard to navigation, or to correct an operating or safety deficiency. Accordingly, there is no statutory authority for the FOSC to declare that the entire response to a casualty is necessary to prevent a discharge or substantial threat of a discharge. This gap currently results in severe limitations with respect to a casualty response. In the middle of some incidents, the FOSC may order actions to be taken by the R.P. When the R.P. does not respond, the FOSC seeks funds from the OSLTF but will not in all cases be authorized access. It is not helpful to have these kinds of problems arise during the emergency response phase of a pollution event.

While MPRG, or the SMT of a P&I insurer, will likely be actively participating in the casualty response on behalf of an assured, representatives of an assured's hull underwriter will not necessarily be present unless a salvage operation is contemplated. (Indeed, under OPA '90 the FOSC is not empowered to demand the hull underwriter's presence or the submission of a salvage plan.) This situation occurs because many insurance companies are reluctant to get involved in pollution events and do not want their names linked to the event in the press. Many insurers do not normally deal with emergency response but rather make decisions in a relaxed time frame. This means that the insurers may not wish to step forward and volunteer their involvement. The failure of the system to facilitate the involvement of all the interested insurers could hinder the timely or effective response to a casualty. However, this reaction by non-pollution insurers is understandable, since the Coast Guard is turning accepted principles of marine insurance coverage on their head by requiring pollution underwriters to assume responsibility for such items as salvage by simply asserting that the entire response to a multifaceted casualty is required due to a "substantial threat" of pollution under OPA '90. To combat this situation, the Coast Guard must address this issue during its training of potential FOSC's and other Coast Guard response personnel, instructing its personnel to keep open lines of communications with all insurance stakeholders. Allowing insurers other than the pollution liability insurer to avoid direct participation in the casualty response by ordering the R.P. to conduct all casualty response activities under OPA '90 will only result in litigation, since it is simply unacceptable for the underwriter addressing the pollution liabilities, whether it be a P&I Club or a pollution liability underwriter such as WQIS, to be required to pay expenses that are not for pollution response.

An example of litigation arising out of this type of scenario is *Alabama State Docks v. Compania Antares de Navegacion*, in which the Court granted summary judgment in favor of WQIS, ruling that wharfage and docking fees for the M/V ANTARES due and owing to Alabama State Docks ("ASD") were not removal costs or damages under OPA '90, even though a Notice of Federal Interest was issued by the Coast Guard suggesting that there was a threat of pollution. The

Court explained that ASD played no part in removing pollutants from the ANTARES, nor did ASD play any role in minimizing or mitigating the danger of pollution presented by the unseaworthy condition of the vessel. The Court also ruled that because there was no oil spill, the dockage and wharfage fees could not be considered compensable revenue or lost profit or damage under OPA '90, thus applying the general rule under maritime law that there can only be recovery for economic losses when there is accompanying physical damage (i.e., the Robins Dry Dock rule).

Similarly, a pollution insurer pressured into paying more than its appropriate share of damages by the FOSC must seek legal relief. *Kearny Barge Co., Inc. v. Global Ins. Co. (the CYNTHIA M)*, is a case that is illustrative of the type of damages that can initially be foisted on the pollution underwriter in the context of a spill and at the same time offers a practical approach to allocation of marine salvage expenses when a potential threat of pollution exists.

The cost of salvage traditionally falls within the coverage of the vessel's hull underwriters. Here, an attempt was made to charge the pollution underwriter, on the theory that the refloating also addressed a threat of pollution under CERCLA.

The barge CYNTHIA M, owned by Kearny Barge Co., sank at dockside on the Hackensack River, fully laden with caustic soda about to be unloaded at that location. Some of the cargo leaked into the river and dissipated. All valves were quickly closed and the cargo secured. Pollution surveyors and clean-up crews were brought in to stand by, and that expense was borne by WQIS, the vessel's pollution underwriter. Seventeen days later the vessel was refloated, with no intervening pollution. The pollution contractor was released by the Coast Guard two days after the sinking and returned, for stand-by only, on the day of refloating two weeks later. Their bill was paid by WQIS.

The salvor's bill was not paid, in any measure, by hull underwriters. Kearny Barge's average adjuster sought to allocate the majority of the salvage expense to WQIS, who refused to pay it, arguing that the salvage bill was the responsibility of hull underwriters. The district court (in a decision later affirmed by the Court of Appeals for the Second Circuit) agreed. Relying upon the Ninth Circuit's decision in *Port of Portland v. Water Quality Ins. Syndicate* (addressing the issue under the Federal Water Pollution Control Act), the court ruled that the determination as to who pays for the raising and refloating of the barge turns on a question of fact-whether the refloating activities constituted salvage operations or pollution control.

The court found, after trial, that the refloating of a sunken barge laden with caustic soda was a salvage operation and that the expenses were not affected by the potential pollution. Although the salvage operation addressed the threat of pollution, the pollution prevention was "incidental" to the salvage of the CYNTHIA M, and the salvage costs were thus properly chargeable, in full, to hull underwriters.

Although the CYNTHIA M was decided in a CERCLA setting, the issue under OPA '90 would also turn on a question of fact, with a strong leaning toward the view that salvage is just that, and that salvage costs remain the responsibility of hull underwriters. Unfortunately, this type of litigation is not the commercially preferable solution for resolving disputes that could potentially be solved at the time of a casualty by the active participation of all underwriters.

CONCLUSION

The fact that insurers are not even mentioned in the 300 page National Contingency Plan is a telling indicator of the U.S. Government's lack of attention to the role they should have in spill response. Since most R.P.'s do not themselves have the financial resources to carry out all the actions that may be needed, the failure of the FOSC to recognize and involve the various stakeholders causes the R.P. to be unable to act, resulting in delay and less effective and timely response to what is oftentimes a very time sensitive situation. The appropriate recognition by the FOSC and the ICS staff that most casualties are complicated events requiring inclusion of all financial stakeholders to sort out the financial complexities on an ongoing basis would alleviate this problem.

The FOSC should require that the R.P. identify its insurers and insist that they be fully represented at an event and prepared to make financial commitments with respect to a response. One possibility is to have insurers participate directly in the Finance Section of the ICS. Other less formal approaches might be acceptable, such as simply requiring that insurers have an individual available to discuss coverages with the FOSC on an as needed basis.

It is recognized that the response to a casualty will depend on the type of insurance and the specific philosophy of the insurer, and that as a general matter pollution insurers are more proactive than hull insurers since the type of liability insured against almost always requires an immediate response. Indeed, a hull insurer may not even have a hull surveyor attend a casualty and will only inspect a vessel for damage well after a casualty occurs. However, the FOSC should require that some representative of the insurer, such as a surveyor, be on-scene to participate in the financial decisions made in the context of the ICS. The P&I carrier and other insurance interests should be required to work closely with the Coast Guard to address these non-OPA '90 expenses.

The U.S. Coast Guard's Crisis Management School should increase the time spent training the attendees in the distinctions among an R.P.'s various insurance carriers and emphasize that casualties that involve more than simply spill response may involve multiple insurer interests. It is not enough that the FOSC simply issue orders, but rather that the event is managed with a view to allowing the R.P. and other interested parties to have the maximum chance at successfully responding to a spill without facing additional disputes and litigation after the response is completed.

It would also be advantageous to establish a working group of individuals from the government and maritime and insurance industries to discuss these problems and seek solutions.

All parties that have an interest in a casualty are best served by the prompt and efficient handling of the event. While OPA '90 has used the ICS to great advantage in managing spill responses, the foregoing issues must also be addressed before there can be truly effective casualty response.

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BIOGRAPHIES

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