

Business Update

The Legal Newsletter For Maine's Small Business Community

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Marine Oil Spill Claims Collecting Damages Under OPA

By Richard Olson

When a tanker or barge coming into Portland improperly discharges gasoline, bunker fuel or other petroleum product the results can be devastating. The effects of these spills on some marine businesses has been both immediate and long lasting. In the short term, Styrofoam type floats are destroyed by gasoline, fishing lines, tanks and equipment can be irreparably tainted by the petroleum products; vessels can be damaged by both the chemicals spilled into the ocean as well as improper, often rushed, cleaning procedures. Over the long terms Marine related businesses reel from disruption and lost income.

We have handled several of these kinds of cases at Perkins Olson. We have pursued remedies against both the responsible party and against the National Pollution Funds Center and our experi-

ence has taught us and our clients a number of lessons regarding what is and will be important the next time there is a spill.

A business harmed by a discharge of petroleum has several avenues to pursue. The first is the traditional claim against the persons or entities responsible for the spill. These claims follow typical litigation paths—a formal notice of claim, an effort to settle, a civil complaint, discovery, trial, appeal. Absent a settlement, the process is usually long and expensive.

OPA Claims

The federal Oil Pollution Act of 1990 ("OPA") provides on its face a way to short-circuit the litigation approach. If the injured party and the responsible party cannot agree on a settlement, the injured party has the option of pursuing

continued on page 3

LITIGATION UPDATE:

Scams, Spills & Land Disputes

By David Perkins, Esq.

Calendar year 2000 was a busy year for our litigation practice. The following cases highlight some of our clients' disputes and their successful resolutions in court:

The Emerald Green Scam

This was one of the stranger security fraud cases to ever be litigated in Maine.

The Defendants created the Emerald Green Pension Plan, which they claimed owned substantial assets, including precious gems, which would be used as collateral for trading of international debentures. Through very convincing sales efforts, the Defendants sold this implausible investment to over 30 individuals and more than \$3 million in investments around the country, based on promises of 300% returns. Our three Maine clients invested a total of \$417,500.

While our clients received investment reports showing very profitable trades, the Defendants used the funds to pay off earlier investors, to purchase sports cars, and to pay legal bills.

Our case was litigated in federal court in Portland. The Defendants used counsel from New Orleans whose specialty was defending the mob. The highlight of the case was the Defendants putting emeralds into evidence, which they claimed bolstered their claim that their enterprise was legitimate.

The Court found the defendants liable for federal security law violations, common law fraud, conversion and violations of Maine security laws. The court granted our clients damages of \$417,500, attorneys fees and costs and \$300,000 in punitive damages.

continued on page 4

Perkins Olson, P.A. is now eight years old. We've grown from four to nine employees. With this passage of time and growth, our goal is still the same. We want to provide you with high quality, reasonably priced legal services that will add value to your business.

Richard Olson and David Perkins focus on business startups, reorganization and resolving financial difficulties and business disputes.

Don Perkins continues to focus on divorce involving substantial business assets, business law and estate work.

Patrick Mellor has a keen interest in maritime law and litigation.

With this depth of talent we can help your firm prosper as well as resolve any difficulties that you may encounter.

Getting Value for Your Property in an Eminent Domain Proceeding

By Patrick Mellor

Every organized system of government has within its powers the right to use property in a manner which it deems to be most beneficial for the population as a whole. In the United States, that power is known as eminent domain and the act

of a governmental “taking” is how that power manifests itself. So long as town, county, state and federal governments continue to expand our transportation systems, communication systems and waste and water systems, issues associated with eminent domain will continue to be of significance to property owners. In order to constitute a “taking” that demands compensation, it is not necessary that the property

owner actually be removed from his property or deprived of its possession, but merely that the use or enjoyment of the property has been impaired.

In *State v. Johnson*, 265 A.2d 711 (Me. 1970), Maine’s Supreme Court approved the definition of a “taking” for which a property owner must be compensated as follows:

Broadly speaking, deprivation of property contrary to constitutional guaranty occurs if it deprives an owner of one of its essential attributes, destroys its value, restricts or interrupts its common necessary, or profitable use, hampers the owner in the application of it to the purposes of trade, or imposes conditions upon the right to hold or use it and thereby seriously impairs its value.

One of the most important issues involved from a property owner’s perspective is the valuation of the property to be taken by the government through its

police powers. Regardless of whether the taking involved is the town building a pump station at your family’s summer vacation place, or an expanded road that interferes with a private parking lot, or a utility pole interfering with a social

club’s tennis courts; valuation of the property to be taken by the government involves similar considerations. The general precept is that the valuation of the property must ensure that the owner will receive the equivalent monetary worth for the value of the property taken. Necessarily, the valuation of the property involves an independent appraisal of the property.

Obviously, the factors involved in valuing a business will vary significantly from the factors considered in evaluating personal property. In ascertaining the value of a business asset, it is important that the property owner is able to obtain an appraisal from a business-savvy appraisal firm. While the market value of property cannot be proved with mathematical certainty and must ultimately rest on a judgment decision, there are some tools that the property owner should be aware of and utilized when negotiating a value.

One question that a property owner should ask is whether the property is marketable. In the event that the property in question is a college building, religious society, club, or some other entity that makes the property virtually unmarketable, this fact is very significant for the property owner. Because market value suggests a willing buyer and a willing seller, it is possible there is no market value in the ordinary sense of the term in some cases. In such cases, market value generally would not be the measure of compensation. However, it must be kept in mind that market value is based on



hypothetical conditions. Therefore, the measure of compensation must be what another college, society, or club would pay for the property that is being taken.

In dealing with such special-purpose properties, the hypothetical is to assume what the owner of a similar special-purpose property would pay for the subject property. There are numerous other issues to be considered by a property owner that is subject to governmental taking. For example, loss of value due to the close proximity to a railroad or highway that may damage the enjoyment of the property to both the owner and/or business patrons and costs of curing defects caused by the taking are considerations when determining loss of value.

According to Maine law, if the property owner disagrees with the amount awarded for a taking, the owner may appeal from the award to the Superior Court of the county in which the property lies by filing a complaint in that court. The damages may be determined in the Superior Court by a committee or jury. Important to remember is that if the damages awarded are increased, the district must pay the damages and additional costs of the appeal; otherwise, the property owner will pay the costs of the appeal.

Our firm’s business knowledge coupled with our grasp of issues related to government takings make us well-suited to represent your personal or business interests in an eminent domain proceeding. ♦

Finance Update

Perkins Olson continues to work with clients on business startups and raising capital.

This month, we successfully launched A. L. Ryan, Inc., which will process and trade seafood products, as well as develop and sell value added seafood products, such as seafood salads. The financing came from individual investors whom we introduced to the founder, as well as asset-based financing from Coastal Bank.

In December, we represented C.V. Finer Foods, Inc., and arranged a G.E. Capital Public Finance bond financing with an interest rate of 6.35% which will be used to acquire and construct a manufacturing facility in Auburn. ♦

its claims directly against the National Pollution Funds Center (the “NPFC”).

The Claimant prepares a statement of claim either using an officially prepared form (available at the NPFC web site) or prepares a detailed statement of the claim that provides all the required information and submits that to the NPFC for action. The NPFC has a team that reviews the claim. Depending on the nature of the claim, the NPFC’s team will consist of a lawyer, an in-house claims specialist, an insurance adjuster and one or more outside experts as necessary to evaluate the claim. The NPFC’s web address is <http://www.uscg.mil/hq/npfc/npfc.htm>.

Perception Versus Reality

In its descriptive materials the NPFC gives claimants the impression that the process is non-adversarial, rational and designed to reach a fair result. While these statements of principal may be correct, the reality is that successfully pursuing a claim of any complexity or magnitude against the NPFC requires a sophisticated, multi-disciplinary approach, strong advocacy skills, persistence and probably a good deal of luck.

The NPFC also gives the impression that the process proceeds with some degree of speed—within 60 days. While this may be true for simple claims, a claim of any complexity will take substantially longer.

You are going to need to do all the things you would normally need to do to prepare for trial or arbitration. You cannot rely on the NPFC’s expertise. You will need to engage competent experts to testify regarding the cost of repairing damage the magnitude of your consequential damages such as lost profits. You will also need an advocate to argue both the legal and factual aspects of your case.

Before Filing the Claim

Anything you say or do can and will be used against you by the NPFC in reviewing/denying your claim. You are required to attempt to settle the matter with the responsible party before filing your claim. The NPFC will look to see if you negotiated in good faith. They will look to see if you cooperated with the efforts of the responsible party to evalu-

ate and pay your claim. The NPFC will look to see if you took all the steps you could to mitigate your claim. If you acted in bad faith, failed to cooperate or failed to mitigate, the NPFC is going to sharply curtail any claim you have for lost income or other consequential damages arising from the spill.

There is no substitute for photos or videos of the property before the damage, of damage, of the conditions before, during, after the spill.

When the NPFC investigates your claim they will review all the materials held by the responsible party including the communications you sent to the responsible party. They will interview the lawyers and officers of the responsible party to confirm the facts you allege in your claim. They will review all public records that might relate to your claim such as harbor master logs, Coast Guard reports etc. They will want to review all of your logs and records.

There is no substitute for good record keeping. Records that you submit or refer to in your claim that are inconsistent or inaccurate or incomplete will undercut your credibility with the NPFC on all other issues. The NPFC will be looking for complete financial, maintenance and repair records and the NPFC places the burden on the Claimant to have such information. They are going to want to know what you paid for that equipment when you purchased it.

Filing the Claim

The form is deceptively simple. The claim needs to be clear and concise but also detailed with lots of supporting information. If it is complex, include one or more short executive type summaries to introduce the claims to the evaluators, but provide lots of detail and lots of back up information. Remember, the NPFC gets reviewed and audited and they need to show their award is justified.

Be as honest and accurate as possible in the claim. Confront and deal with any negative records or information up front. Remember that filing a false claim is a federal crime.

The NPFC has 60 days to respond to the claim and they are likely to use all 60 of those days. The end result for a complex claim is almost certainly going to be a request for additional information. You

will have 60 days to provide that information.

With a complex claim the NPFC will probably need to hire one or more outside experts, such as marine surveyors, financial analysts etc. This involved a government contract bid procedure which, by itself, can take 4 to 8 weeks.

Once the Claim is filed it is important to open up the lines of communication with the NPFC to keep yourself abreast of the status of the claim and to answer questions the NPFC might have.

NPFC Response

If the claim is complex, the most likely response from the NPFC is a request for more information. The NPFC is a paper driven organization. They want things to be in writing. You, as a Claimant, want an opportunity to personalize your claim as much as possible, to explain your special circumstances.

Although the NPFC’s job is to evaluate and pay claims, their institutional mindset is as parsimonious as any private insurance company. The NPFC operates in bureaucratic time. Unlike private companies who occasionally want to wrap things up on a quarterly or annual basis, the NPFC is under no internal time pressure. This presents the claimant with a difficult situation. You can pester them with phone calls and letters and you can contact your congressman or senator. Although those steps can speed up the process, the NPFC personnel are *experts* at the business of bureaucracy and if one or more of them takes umbrage at your tactics, you can quickly find yourself at the wrong end of an unfavorable decision.

Response and Reconsideration

The NPFC’s decision will come in writing. If it is acceptable you are finished. If not, you have a limited time to file written request reconsideration. In my view, there is no substitute for making face to face contact with as many NPFC personnel as possible during the reconsideration process. You need to find some way to make them appreciate why your case is different, why it does not fit into the neat categories they tried to fit it into.

With any luck, at some point in the

continued on page 4

process you will have a chance to engage in some degree of meaningful negotiations with a decision-maker at NPFC. It can take over a year to reach that point. You must be well prepared, have your experts available and you will also need counsel to argue the legal points. If you get the matter resolved, you assign your claims against the responsible party over to the NPFC.

If you ultimately cannot agree on a resolution, you will be left to either litigate the NPFC decision under the administrative procedures act or go back to litigate with the responsible party.

Conclusion

Pursuing complex claims under OPA 90 can be a long, arduous and expensive process, but it is probably less expensive than litigation and somewhat less adversarial. The NPFC personnel have a mandate to resolve and pay claims fairly and they are willing to do so once you fully and effectively make your case. ◆

Fortunately, the judgment will be collected against North Carolina bank accounts seized by the federal government

The Gulf Oil Spill

Our client, the South Port Marina, was damaged when the Gulf Oil Terminal in South Portland spilled over 26,000 gallons of gasoline from a barge into Casco Bay. The gas drifted down river and caused floats to melt and capsized at the marina.

When the oil company refused to pay fair compensation, we tried the case under the Oil Pollution Act of 1990 with a jury in federal court. The jury awarded our client \$181,964 in property damages, \$110,000 in lost profits and \$300,000 for injury to good will.

The oil company felt the jury had been a bit generous, given the fact that the spill happened in February and the floats were repaired by the boating season. For that reason, the defendants requested the federal court to reduce the jury's verdict, which the court did by reducing the damages to \$196,964.

The case was then appealed by both sides to the First Circuit Court in Boston. The First Circuit decided several issues that will be cru-

cial for the oil industry (the plaintiff was entitled to a jury trial in the spill case, punitive damages are pre-empted by the Oil Pollution Act of 1990). The First Circuit Court also restored our clients damages for lost profits.

Mid-Coast Land Disputes

We also tried two cases in the mid-coast area dealing with land disputes.

In a case tried before a jury in Belfast, we won a unanimous jury verdict granting our client \$140,000 in direct damages and \$50,000 in punitive damages in a road dispute case.

The Court also determined that our client had a legal right by easement to use an old abandoned road, as a result of plans that were recorded in the 1700's by the original land proprietors. The easement created substantial value in the 150 acres that was purchased by our client for development purposes.

In a case tried in the Superior Court in Rockland, we prevailed on a boundary line case involving land on Matinicus Island.

Conclusion

While we are proud of our ability to resolve business disputes prior to litigation, our firm has shown a remarkable ability to prevail in court when necessary. ◆



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