Letter from the Gulf of Mexico by William Shepherd

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One of the benefits of the corporate form is that it gives giant corporations the ability to escape liability. *BP* may or may not choose to capitalize on such escapes, but it would be foolish to presume that it won't. No one really knows what the damage from the oil gusher or the overall costs to *BP* may be. Some analysts are now throwing around numbers of $70 billion[1] on the upper end - but it's not hard to see how the ultimate cost to *BP* could rise even higher.

The company faces civil fines of up to $3,000 per barrel of oil polluting the ocean. If the gusher lasts for four months at 40,000 barrels a day, the fine alone could hit $14 billion. If the actual oil flow is double that, the fine could approach $30 billion and more if it lasts more than four months.

Beyond these payments, the company will be facing massive lawsuits with damages in the billions and possibly tens of billions. On top of that, it may face a massive punitive damage award. *Exxon* challenged a punitive damages award of $10 billion in the Valdez case, and succeeded through appeals in dragging out payment for 20 years and lowering the amount to $500 million. But that was $500 million on top of compensatory damages of $500 million. On top of all this, *BP's* brand - just a couple months ago, the most valued among oil companies - is now ruined.

Still, as hard as it is to conceptualize, *BP* can afford to pay $70 billion. The company made $14 billion in profits in 2009, a bad year. Before the Gulf of Mexico disaster, it was on track to make much more in 2010. *BP* may be able to pay $70 billion, but it surely doesn't want to. Even as the company pledges again and again to cover all 'legitimate' claims, you can be sure that its attorneys are conjuring a variety of maneuvers to avoid paying.

Robert Weissman[2] spells out five approaches open to a corporation like *BP* seeking to exploit the full potential of limited liability status: the *Dalkon Shield* Bankruptcy Scam[1]; the *Union Carbide* Disappearance[2]; the *Shell* Company Game[3]; the *Exxon* Hardball Approach[4]; and the *Big Tobacco* Global Deal[5]. Against this panoply of available maneuvers, public officials have limited options.

The *Obama Administration* has probably done as much as it can by pointing out the danger of *BP* draining company assets by paying dividends and by insisting on an escrow fund to avoid this.[3] But there is not much more the state can do against the corporation protected by limited liability and due process. Weissman would like to change this:

> 'What this and future administrations also need is a way to exert control over companies facing environmental or other liabilities of the scale now facing *BP* - a kind of receivership to prevent manipulations of the corporate form to enable corporate goliaths to escape liability. Forcing corporations to pay for the damage they cause is not sufficient to prevent them from recklessly endangering people and the planet, but it is certainly necessary. Permitting them to avoid liability and foist costs on to others is to ensure more and worse corporate catastrophes.'

Two items that have been getting scant coverage in the mainstream media are insurance and counter-claims by *BP*. When the survivors of the *Deepwater Horizon Rig Disaster* went ashore, *BP* made them sign waivers that they witnessed nothing and knew nothing and would not claim for any injuries. And for the past two months *BP's* spokesman in the USA, its *Chief Executive Officer* and corporate fall guy, Tony Hayward, has repeatedly referred questions of liability to the accident investigator's forthcoming report.

All this has the ring of insurance claims in the offing. And this means some *Lloyds Syndicates* picking up the tab when it falls due in 2013. There is a three-year lag before syndicates close their books. Perhaps there was more to the collapse of *Prudential's* takeover of *AIG's* Asian arm than meets the eye…or was open to public gaze?

The explosion of April 20, 2010 that sunk the *Deepwater Horizon* in the Gulf of Mexico led to the deaths of 11 crew workers and the loss of a $560 million dollar drilling rig. The resulting oil slick threatens extensive environmental

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[1] Enough to pay for the £25 million *Stonehenge Visitor Centre Project* cancelled by the *Cameron Government* 3000 times over.

[2] Robert Weissman is president of [Public Citizen](), which is calling for a [BP Boycott](). The article *Closing BP's Escape Routes* was first posted at: http://lists.essential.org/pipermail/corp-focus/2010/000336.html on 15th June 2010.

[3] This is true as far as the *BP* dividend of €2.6 billion is concerned. But $1 billion of dividends pocketed by *Transocean* shareholders sneaked under the Obama radar. *Transocean* owned and operated the doomed *Deepwater Horizon Rig* oil rig.

damage to the coastline of Louisiana, Mississippi, and Alabama. The ocean currents aided and abetted by the hurricane season will then drive the oil to the tourist beaches of Florida and up the American East Coast.

Already the potential financial impact of the explosion eclipses the *Exxon Valdez Disaster* in 1989, which resulted in a $3.5 billion dollar settlement and $5 billion in legal and financial settlements. As efforts to contain the oil spill continue without success, the insurance ramifications of the disaster loom large. The ultimate costs of the clean-up may approach $2 to $7 billion. The projected cost to the Louisiana fishing industry is $2.5 billion, whereas the cost to the Florida tourist industry is $3 billion.

According to business litigation lawyer Michael Cessna[4] the claims will implicate property liability, environmental liability, and business interruption insurance coverages and be spread throughout insurance markets in London, the United States, and Bermuda. The disaster has already spawned over three dozen lawsuits, including thirty-one class actions. The lawsuits range from actions for wrongful death and personal injury, from the families of crew members killed or injured, to actions for economic losses from environmental damage brought by fishermen, property owners, and others who have economic interests that were affected by the oil spill.

On the receiving end of these claims are *Transocean Ltd*, who owned and operated the rig; *British Petroleum PLC*, with a 65 percent interest in the oil drilling lease; *Halliburton Energy Services, Inc.*, who was engaged in cementing work on the well cap prior to the explosion; and *Cameron International* who made the *Blow-out Preventer*.

BP is required under the *Oil Pollution Liability Act (OPA)*, to maintain financial responsibility in the form of self-insurance or stand-alone pollution insurance with liability limits that are adequate to meet its maximum statutory liability. *BP* self-insures its statutory obligations through its own insurance company *Jupiter Insurance Ltd*. *Jupiter* has an underwriting limit of $700 million and at the end of 2009 had net assets of $6 billion. It does not reinsure.

Transocean's drilling rig was subject to a $560 million hull insurance policy, with a deductible in the event of constructive total loss of $500,000 to $1.5 million. The hull policy also covers the cost of removing the sunken rig. In an *SEC* filing, *Transocean* has reported that it has recovered $401 million from its hull insurer.

Cameron maintains a $500 million environment liability insurance policy while *Transocean* carries $700 million. *Hanover Re* is *Transocean's* reinsurer and is forecasting a loss of $53 million. *Transocean* also maintains a $950 million third-party liability insurance policy for collision, personal injury and death to crew, and third party liability. Its deductibles are $10 million per occurrence on crew claims, $5 million on non-crew claims with an aggregate deductible of $500 million. *Transocean* retains the risk for liability losses in excess of $950 million.

Coastal businesses may face difficulty in recovering their losses from their property insurers under business interruption coverage. First, commercial property insurance policies generally condition coverage on physical loss or damage to the insured property, so that recovery may depend on whether oil actually touches their property. Claims may also be subject to pollution exclusion clauses.[5]

The maritime economic loss doctrine will preclude business owners whose properties do not suffer physical loss or damage from asserting economic loss claims against *Transocean* and *Cameron*. Coastal business owners will likely have a better prospect of recovering those economic losses from *BP* under *OPA* because *BP*, as lessee of the drilling area, is responsible for removal and government response costs, property and natural resource damages, and economic losses resulting from the oil spill. Under the *OPA*, *BP's* liability is subject to a $75 million limitation of liability unless gross negligence or willful misconduct can be demonstrated. But what exactly constitutes gross negligence and willful misconduct?

Writing in the *Financial Times* on Wednesday 23rd June 2010, columnist John Kay wrote of a conversation with a senior executive of a privatized water company. Kay was puzzled that so many water companies seemed to be able to issue peremptory edicts to their managers to reduce costs or headcount...and they promptly did so. Could there really be so much inefficiency? And could it really be sorted just like that?

The reply gives an interesting insight into big business and its fraudulent claims for those at the top of the corporate heap to be paid excessive salaries Water supply is not hard. Rain falls. It flows downhill into treatment works and then into supply pipes. End of story. No human hands required…except to stop things going wrong or to fix them when they do. Systems like this can always operate with fewer people.

In fact, if you sacked the whole workforce, except for the billing staff, profits would soar and everything would be fine - for a bit. But it would not last. Over time problems would first accumulate, then emerge. Here is John Kay:

> 'My informant predicted that his company, in common with its rivals, would engage in successive rounds of efficiency savings, and be congratulated by analysts and regulators. Eventually, he predicted,

[4] Michael Cessna is *Counsel for Lathrop & Gage LLP*. This article first appeared online on 18th May 2010 under the title *Insurance Ramifications of the BP - Deepwater Horizon Oil Spill Environmental Disaster*.

[5] Business owners may be able to claim for interruption of business due to the property loss of a key supplier or customer, or for denial of access to their property by the government due to the threat of the oil spill or the ongoing clean-up efforts…provided the insuring agreement does not exclude claims that pertain to property damage to the water or water front.

> there would be a big problem - or several. Then politicians would compete in the vigour of their denunciations. Money would be thrown at the problems. He hoped he would have retired before this.'

His prediction was right, but he got the industry wrong. Nowadays, where disasters are concerned, corporate best practice is public relations rather than lawyers. To meet their legal responsibilities to protect shareholder profits, *BP* head of PR, Andrew Gowers, a former editor of the *Financial Times,* has called in the London-based PR firm of *Brunswick* run by the *City of London* spin doctor Alan Parker.[6]

On the other side of the pond, *Brunswick's* Washington office has seconded Anne Womack-Kolton to *BP* for the foreseeable future. This may turn out to be quite a coup…or not. Womack-Kolton served as Dick Cheney's press aide during the 2004 election before running public affairs in the *Department of Energy* under President George W. Bush. She was also an assistant in the *White House* press office. She will be on nodding terms with cupboards and skeletons. So where does this leave *Halliburton*?

Perhaps *Halliburton* and not *BP* needs Weissman's advice? The *Oil Pollution Liability Act* may limit *BP's* liability but it does nothing for *Transocean*, *Halliburton*, or *Cameron*. Actions for contractual indemnification are surely inevitable. So in the language of *Wall Street*: 'Buy BP, sell Halliburton, spread-bet and hedge.' Disasters are God-sent and must be exploited. If greed is good then shocks are better. No doubt *Goldman Sachs* set a team to work on the *BP Oil Spill Disaster* two months ago. Naomi Klein has written the book. It is called *The Shock Doctrine*.[7]

Endnotes:
Source: Closing BP's Escape Routes by Robert Weissman

[1] **The Dalkon Shield Bankruptcy Scam.** *A.H. Robins*, the manufacturer of the defective *Dalkon Shield* intrauterine device, filed for Chapter 11 bankruptcy in 1985. Women who were victims of the dangerous device received less compensation than they otherwise would have. Meanwhile, with the company's otherwise open-ended liability demarcated in the bankruptcy process, *Robins'* value shot up. *AHP* (now part of *Wyeth*, itself now part of *Pfizer*) acquired the company at a premium, with the Robins family making off with hundreds of millions of dollars. *BP* wouldn't follow the Robins' model exactly. The play for *BP* would not be to declare bankruptcy for the parent company, but for *BP America* or another subsidiary that could be tagged with the liability for the Gulf of Mexico gusher. In advance of such a move, *BP* might try to move assets out of the designated subsidiary and into other subsidiaries in its vast network. Such asset shifting is not permissible, and creditors would challenge any such moves, if they could discover them. But using its labyrinthine structure, *BP* might hope to evade the creditors. Even without the asset shifting effort, bankruptcy for an affiliate could prove attractive for *BP*.

[2] **The Union Carbide Disappearance.** *Union Carbide* was the company responsible for the world's worst industrial disaster. A gas escape from its chemical facility in Bhopal, India killed many thousands (likely tens of thousands) and severely injured tens of thousands more. After settling for a paltry amount with the Indian government, *Union Carbide* disappeared as a standalone company. It is now a subsidiary of *Dow Chemical*. Says *Dow*: "Dow has no responsibility for Bhopal." Moreover, "the former Bhopal plant was owned and operated by *Union Carbide India, Ltd. (UCIL)*, an Indian company, with shared ownership by *Union Carbide Corporation*, the Indian government, and private investors. *Union Carbide* sold its shares in *UCIL* in 1994, and *UCIL* was renamed *Eveready Industries India, Ltd.*, which remains a significant Indian company today." So that's alright then. *BP* might conceivably be acquired by another oil major. Or, more likely, it might just sell some or all of its US subsidiaries. If the liability cap in the *Oil Pollution Act* works to protect *BP* from legally recoverable claims (perhaps less likely than has been reported, since the cap does not apply to a spill caused by violation of applicable federal rules), an acquiring company could simply state that it refuses to make good on the liabilities that *BP* now says it will voluntarily accept. A new company would also benefit from operating *BP* assets with a new, uninjured brand name.

[3] **The Shell Company Game.** A variant on the *Union Carbide Disappearance* gambit would involve selling one or more subsidiaries' assets, but leaving the current corporate structure in place. Liability would still attach to the old subsidiaries, but it would be devoid of assets to pay - if *BP* could find a way to move the cash it received for selling assets out of the subsidiary and out of reach of creditors. Again, such a move should not be legal. But it would be a mistake to assume that formal legal rules provide guarantees when billions or tens of billions of dollars are at stake for a giant, global multinational.

[4]**The Exxon Hardball Approach.** *BP's* lawyers are undoubtedly considering other, more straightforward approaches to limit the company's liability. Under the *Exxon Hardball* approach, *BP* would follow its oil company brethren's approach to the Valdez spill. Drag out compensation payments. Challenge adverse legal rulings. Rely on a corporate-friendly judiciary to overturn or scale back any large scale jury verdicts or government-proposed fines.

[5] **The Big Tobacco Global Deal.** Another approach might be for *BP* to offer a 'global settlement' of all claims arising from the Gulf Oil gusher. This would follow the precedent of *Big Tobacco*, which in 1997 offered to put hundreds of billions of dollars on the table, and accept some regulatory restraints, to settle lawsuits for its past misconduct and effectively preclude new litigation. (This deal was ultimately scuttled.) For *BP*, the play would be to put a 'shock and awe' amount of money on the table to resolve all claims and penalties. Its aim would be to eliminate the prospect of getting hit with outsized punitive damages or fines, and escaping payment for ecological damage that may not be apparent for many years - amounts that might vastly exceed what *BP* pays.

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[6] *Public Relations* includes buying up search engine terms to ensure that your own version of events is the first to be brought to web users' attention. 'Oil leak' in the *Google* search engine, for instance, sends you to the *BP Crisis Control Center*.
[7] *The Shock Doctrine - the rise of disaster capitalism* by Naomi Klein (Penguin, London, 2007, ISBN 978-0-141-02453-0).