Statement of Steve Gordon

Attorney for Douglas Harold Brown
Chief Mechanic/Acting Second Engineer
of the Deepwater Horizon

on

Legal Liability Issues Surrounding the Gulf Coast Oil Disaster

before the

House Judiciary Committee

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STATEMENT OF STEVE GORDON
MARITIME ATTORNEY

Chairman Conyers, Ranking Member Smith, and Members of the Committee, my name is Steve Gordon and I thank you for letting me submit my statement for the record.

I am a lawyer licensed for 25 years to practice law in Texas, Louisiana and the District of Columbia. I am a member of the American Association of Justice - Admiralty Law Section and an active member of the Maritime Law Association. I am also Board Certified in the area of Personal Injury Trial Law by the *Texas Board of Legal Specialization* since 1990. Gordon, Elias & Seely, LLP, handles cases involving injured seaman under maritime law and we have the honor of representing the family of Karl Kleppinger, Jr. who died in this horrific, but completely avoidable, maritime disaster.

Karl was one of the eleven crew members of the *Deepwater Horizon* that were never found after the explosion on April 20, 2010 and is now presumed dead. Karl was a Desert Storm veteran; was 39 years old; and was married to Tracy Kleppinger. Karl also left behind his wonderful, sweet and kind son, Aaron Thomas Kleppinger. Aaron is 17 years old and is mentally challenged. The Kleppingers live in Natchez, Mississippi. Karl and Tracy would have been married eighteen (18) years on May 2nd, 2010 and his Memorial Service was on May 3rd, 2010.

Karl was extremely dedicated to his job, working for Transocean for almost ten (10) years without missing one hitch. To demonstrate the kind of employee that Karl was, there was an occasion when a Transocean drilling rig began taking on water in one of its flotation legs. The Captain contacted the shore and an emergency team was being prepared to come out to the vessel. However, they were losing ballast rapidly and the vessel was listing. There was a call for any volunteers to jump into the Gulf of Mexico to close a valve below the water line. Without any hesitation, and without any diving experience whatsoever, Karl volunteered and went into the water to successfully fix the problem below the water line.

Karl's position on the DWH was a "shakerhand". The shakerhand, sometimes called the "mudman", works in the "shaker room" to monitor the shakers. These are screens mounted on a vibrating motor that separate the down-hole cuttings from the drilling fluid. The shakerhand maintains this equipment and weighs the mud. Though Karl's story will never be personally told, the evidence will show that the shakers were abnormally filling up with mud for quite some time and well before any explosion occurred. Also, the "shaker room" as well as the "pit room" and "pump room", are some of the very first areas where there will be a gas buildup if a "Kick" occurs or there is an impending blowout. Additionally, a shakerhand as experienced as Karl was would have clearly known for hours that there was a severe problem occurring with the well control. However, Karl never left his station; but, more sadly, no one ever ordered Karl, or the ten (10) other rig workers to vacate their positions. This type of behavior on the part of Transocean's OIM [Offshore Installation Manager] and others as well as BP personnel that were on the rig is not just negligence but surpasses gross negligence and actually rises to the level of criminal behavior. Basically put, these dedicated employees died manning their positions while placing their lives in the hands of people that clearly had an opportunity to save their lives but for

the company's desire to reduce costs, by avoiding any "down time", thereby increasing profits on this job.

We also have the honor of representing several other crew members who survived this horrific event. As Congress and the rest of the world has learned over the last few weeks, and as will undoubtedly be further discovered, this horrible tragedy was the result of conduct on the part of Transocean and BP that was so egregious that it reflected a conscious disregard for the safety and welfare of the crew members on board the *Deepwater Horizon*.

Despite the fact that their carelessness resulted in the death of eleven people and the injury of many more as well as damage to the fishing and other industries along the Gulf Coast, the full extent of which will not be known for many years, Transocean, and the foreign [Swiss] owner of the *Deepwater Horizon* have already filed an action in Federal Court in Houston, Texas asking the Court to exonerate or limit their liability to $26,764,083.00.

Transocean acknowledged in their filing that "the amount of claims that are reasonably anticipated to arise from the events in question are expected to greatly exceed the amount and value of the Petitioners'" value in the vessel as it sits on the seabed floor.

Transocean seeks this protection despite the fact that they have already been paid in excess of $400,000,000.00 by their insurance company as a result of the loss of the *Deepwater Horizon*.

Limitation of Liability Act, 46 U.S.C 30501, *et seq.*

In 1851, the United States Congress enacted the Limitation of Liability Act. The purpose of the act was to promote and encourage the growth of American shipping and the American merchant fleet. Under the terms of the Act, if certain factual prerequisites are met, a shipowner, *i.e.*, Transocean and Triton Asset Leasing GmbH [*a Swiss entity*] and others in this matter, can limit their liability for a casualty to the value of the vessel and the freight then pending, if any. Specifically, vessel owners and/or operators are entitled to limit their liability if the negligence or unseaworthy condition which caused the loss occurred without the "privity and knowledge of the owner or master."

The *Deepwater Horizon* is a "vessel". I realize people commonly refer to it as a "rig" but, in fact, it is actually a semi-submersible vessel. I will not, in this statement, get into what has, and what has not, judicially been held to be a "vessel" but, suffice it to say that the profits to be made by oil/gas exploration, development and production have accelerated technological development to construct very odd looking structures which has, in turn, "pushed the traditional legal definitions" of what is deemed a "vessel". The structures that we now see being utilized to extract hydrocarbons from the seabed floors, at incredible depths, do not look anything like a cargo tanker, or other traditional ship historically utilized in commerce and trade. The point is that, because the *Deepwater Horizon* is a "vessel" the: (1) Jones Act and DOHSA applies to injured/killed "seaman", (2) DOHSA applies to killed "non-seaman" and (3) the *Deepwater Horizon* owners/operators can avail themselves, *i.e.*, like they have in this matter, of the Exoneration and Limitation of Liability action set out in *Title 46 Subtitle III. Ch 305* Section 30501, *et seq*. [hereinafter called the "Limitations Action"]

(1) Why should the Limitations Action be available in today's world? *It should not.*

a. With insurance and indemnity coverage offered by the Lloyd's of London and other international insurance markets insuring vessels to extraordinary amounts, the Limitation Action is antiquated and functionally not necessary; and

b. Additionally, with the ability of U.S. companies hiring U.S. workers but legally shifting the ownership of the vessel, such as the *Deepwater Horizon*, into a company out of Switzerland, what is Congress' impetus to provide protection to the Swiss based *Triton Asset Leasing GmbH* under the Limitation Action? *There is none and it should be abolished.*

i. There are no Congressional requirements that the vessels extracting our natural resources be U.S. made, U.S. flagged, U.S. owned or, for that matter, U.S. crewed/manned. What interest does Congress have in protecting a Marshall Islands flagged vessel owner under the Limitations Action? *They have none*.

(2) If Congress does not abolish the Limitations Action, it should, ***<u>at bare minimum</u>***, amend it to require that any and all insurance covering the vessel and its owners be made a part of the "Limitation Fund" available for the claimants. As the Limitation Action sits right now, the movant is only required to post a surety for the amount of the appraised value. In the Transocean instance, that is $26MIL and change.

A question has been raised that "wouldn't this "Insurance Inclusion" amendment cause intentional underinsurance by the vessel owner and/or operator". On this topic, my response would be:

a. The companies that operate and own these vessels have no interest whatsoever in subjecting themselves to a situation where they file a Limitation Action and, at the end, do not get a limitation granted. If this occurred, it would subject their corporate assets to seizure due to a verdict that would exceed the low insurance limits that some people think would happen;
b. Furthermore, the vessel owners are usually obligated to obtain and maintain insurance that is sufficient to cover the lease holder [BP] as an additional insured as a prerequisite to getting the job of drilling the well and you can rest assured that, for example in this case, BP would never allow them to underinsure.

There is a practical application "issue" with an "Insurance Inclusion" amendment and it is:

a. Very infrequently, the vessel owner/operator will actually file for bankruptcy. When this happens, the bankruptcy filing places an automatic "stay" in any litigation that is ongoing against the "Debtor". Since the Debtor has been sued as a defendant, this requires the plaintiff to file, in the bankruptcy court, a "Motion to Lift the Bankruptcy Stay" and when this is done, the motion would state that

the plaintiff will agree to only recover from the available "insurance" proceeds in the underlying litigation. The bankruptcy court will routinely grant these requests to lift the stay because it does not disturb, nor touch, the actual assets of the debtor. The problem in the maritime context is that the policies are not true insurance policies but are, instead, "indemnity" policies. An "indemnity" policy will never pay claims until the insured has paid out of pocket to some third party. Thus, if the debtor [vessel owner] will never pay because they are in bankruptcy the contractual requirements to indemnify the debtor/vessel owner will never come to fruition. This could be legislatively addressed in the "Insurance Inclusion" amendment by expressly providing that any bankruptcy, reorganization, *etc.,* filing on the part of one or more of the "Parties in Limitation" would not, in any way, affect the requirement to tender the insurance as part of the Limitation Fund.

(3) In addition to including the insurance aspects in number 2 above, the Limitation Action should be excluded from use by "vessels" engaged in the exploration, development and production of hydrocarbons. The reason is simple: When Congress thought about protecting vessel owners it had no idea that someday there would be a vessel that could, in one event, destroy the entire ecosystem of a body of water as large as the Gulf of Mexico. If offshore drilling is here to stay, then the companies that choose to engage in this risky endeavor for incredible economic gain should not be afforded protections when they can kill people, hurt people and destroy four states' coastlines.

Death on the High Seas Act (DOHSA)

Under the current state of maritime law, seaman who are killed as a result of the negligence of their employer, a third party, or as a result of the unseaworthiness of the vessel upon which they work, are not afforded the same remedies as people who are killed as a result of negligence on land.

Congress previously amended the *Death on the High Seas Act*, which governs aviation and maritime death accidents, to afford aviation accident victims the same remedies as those accidents that occur over land. Prior to that amendment, following the tragic airline crashes involving TWA Flight 800, Swissair Flight 111, and EgyptAir 990, Senator McCain explained that: "[t]he families of aviation accident victims over international waters have waited far too long for Congress to make sure that their losses are accorded the same respect as those associated with accidents over land. Family members should know that their children have value in the eyes of the law. The recent aviation tragedies only highlight the need for prompt action." The DOHSA amendment afforded aviation accident victims non-pecuniary damages—e.g., damages for the loss of love and affection—a remedy previously unavailable under the law.

Congress, unfortunately, did not amend DOHSA to allow families of maritime workers to recover for the lost love and affection of their father, husband, brother, sister, son, or daughter. As a result, maritime families are currently not accorded the same respect as those associated with accidents over land, whose families are afforded the opportunity to recover non-pecuniary damages. Congress should change the law and allow families in maritime death cases to recover

non-pecuniary damages, including loss of love and affection and pre-death pain and suffering. As of now, if a non-seaman burned to death over the course of five minutes, in agonizing pain, the current law does not afford his survivors a remedy for those damages.

The Jones Act, likewise, does not allow families to recover non-pecuniary damages. That means that under both the Jones Act and DOHSA, if a seaman is not married and has no children, his parents do not have a remedy at law. Children that the seamen do not financially support also have no legal remedy.

A brief summary of the differences between damages available for those who die on land vs. those who die at sea is as follows:

	State Wrongful Death Damages	**DOHSA/Jones Act Death Damages**
Financial Contributions to Family	YES	YES **but for children, only until they reach majority**
Loss of care guidance and support	YES	YES **but only until children reach majority**
Loss of companionship and society	YES	NO
Mental Anguish	YES	NO
Loss of inheritance	YES	NO
Punitive Damages	YES **in some states**	NO

The *Deepwater Horizon* maritime disaster calls out to Congress to *promptly* amend the above maritime statutes to afford these workers and their families the same remedies as those involved in accidents occurring on land. *If Congress moves swiftly in adopting the above recommendations, it is this author's opinion that it would be applicable to these Deepwater Horizon victims both on the Limitations Action and on DOHSA*.

We truly hope that families like the Kleppingers, as well as the ten (10) other families who lost their sons, husbands and fathers that horrific night will never again be faced with the cold realities of the law as it exists today.

I realize that making laws can be very complex and that the interest of all must be taken into consideration but for far too many years the interests of the hard working men and women in the maritime industry who lay their lives on the line everyday have been silenced. The time has come for Congress to recognize this gross inequity in our judicial system and to act now.

Steve Gordon