OPA 90 in 2010: A Maritime Perspective

Susan Molero Vance*
Paul N. Vance†

* Susan Molero Vance is of Counsel at Larzelere Picou Wells Simpson Lonero, LLC.
† Paul N. Vance is a Partner at Baldwin Haspel Burke & Mayer.

On July 23, 2008, a collision occurred in the New Orleans harbor on the Mississippi River between a tank barge and M/V TINTOMARA, a foreign-flag tanker, resulting in a large quantity of oil being spilled into the Mississippi River.[1] More recently, the DEEPWATER HORIZON Mississippi Canyon-252 oil spill (the BP pollution disaster) resulted in the largest oil pollution disaster in United States history.

Both cases are subject to the Oil Pollution Act of 1990 (OPA), which was enacted in response to the EXXON VALDEZ oil spill in Prince William Sound, Alaska.[2] While OPA governs those claims arising out of the discharge of oil into navigable waters adjoining shorelines and exclusive economic zones of the United States,[3] it does not totally supplant general maritime law.

These recent oil pollution cases present a unique opportunity to examine the interplay between OPA and traditional general maritime claims.

I. DISTINGUISHING BETWEEN OPA CLAIMS AND GENERAL MARITIME CLAIMS

A. Liability of OPA Responsible Parties

OPA imposes strict liability on the "responsible party," or parties, for pollution removal costs and damages.[4] There are three defenses to the strict liability provided by the act: if the discharge of oil was caused *solely* by (1) act of God; (2) act of war; or (3) act or omission of a third

1. *See* Gabarick v. Laurin Mar. (Am.) Inc., No. 08-CV-4007-A, 2010 WL 147216 (E.D. La. Jan. 11, 2010).
2. 33 U.S.C. §§ 2701-2761 (2006).
3. *Id.*
4. 2 THOMAS J. SCHOENBAUM, VESSEL-SOURCE POLLUTION, ADMIRALTY & MARITIME LAW § 18-2 (4th ed. 2008).

party.[5] For the third party defense, a "third party" must be solely at fault and cannot be an independent contractor of the responsible party.[6] Accordingly, if the discharge is caused *solely* by the act of a *noncontracting* "third party," the third party is subject to the same liability for damages as the responsible party; the third party is strictly liable; and the third party's liability is subject to the liability limits of OPA for OPA damages.[7]

B. Claims Subsumed by OPA

OPA's savings provisions, specifically 33 U.S.C. § 2751(e), provides that OPA does not affect:

> (1) admiralty or maritime law; or
> (2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.[8]

If a discharging vessel is "solely" at fault, however, OPA clearly subsumes general maritime law, including contribution and subrogation rights of an OPA responsible party or its "guarantor," to the extent that the claim is an OPA claim.[9] But what determines whether a claim is an OPA claim or a general maritime claim? The short answer is that if

---

5. 33 U.S.C. § 2703(d)(1)(A).

6. 2 SCHOENBAUM, *supra* note 4 (citing 33 U.S.C. § 2703(a)).

7. *Id.* (citing 33 U.S.C. §§ 2702(d)(1)(A), 2702(d)(1)(B); Commonwealth of Puerto Rico v. M/V Emily, 13 F. Supp. 2d 147 (D.P.R. 1998)).

8. Similarly, 33 U.S.C. § 2718(a) and (c) preserve state law claims resulting from an oil spill. *See* discussion *infra* Part I.D. Section 2718(a) provides:

> Nothing in this Act . . . shall (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to (A) the discharge of oil or other pollution by oil within such State; or (B) any removal activities in connection with such a discharge . . . .

Section 2718(c) provides:

> Nothing in this Act . . . shall in any way affect, or be construed to affect, the authority of the United States or any state or political subdivision thereof—
> (1) to impose additional liability or additional requirements; or
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law; relating to the discharge, or substantial threat of a discharge, of oil.

9. *See* 33 U.S.C. §§ 2704(a), 2709, 2710(c), 2715, 2718, 2751. 33 U.S.C. § 2710(a) allows agreements to insure, and 33 U.S.C. § 2710(c) allows contribution/subrogation actions by the responsible party and a guarantor. Guarantor is defined as "any person, other than the responsible party, who provides evidence of financial responsibility for a responsible party." *Id.* § 2701(13).

liability for cleaning up an oil spill and compensating victims is derived exclusively through OPA, the case is "controlled" by OPA.[10] Where OPA sets the liability of the responsible party, OPA provides the remedy of the responsible party against a negligent third party.[11]

OPA liability and damages are set out at 33 U.S.C. § 2702(b)(1) and (2)(A)-(F), and include the following:

> (b) covered removal costs and damages
>
> (1) Removal costs
>
> . . . .
>
> (2) Damages
>
> . . . .
>
> (A) Natural Resources
> Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damages, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.
>
> (B) Real or Personal Property
> Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.
>
> (C) Subsistence Use
> Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.
>
> (D) Revenues
> Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision there in.
>
> (E) Profits and Earning Capacity
> Damages equal to the loss of profits or impairment of earning capacity die to the injury, destruction, or loss of

10. *See, e.g.*, Gabarick v. Laurin Mar., Inc., 623 F. Supp. 2d 741 (E.D. La. 2009); *In re* Settoon Towing, LLC, No. 07-CV-1263, 2009 WL 4730969 (E.D. La. Dec. 4, 2009).

11. *See* Tanguis v. M/V Westchester, 153 F. Supp. 2d 859 (E.D. La. 2001); Nat'l Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atl. Corp., 924 F. Supp. 1436, 1447-49, 1454-55 (E.D Va.1996), *aff'd*, 122 F.3d 1062 (4th Cir. 1997), *cert. denied*, 523 U.S.1021 (1998).

real property, personal property, or natural resources which shall be recoverable by any claimant.

(F) Public Services
Damages for net costs of providing increased or additional public services during or after environmental activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a state.

C. Claims that Remain Subject to General Maritime Law

OPA does not regulate recovery of those oil spill damages that exceed the responsible party's liability limitation under OPA.[12] It does not regulate recovery of damages incurred as a result of a collision, nor does it regulate claims not specifically enumerated in OPA.[13] Collision damages, personal injury claims, as well as collision-related cargo claims remain subject to the general maritime law.

Arguably, because OPA is silent on the issue of punitive damages, to the extent that punitive damages are awardable under general maritime law, punitive damages may be permitted pursuant to OPA's savings provisions.[14] This view is consistent with the United States Supreme Court's award of punitive damages under OPA's predecessor, the Clean Water Act (CWA).[15] In *Exxon Shipping Co. v. Baker*, the Supreme Court, recognizing the availability of punitive damage awards under general maritime law, reasoned that because the CWA was silent regarding punitive damages, the Court could not assume that Congress intended to preempt punitive damages recoverable under general maritime law.[16] Nevertheless, it is noteworthy that the United States Court of Appeals for the First Circuit has held that OPA preempts recovery of punitive damages under general maritime law.[17]

D. State Law Claims and the Admiralty Extension Act

In addition to OPA's savings provision for admiralty and maritime claims, 33 U.S.C. § 2751(e), OPA includes savings provisions at 33 U.S.C. § 2718(a) and (c) for state law claims resulting from an oil spill.

---

12. *See* 33 U.S.C. § 2751(e); *Gabarick*, 623 F. Supp. 2d at 746-51 (holding that OPA has no effect on damages not covered under OPA).

13. *See* 33 U.S.C. § 2751(e); *Gabarick*, 623 F. Supp. 2d at 746-51.

14. *See* 33 U.S.C. § 2751(e); *Gabarick*, 623 F. Supp. 2d at 748 ("OPA expressly leaves claims not addressed by the Act to general maritime and admiralty law.").

15. Clean Water Act, 33 U.S.C. §§ 1251-1387 (2006).

16. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2619 (2008).

17. S. Port Marine, LLC v. Gulf Oil Ltd., 234 F.3d 58 (1st Cir. 2000).

The issue of whether a claim, not subsumed by OPA, is subject to state law is beyond the scope of this Article. Nevertheless, in considering applicable law, it is important to consider the Admiralty Extension Act, 46 U.S.C. § 30101, which extends admiralty jurisdiction inland and provides coverage for injuries that occur on land but are caused by vessels on navigable waters.[18] The reach of the Admiralty Extension Act is generally considered on a case-by-case basis. One of the more extreme applications of the Admiralty Extension Act occurred in a case involving an intoxicated cruise ship passenger who was injured in an automobile accident caused by the driver of another car who also became intoxicated while a passenger on the same cruise ship.[19]

E. The Limitation Act Does Not Apply to OPA Claims

The Limitation of Vessel Owner's Liability Act (Limitation Act) provides an admiralty law procedure to enjoin all pending suits and to compel all claims to be filed in a special limitation proceeding so that a shipowner's liability may be determined and potentially limited to the value of the vessel and freight pending.[20] This procedure requires a single forum, or concursus, for the adjudication of all claims.[21] Thus, the judge in the limitation proceeding will determine (1) liability and, if any, the percentage of fault attributable to the vessel(s) involved, and any additional parties; (2) whether the shipowner is entitled to limit its liability to the value of the vessel because it lacked privity or knowledge of the fault causing the loss; (3) quantum; and (4) how the limitation fund should be distributed to the claimants.[22]

The parties seeking damages will have the opportunity to challenge the ability of the shipowner to limit its liability under the Limitation Act. Even if the shipowner is not able to limit its liability to the value of the vessel and freight pending, all claimants will still be required to address these issues in a single forum.

OPA "broadly supersedes" the Limitation Act with respect to damages and removal costs under both federal and state law, including

---

18. 46 U.S.C. § 30101(a) (2006); Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995).

19. Duluth Superior Excursions, Inc. v. Makela, 623 F.2d 1251 (8th Cir. 1980). *But see S. Port Marine*, 234 F.3d at 64 (noting that courts have consistently held that floating docks do not process the characteristics typically associated with maritime objects, and thus do not fall under admiralty jurisdiction).

20. 46 U.S.C. §§ 30505-30512.

21. *Id.* § 30505(a).

22. FED. R. CIV. P. XIII.F.

common law.[23] Accordingly, the Limitation Act should not apply to limit any action for damages or removal connected with a pollution incident. The Limitation Act may still apply, however, to nonpollution claims, such as collision claims, collision-related cargo claims, and personal injury claims.[24]

The primary case dealing with OPA's effective "repeal" of the Limitation Act for claims governed by OPA is *Metlife Capital Corp. v. M/V Emily S*.[25] In *Emily S*, a parted towing wire between a tug and barge caused the grounding of the barge, resulting in an oil spill.[26] The Commonwealth arrested M/V EMILY S and filed civil actions in the District of Puerto Rico, along with other private parties seeking recovery for damages under a variety of theories, including OPA, the general maritime law, and Puerto Rican law.

The vessel owners filed complaints under the Limitation Act. The district court issued a monition enjoining the commencement of any actions against the limitation plaintiffs for claims arising out of the grounding of the barge (except for actions filed in the limitation proceeding), creating a concursus of all claims in a single consolidated proceeding. The Commonwealth of Puerto Rico and the United States "asserted that their OPA claims should not be subject to concursus."[27] Additionally, while their administrative claims were pending in the National Pollution Funds Center (NPFC), Hilton Hotel interests, the Puerto Rico Tourism Company and the Hotel Development Corporation filed claims under seal in the limitation proceedings.[28] In order to protect their OPA claims should they withdraw from the concursus, these parties moved the district court for relief.[29]

The district court issued an order suspending the order of injunction issued in the limitation proceedings. It allowed "any claims for oil spill removal costs or damages resulting from or in any way connected with the grounding of the barge . . . to be asserted independently of the limitation of liability proceedings."

---

23. 2 SCHOENBAUM, *supra* note 4, § 18-2, at 376.

24. *Id.*; 70 AM. JUR. 2D *Shipping* § 393; Laurence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 TUL. MAR. L.J. 481, 530-32 (2000).

25. *See* 132 F.3d 818 (1st Cir. 1997).

26. *Id.* at 819.

27. *Id.* at 820.

28. *Id.* The NPFC is an independent United States Coast Guard unit charged with receiving and reviewing claims against the OSLTF.

29. *Id.*

For the reasons set forth below, the First Circuit affirmed the ruling of the district court and held that OPA § 2702(a) "repealed" the Limitation Act with respect to removal costs and damages claims against responsible parties.

First, § 2702(a) provides: "*Notwithstanding any other provision or rule of law*, . . . each responsible party . . . is liable for the removal costs and damages specified in subsection (b) of this section that result from such incident."[30] In interpreting similar language in the Federal Water Pollution Control Act (FWPCA), the First Circuit cited cases which held that the statute's "notwithstanding" phrase precludes application of the Limitation Act to claims for FWPCA pollution removal costs.[31] The court found these cases instructive because "[n]either . . . OPA nor its legislative history suggests that OPA's provisions should be construed contrary to the settled law applicable to FWPCA when OPA was enacted."[32]

Second, the following four provisions of OPA explicitly "repeal" the Limitation Act:

1. 33 U.S.C. § 2702(d)(1)(A) (repeals the Limitation Act as to third parties solely responsible for a spill);
2. § 2718(a) (repeals the Limitation Act as to state and local statutory remedies);
3. § 2718(c)(1) (repeals the Limitation Act as to additional liability imposed by the United States, any state, or political subdivision);
4. § 2718(c)(2) (repeals the Limitation Act as to fines or penalties).[33]

Third, OPA supercedes the procedural rules of Rule F of the Federal Rules of Civil Procedure for Certain Admiralty and Maritime Claims for the following reasons:[34]

1. Rule F's venue provisions are inconsistent with OPA venue provisions, which offer claimants a much broader choice of forums. Under Rule F(9), a limitation proceeding may be commenced only in the district where the vessel has been seized, or if the vessel has not been seized, in any district in which the owner has been sued. If neither applies, the limitation action may be filed in the district where the vessel may be. Under OPA, 33 U.S.C. § 2717(b), venue is proper

30. *Id.* (citing 33 U.S.C. § 2702(a) (2006) (emphasis added)).

31. *Id.* at 821 (citing *In re* Oswego Barge Corp., 664 F.2d 327, 340 (2d Cir. 1981); *In re* Hokkaido Fisheries Co., 506 F. Supp. 631, 634 (D. Alaska 1981)).

32. *Id.* (quoting Greg L. McCurdy, Comment, *An Overview of OPA 1990 and Its Relationship to Other Laws*, 5 U.S.F. MAR. L.J. 423 (1993)).

33. *Id.* (citing 33 U.S.C. §§ 2702(d)(1)(A), 2718(a), 2718(c)(1)-(2)).

34. FED. R. CIV. P. XIII.F sets forth procedural requirements for claims filed under the Limitation Act.

> in any district in which the discharge of oil or injury or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process.[35]

2. Rule F's deadline for claims is also inconsistent with OPA's provisions. Under Rule F(4), once a limitation action is commenced, the court issues a notice to claimants requiring them to file their claims by the date fixed in the notice, which may be as little as 30 days after issuance of the notice. OPA, 33 U.S.C. § 2717(f)(1) and (2), however, allows claimants three years to commence an action to recover removal costs and damages. Additionally, a claimant that decides to seek recovery from the Fund has six years to present removal costs claims [33 U.S.C. § 2712(h)(1)] and three years to present damage claims [33 U.S.C. § 2712(h)(2)]. OPA also extends the limitation period for subrogation actions by three years from the date the Fund pays a subrogated claim. 33 U.S.C. § 2717(f)(4).[36]

Finally, the First Circuit stated that OPA establishes its own claims procedure, set out at 33 U.S.C. § 2713(a). Subject to certain exceptions, most OPA claimants who suffer loss or damage due to an oil spill are required to first submit claims to the responsible party or its insurer for reimbursement or compensation.[37] If the responsible party or its insurer denies the claim or does not pay the claim within ninety days of the date of submission, the claimant may then elect to file suit against the responsible party or submit the claim to the NPFC.[38] The NPFC is an independent United States Coast Guard unit charged with receiving and reviewing claims against the Oil Spill Liability Trust Fund (OSLTF), which was established to provide funds for federal cleanup; funds to assess and restore damaged natural resources; compensation to claimants for certain removal costs and damages resulting from an oil spill incident; and cost recovery from responsible parties for costs and damages paid from OSLTF.[39] In contrast, Rule F(3) forces all claimants

---

35. *Emily S*, 132 F.3d at 823.

36. *Id.*

37. NAT'L POLLUTION FUNDS CTR., U.S. COAST GUARD, CLAIMANT'S GUIDE: A COMPLIANCE GUIDE FOR SUBMITTING CLAIMS UNDER THE OIL POLLUTION ACT OF 1990 (2009) [hereinafter CLAIMANT'S GUIDE], *available at* http://www.uscg.mil/npfc/does/pdfs/urg/Ch6/NPFC ClaimantGuide.pdf. A responsible party may also submit a claim to the NPFC for removal costs and damages paid by the responsible party if it can establish entitlement to a defense to liability or limitation of liability in accordance with 33 U.S.C. § 2708. CLAIMANT'S GUIDE, *supra*, at 3.

38. 33 U.S.C. § 2713(c)(2) (2006). Additionally, under 33 U.S.C. § 2713(b) claims may be presented directly to the NPFC, in certain instances, without first presenting them to the responsible party.

39. NAT'L POLLUTION FUNDS CTR., USER REFERENCE GUIDE 569 (1999) (citing 33 U.S.C. § 2701). The NPFC cannot, however, evaluate, decide or pay any claim that is part of a court case, including a class action suit, to recover the claimants' costs or damages.

into litigation against the vessel owner and if the claimant fails to appear within the monition period, he is enjoined from raising any claims.[40]

While the First Circuit in *Emily S* observed that general maritime tort actions for injury to persons or vessels, arising from an oil pollution incident, "do not escape" the Limitation Act,[41] the court provided no guidance in differentiating between those claims properly characterized as maritime tort actions from OPA claims. This difference may prove significant, for under OPA, neither the Limitation Act nor *Robins Dry Dock* principles apply.[42]

II. OPA EXPANDS *ROBINS DRY DOCK* TO ALLOW PROPERTY DAMAGE CLAIMS TO LESSEES UNDER 33 U.S.C. § 2702(b)(2)(B)

Robins Dry Dock stands for the proposition that economic loss claims are not recoverable if a claimant does not have a proprietary interest in the property that suffered physical damage.[43] In order to satisfy the proprietary interest requirement, the claimant must have had: (1) actual possession or control of the property that sustained physical damage, (2) responsibility for repairs to the property, and (3) responsibility for maintenance to the property at the time of the incident.[44]

OPA § 2702(b)(2)(B) provides that a claimant may recover damages for injury to, or economic losses resulting from, "destruction" of owned *or leased* real or personal property.[45] This is an expansion of the *Robins Dry Dock* principle, which, generally, does not consider a lessee to have a sufficient proprietary interest to recover for economic loss suffered as a result of leased property damage.

In order to make a § 2702(b)(2)(B) claim against the OSLTF, the claimant must establish the following: "(1) An ownership or leasehold interest in the property; (2) That the property was injured or destroyed; (3) The cost of repair or replacement; and (4) The value of the property both before and after the injury occurred."[46]

To recover an *economic loss claim* resulting from destruction of real or personal property under § 2702(b)(2)(B), the claimant must demon-

---

40. FED. R. CIV. P. XIII.F(3).

41. *Emily S*, 132 F.3d at 822 (citing OPA's savings provisions, 33 U.S.C. § 2751(e)).

42. *See* Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).

43. *Id.*; Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985) (en banc); *In re* Brown Water Towing I, Inc., 66 F. App. 523 (5th Cir. 2003).

44. IMTT Gretna v. S/S Robert E. Lee, 993 F.2d 1193 (5th Cir. 1993); Tex. E. Transmission Corp. v. McMoran Offshore Exploration Co., 877 F.2d 1214, 1225 (5th Cir. 1989).

45. 61C AM. JUR. 2d *Pollution Control* § 1092 (2d ed. 2008) (citing 33 U.S.C. § 2702(b)(2)(B)).

46. 33 C.F.R. § 136.215(a) (2010).

strate: "(1) The property was not available for use and, if it had been, the value of that use; (2) Whether substitute property was available and, if used, the costs thereof; and (3) The economic loss was incurred as the result of the injury to or destruction of the property."[47]

III. *ROBINS DRY DOCK* DOES NOT APPLY TO OPA CLAIMS FOR PURE ECONOMIC LOSS UNDER 33 U.S.C. § 2702(b)(2)(E)

Both courts and commentators have interpreted OPA to abrogate the traditional admiralty protection to vessel owners provided by *Robins Dry Dock/Testbank* and to allow the recovery of pure economic loss damages based on OPA 33 U.S.C. § 2702(b)(2)(E).[48] Section 2702(b)(2)(E) provides that "[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources . . . shall be recoverable by any claimant."[49]

To recover for lost profits or income under § 2702(b)(2)(E), the claimant does not need to be the owner of the affected property or resource.[50] Assuming proximate cause and foreseeability hurdles are overcome (discussed below), in order to maintain a claim for lost profits or loss of earning capacity under § 2702(b)(2)(E), a claimant must establish the following:

A. That real or personal property or natural resources have been injured, destroyed, or lost;
B. That income was reduced as a consequence of injury to, destruction of, or loss of property or natural resources, and the amount of that reduction;
C. The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial

---

47. *Id.*

48. *See Robins Dry Dock*, 275 U.S. 303; *Testbank*, 752 F.2d 1019. We note that *Testbank* and its progeny sets forth an exception to *Robins Dry Dock* for commercial oystermen, shrimpers, crabbers, and fishermen who are entitled to recover for economic damages despite lack of a "proprietary interest" in the damaged property.

49. 33 U.S.C. § 2702(b)(2)(E). Commentary observing OPA's abrogation of *Robins Dry Dock* includes: Keith B. Letourneau & Wesley T. Welmaker, *The Oil Pollution Act of 1990: Federal Judicial Interpretation Through the End of the Millennium*, 12 U.S.F. MAR. L.J. 147 (2000); Steven R. Swanson, *The Oil Pollution Act of 1990 After Ten Years*, 32 J. MAR. L. & COM. 135 (2001); Thomas J. Wagner, *Recoverable Damages Under the Oil Pollution Act of 1990*, 5 U.S.F. MAR. L.J. 283 (1993); Francis J. Gonynor, *The Robins Drydock Rule: Is the Bright Line Fading?*, 4 U.S.F. MAR. L.J. 85, 95-96 (1992); McCurdy, *supra* note 32; Kiern, *supra* note 24, at 531-32.

50. 33 C.F.R. § 136.231.

statements, and similar documents. Additionally, comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident must be established; and

D. Whether alternative employment or business was available and undertaken and, if so, the amount of income received.[51]

Additionally, any income that a claimant received as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.[52] Allowable compensation is limited to the actual net reduction or loss of earnings or profits suffered, and calculations for net reductions or losses must clearly reflect adjustments for all income resulting from the incident and from alternative employment or business undertaken.[53] Finally, adjustments should be made for potential income from alternative employment or business not undertaken, but reasonably available; any saved overhead or normal expenses not incurred as a result of the incident; and federal, state, and local taxes.[54]

Economic loss claims under general maritime law require similar proof. A claimant must prove its economic loss with "reasonable certainty."[55] For example, in *Marine Office of America Corp. v. M/V Vulcan*, the court held that plaintiff had not sustained recoverable economic loss because at the time of the damage, the vessel involved had earned no profits.[56] The inquiry is not whether profits could have been made; instead, a claimant must demonstrate with "reasonable certainty" that profits were impacted.[57]

IV. CASES INVOLVING OPA ECONOMIC LOSS CLAIMS

The "Claimant's Guide" published by the U.S. Coast Guard describes a "typical" claim which "may" qualify as a claim for loss of profits and earning capacity under § 2702(b)(2)(E): "You lease a commercial charter boat that was trapped in port when the Coast Guard closed the river to remove oil."[58] There are not a large number of cases that deal specifically with OPA economic loss claims. The only Fifth

51. *Id.* § 136.233.
52. *Id.* § 136.233(d).
53. *Id.* § 136.235.
54. *Id.*
55. Marine Office of Am. Corp. v. M/V Vulcan, 891 F. Supp. 278, 287 (E.D. La. 1995).
56. *Id.*
57. Skou v. United States, 478 F.2d 343, 346 (5th Cir. 1973).
58. CLAIMANT'S GUIDE, *supra* note 37.

Circuit case reviewed is *In re Taira Lynn Marine Ltd. No. 5*.[59] *Taira Lynn* involved a number of business owners who brought claims under general maritime law, OPA, CERCLA and state law for economic losses they suffered following an allision between M/V MR. BARRY and its tow with the Louisa Bridge in St. Mary Parish, Louisiana.[60] The allision caused a discharge of a gaseous mixture of propylene/propane into the air, resulting in a mandatory evacuation of businesses and residences in the area.[61] The primary issue on appeal was "whether claimants who suffered no physical damage to a proprietary interest can recover for their economic losses as a result of a maritime allision."[62]

Two claimants had successfully argued before the district court that the physical presence of gas on their property satisfied *Testbank*'s physical damage requirements.[63] Despite the Fifth Circuit's pronouncement that the issue was not the subject of the appellant's motion for summary judgment, it engaged in a lengthy analysis of why such claims were not sustainable under general maritime law, § 2702(b)(2)(B) (the OPA section dealing with claims involving both property damage and economic loss), or state law. The court quickly disposed of the general maritime claims, stating that it is "unmistakable that the law of this circuit does not allow recovery of purely economic claims absent physical injury to a proprietary interest in a maritime negligence suit."[64] The Fifth Circuit stated that the district court erred in concluding that those claims satisfied *Testbank*'s physical damage requirements.[65] The Court also concluded that the claimants may not recover under state law, because maritime law specifically denies recovery to nonproprietors for economic damages.[66] "To allow state law to supply a remedy when one is denied in admiralty would serve only to circumvent the maritime law's jurisdiction."[67]

---

59. 444 F.3d 371 (5th Cir. 2006).
60. *Id.* at 375.
61. *Id.* at 376.
62. *Id.* at 371.
63. *Id.* at 378.
64. *Id.* at 377.
65. *Id.* at 378.
66. *Id.* at 380.
67. *Id.* (quoting IMTT-Gretna v. Robert E. Lee SS, 993 F.2d 1193, 1195 (5th Cir. 1993), *supplemented by* IMTT-Gretna v. Robert E. Lee SS, 999 F.2d 105 (5th Cir. 1993)); *see also* Shelley F. Spansel, Robins Dry Dock *Versus State Laws Governing Liability for Pure Economic Loss: How the Maritime Circuit Should Resolve the Preemption Conflict*, 51 LOY. L. REV. 165 (2005) (suggesting the Fifth Circuit should not follow the First Circuit in *Ballard* and the Ninth Circuit in *Exxon Valdez*, but should continue to apply the *Robins* doctrine over conflicting state laws until Congress or the Supreme Court overrules the doctrine or sets forth a clear and definite preemption test). *Contra* Ballard Shipping v. Beach Shellfish, 32 F.3d 623 (1st Cir. 1994)

Two other claimants alleged to have suffered physical damage.[68] One claimant alleged it suffered physical damage when boxes of crabs spoiled in a freezer when law enforcement officials shut off the electricity during the evacuation. The other claimant alleged that two manufacturing runs had to be prematurely terminated and the company lost the material in those runs and could not sell the products. The district court concluded that these damages also met the physical damage requirement of *Testbank*. Again, the Fifth Circuit disagreed and stated that even if they suffered damage, the damage was not directly caused by the allision, and was unforeseeable. The court distinguished these claims from the claim in *Consolidated Aluminum Corp. v. C.F. Bean Corp.* (*Consolidated I*), where a dredge struck and ruptured a pipeline, which caused a reduction in gas pressure and supply to Consolidated's power plant.[69] The Court noted that in *Consolidated I*, it held that *Testbank* did not bar recovery because Consolidated suffered physical damage to its equipment.[70] In this case, the allision did not physically cause the disruption in electrical power nor did it physically impact the manufacturer's facilities.

With regard to the OPA claims, the Fifth Circuit held that the claimants had not raised an issue of fact as to whether the discharge of gaseous cargo caused damage to their property.[71] Thus, they were not entitled to recover under § 2702(b)(2)(B), pursuant to which economic damages have to be a direct result of property damaged by an OPA event.[72] The Fifth Circuit then went on to consider the claims under 2702(b)(2)(E), which provides that a claimant need not be the owner of damaged property or resources to recover for lost profits.[73] Because the court had not yet had occasion to consider the issue, it looked to a Fourth Circuit case, *Gatlin Oil Co. v. United States*,[74] for guidance.

(finding it "compelling" that Congress authorized recovery of purely economic damages pursuant to OPA § 2702(b)(2)(E) and concluding that *Robins Dry Dock* does not preempt Rhode Island law authorizing recovery for pure economic loss).

68. *Taira Lynn*, 444 F.3d at 380.

69. *Id.* (citing Consol. Aluminum Corp. v. C.F. Bean Corp., 772 F.2d 1217 (5th Cir. 1985)).

70. *Id.*

71. *Id.* at 382.

72. *Id.*

73. *Id.* (citing Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 631 (1st Cir. 1994)). The court noted, but declined to follow *In re Cleveland Tankers, Inc.*, 791 F. Supp. 669, 678-79 (E.D. Mich. 1992), which interpreted subsection (E) to require injury to the *claimant's* property. *Id.* at 631 n.6.

74. 169 F.3d 207 (4th Cir. 1999).

In *Gatlin*, vandals opened some of Gatlin Oil's above-ground fuel storage tanks, which caused an oil spill.[75] Vapors from the oil spill ignited a fire that destroyed a warehouse and other property. In order to prevent further discharge, federal officials instructed Gatlin Oil to remove oil from storm ditches and surface waters. Gatlin Oil presented a claim to OSLTF for payment of uncompensated removal costs and damages, claiming damages resulting from the discharge of oil and the resultant fire.[76] The Coast Guard determined that Gatlin Oil's damages were limited to those caused by the discharge and the measures ordered to prevent discharge.[77] The court held that as a matter of law, Gatlin Oil could not recover compensation for fire damage because the evidence did not establish that *the fire* caused the discharge of oil into navigable waters or posed a threat to do so within the meaning of OPA.[78] "[T]he removal costs and damages specified [under OPA] are those that result from a discharge of oil or from a substantial threat of a discharge of oil into navigable waters or the adjacent shoreline."[79]

The Fifth Circuit's *Taira Lynn* panel agreed with the Fourth Circuit's reasoning in *Gatlin* and concluded, "[E]ven assuming arguendo that OPA applies, the claimants had not raised an issue of fact as to whether *any* property damage was caused by" the release of the gaseous cargo.[80] In short, the court held that "[a]ny property damage upon which Claimants must rely to recover under § 2702(b)(2)(E) did not result from the discharge or threatened discharge of oil."[81] It does not appear that any of the claimants in *Taira Lynn* argued that they could recover economic damages under § 2702(b)(2)(E) based on damage to a natural resource.[82] Arguably, damage to the air quality was the result of the gaseous discharge and the claimants' economic losses were directly related to damage to the air quality. Nevertheless, it appears that the claims would still have been denied based on the unforeseeability rulings, discussed below.

---

75. *Id.* at 209.
76. *Id.* at 210.
77. *Id.*
78. *In re* Taira Lynn Marine Ltd. No. 5, LLC, 444 F.3d 371, 382 (5th Cir. 2006) (citing *Gatlin Oil*, 169 F.3d at 212). The dissent in *Gatlin* felt that the statutory test was satisfied because the fire damage "resulted from" the vandals' discharge of oil.
79. *Id.*
80. *Id.* at 383 (emphasis added).
81. *Id.*
82. For example, claimants could have argued that they were entitled to economic damages based on harms to the air as a result of the gaseous discharge.

A significant Eastern District of Louisiana case is *Sekco Energy, Inc. v. Margaret Chouest*.[83] In *Sekco*, a drilling platform owner brought suit for economic losses against the charterer and owner of a vessel that had towed a seismic cable into the leg of plaintiff's platform.[84] The platform sustained no physical damage, but the cable burst and spilled oil into the Gulf and drilling had to be halted while the spill's source was investigated. The defendant argued that because the platform did not sustain physical damage, economic damages were precluded by *Robins Dry Dock*.[85] The plaintiff argued that it could recover its economic losses under three OPA subsections: 2702(b)(2)(B), (b)(2)(C) and (b)(2)(E).[86]

The district court stated that defendant's position regarding *Robins Dry Dock* "defies logic" where *Robins* would allow economic damages if the seismic cable had "slightly dented the leg" but denied recovery if the leg had no damage.[87] Refusing to be bound in a "semantic straightjacket," the court dismissed the claim under § 2702(b)(2)(B) because economic losses occurred without destruction of real or personal property and dismissed the claim under § 2702(b)(2)(C) on the grounds that plaintiff had not been engaged in subsistence use.[88] The court granted the claim under § 2702(b)(2)(E) finding that plaintiff could recover for lost profits from drilling because future earnings from drilling on the Outer Continental Shelf are property of the type contemplated by § 2692(b)(2)(E).[89] Following a bench trial, however, the district court denied plaintiff's claim for economic damages for lack of proximate cause.[90]

Several other significant cases involved claims for economic loss damages. *Ballard Shipping Co. v. Beach Shellfish*[91] is a significant case because of its substantive holding that the *Robins Dry Dock* rule is not a "characteristic feature" of maritime law.[92] Although *Ballard* involved a pre-OPA spill, the First Circuit found OPA relevant in determining that

---

83. 820 F. Supp. 1008 (E.D. La. 1993).
84. *Id.* at 1010.
85. *Id.* at 1011.
86. *Id.* at 1014.
87. *Id.* at 1011.
88. *Id.* at 1011-12.
89. *Id.* at 1012.
90. Sekco Energy Inc. v. M/V Margaret Chouest, No. 92-CV-0420, 1993 WL 322942, at *18 (E.D. La. Aug. 13, 1993).
91. 32 F.3d 623 (1st Cir. 1994).
92. Martin C. Womer, Case Note, Ballard Shipping Co. v. Beach Shellfish*: The End of the Era When Robins Dry Dock Foreclosed State Jurisdiction over the Recovery of Economic Damages from Oil Spills*, 2 OCEAN & COASTAL L.J. 435 (1997).

Robins Dry Dock does not trigger preemption of a state statute allowing recovery for purely economic losses in oil spill cases.[93]

In *Ballard*, an oil tanker owned by Ballard Shipping spilled over 300,000 gallons of heating oil into Narragansett Bay, Rhode Island when she ran aground.[94] Due to oil contamination, the bay was closed to all fishing activities for two weeks during and after the oil spill clean-up operations. Almost 450 parties filed suit, including shellfish dealers who claimed economic damages under a Rhode Island statute.

In determining that the Rhode Island statute allowing purely economic damages was *not* preempted by the *Robins Dry Dock* rule, the First Circuit found it "compelling" that Congress authorized recovery of purely economic damages pursuant to [recently enacted] OPA § 2702(b)(2)(E).[95] Specifically, the First Circuit cited the language of § 2702(b)(2)(E) which allows economic damages for damage, destruction, or loss of *natural resources*.[96] The First Circuit considered, but dismissed, the United States District Court for the Eastern District of Michigan's opinion in *In re Cleveland Tankers, Inc.*[97] (discussed below), noting that most commentators have read OPA to override the *Robins Dry Dock* rule.[98] The court held that *Robins Dry Dock* does not preempt Rhode Island law authorizing recovery for pure economic loss and remanded the matter to the district court for a determination of whether the economic losses were "reasonably foreseeable or proximately caused" by the grounding of the vessel, or whether the claims were otherwise viable under the Rhode Island statute.[99]

In re Cleveland Tankers held that OPA does require an injury or loss to the claimant's property. In this case, M/V JUPITER was unloading gasoline at a dock in the Saginaw River when it caught fire and spilled gasoline into the river.[100] The ship partially sank and the Coast Guard closed the channel. Several parties whose business interests were adversely affected by the closure, but did not suffer property damage, filed OPA claims against the vessel owner. The court held that OPA does not allow recovery for economic loss if the claimant does not allege "injury, destruction, or loss" to *their* property. As noted above, both the

---

93. *Ballard*, 32 F.3d at 631. As discussed above, this is presently *not* the law in the Fifth Circuit.
94. *Id.* at 624.
95. *Id.* at 635.
96. *Id.* at 630-31.
97. 791 F. Supp. 669 (E.D. Mich. 1994).
98. *Ballard*, 32 F.3d at 631.
99. *Id.*
100. *Cleveland Tankers*, 791 F. Supp. at 671.

Fifth Circuit in *Taira Lynn* and the First Circuit in *Ballard*, considered and dismissed the *Cleveland Tankers* case.

In *South Port Marine, LLC v. Gulf Oil Ltd. Partnership* an onshore facility was pumping gasoline into a barge located in navigable waters when 20,000 to 30,000 gallons of gasoline spilled from the barge into Portland Harbor.[101] The gasoline drifted into South Port Marine's marina, dissolving some styrofoam floats, and causing physical damage to the docks.[102] The owner of the marina brought an action under OPA § 2702(b)(2)(B) to recover damages to its property, lost profits, and economic losses, including loss of goodwill and business stress.

The jury awarded damages under OPA, including $181,964 for property damage; $110,000 for lost profits; and $300,000 for other economic losses, including "business stress" and "loss of goodwill and other intangibles." The defendants filed a motion for judgment as a matter of law or for a new trial with regard to damages for lost profits, loss of goodwill and/or business stress. The district court observed that "not only can a corporation like the plaintiff recover for the physical damage to its docks, as the defendants concede, but it can also recover compensation for injury to its intangible assets—personal property—in the marina business." Because there was ample evidence that some of the marina's property, including the styrofoam flotation, was destroyed, the jury was entitled to find that the intangible economic loses for which it awarded damages (for loss of goodwill and business stress) resulted from that specific property destruction.[103] But, although the marina owner had stated claims for alleged intangible economic losses, the jury awards for lost future revenues, business interruption and decline in the market value of the marina were either significantly reduced or not allowed due to a lack of proof.

The district court then proceeded to review the specific damage awards and the evidence. Regarding lost profits, the marina sought damages of $125,000 for future slip revenues allegedly lost because the spill caused a delay of dredging operations for new slips, as well as $80,000 for business interruption caused by the spill.[104] The district court noted that there was no evidence that if the dredging had been completed earlier as planned, there would have been a demand for the new slips.

---

101. 73 F. Supp. 2d 17, 22 (D. Me. 1999), *aff'd in part, rev'd in part*, 234 F.3d 58 (1st Cir. 2000).

102. *Id.* at 19.

103. *Id.* The district court noted that because of its ruling on § 2702(b)(2)(B) it had no reason to address the interpretation of § 2702(b)(2)(E), a different category of damages available to owners and nonowners alike, which appears to displace the *Robins Dry Dock* rule.

104. *Id.* at 19-20.

Essentially, there was no evidence that a market existed for the additional slips at the time the spill occurred.[105] Accordingly, the district court ruled that the marina could not recover for projected future slip revenues.

The marina's $80,000 claim for business interruption damages consisted of $65,000 caused by the diversion of marina employees to make temporary repairs to the marina's docks, and $15,000 attributed to revenues allegedly lost when customers declined to return to the marina after the spill. Noting that the marina had recovered the cost of repairs to the docks under the property damage element, the district court ruled that the record was devoid of any evidence that the marina's customers were ready to use, and be billed for, the services of the employees assigned to make the temporary dock repairs.[106] Since there was no evidence that business was turned away because the marina workers were occupied with repairs, the marina could not recover the $65,000 it allegedly lost by the diversion of marina employees engaged in dock repairs. On the other hand, the demand for $15,000 attributable to lost future slip revenues was allowed.[107] The defendants conceded $5000 of the loss and the marina's accountant testified that the future slip revenue loss was arrived at by examining records of slips that had been rented and then had become vacant at the time of the spill.[108]

The court then reviewed the marina's claim that it was entitled to recover any decline in the total fair market value of its assets arising out of the damages to its docks.[109] It concluded that the evidence did not support the jury's award for either goodwill or business stress. Although the marina's accountant testified that the marina's goodwill value was $100,000 prior to the spill, the accountant provided no basis for concluding that the goodwill had been reduced to zero or to any other number. Furthermore, the court had ruled at trial that decline in total fair market value was not an available measure of recovery, and both the goodwill and the business stress numbers presented to the jury were really back door attempts to recover a decline in the total fair market value of the business.[110]

Finally, the district court ruled that there was no evidence that the marina's accountant had investigated or received information regarding the market for the marina to support the $150,000 figure claimed due to

105. *Id.*
106. *Id.* at 20-21.
107. *Id.* at 21.
108. *Id.* at 20-21.
109. *Id.* at 21.
110. *Id.* at 21 n.4.

business stress, which allegedly represented the reduced price that a prospective purchaser would pay for the business.[111]

On appeal, the First Circuit agreed with the district court regarding evidentiary deficiencies for the jury award for "business stress" and "loss of goodwill."[112]

In re Settoon Towing, LLC, involved claims arising out of an allision by its barge with a well owned and operated by ExPert Oil & Gas, LLC.[113] The allision caused damage to the wellhead and resulted in a discharge of crude oil into Bayou Perot in Jefferson Parish, Louisiana. Barataria Production Services (BPS) made demand on ExPert, as an OPA responsible party, for damages it suffered as a result of its inability to access its production platform while the oil spill cleanup was in progress, and ExPert sought reimbursement from the negligent party, Settoon.[114] Settoon filed a motion for summary judgment, arguing that because BPS did not allege physical injury to a proprietary interest, its economic loss claims were barred by the rule of *Robins Dry Dock*.

The court held that OPA applied, rather than maritime law and *Robins Dry Dock*, and denied Settoon's motion because ExPert had raised issues of fact as to whether BPS' economic losses resulted from the discharge of oil.[115] Emphasizing that sufficient documentary evidence or testimony at trial would be needed in order to recover the claimed damages, the court allowed ExPert to proceed with the following claims:

1. Potential ICW shutdown suits.
2. Potential fines and/or penalties which may be asserted by the United States under the Natural Resource Damage Assessment regulations, 15 C.F.R. § 990.10.
3. Overhead increases arising out of operating agreements with well owners.
4. Lost business opportunities.
5. Increased control of well rate.
6. Loss of business reputation.
7. Potential cleanup costs arising out of potential well failure.
8. Increased insurance costs.[116]

---

111. *Id.* at 21-22.
112. *Id.* at 22.
113. *In re* Settoon Towing, LLC, No. 07-1263, 2009 WL 4730969, at *1 (E.D. La. Dec. 4, 2009).
114. *Id.* at *2.
115. *Id.* at *2-4.
116. *Id.* at *4-8.

The court granted Settoon's motion, however, for ExPert's claims for individual damages suffered by its employees, holding that a limited liability company did not have standing to bring an action for personal injuries on behalf of its members.[117]

V. PROXIMATE CAUSE/FORESEEABILITY ISSUES

Taira Lynn suggests that tests of foreseeability, causal connection, and remoteness will permit courts to prevent tenuous or meritless claims from being granted recovery.[118] Based on the analysis in *Taira Lynn*, the Fifth Circuit will likely require plaintiffs to overcome two proximate cause determinations in order to recover pure economic damages in an oil spill case: (1) any property damage or natural resource damage must directly result from the oil spill, and (2) economic loss must directly result from the property damage.[119] It has been suggested that in order to permit recovery for pure economic loss, a claimant should have to demonstrate that its "business enterprise was so directly intertwined with the damaged property or resource that the claimant sustained immediate and predictable economic consequences."[120]

This view is supported by a pre-OPA Fifth Circuit case involving proximate cause/foreseeability issues, *Lloyd's Leasing Ltd. v. Conoco*.[121] *Lloyd's Leasing* involved property owners who claimed economic losses caused by oil washed ashore seventy miles from the site of a ship grounding and tracked onto property by tourists and beachgoers.[122] The Court affirmed summary judgment, under *Robins/Testbank*, to the extent that the claim for losses was attributable to actual physical injury, but held that the economic harm suffered was not foreseeable.[123]

---

117. *Id.* at *5, 8.

118. *In re* Taira Lynn Marine Ltd. No. 5, 444 F.3d 371, 383 (5th Cir. 2006).

119. *Id.*

120. Browne Lewis, *It's Been 4380 Days and Counting Since Exxon Valdez: Is It Time To Change the Oil Pollution Act of 1990?*, 15 TUL. ENVTL. L.J. 97, 120 (2001).

121. 868 F.2d 1447 (5th Cir. 1989).

122. *Id.* at 1448.

123. *Id.* at 1449; *see also* Consol. Aluminum Corp. v. C.F. Bean Corp., 833 F.2d 65, 68 (5th Cir. 1985) (noting that harm is the "foreseeable consequence of an act or omission if harm of a general sort to persons of a general class might have been anticipated by a reasonably thoughtful person, as a probable result of the act or omission, considering the interplay of natural forces and likely human intervention").

VI. LIABILITY ISSUES RAISED BY OPA

A. Joint and Several Liability

The Oil Pollution Act provides that "[*e*]*ach* responsible party for a vessel or a facility from which oil is discharged . . . is liable."[124] However, "[w]here there is more than one responsible party, the use of the word 'each' would indicate that such liability is joint and several."[125] A National Pollution Funds Center publication, entitled *Oil Spill Liability Trust Fund (OSLTF) Funding for Oil Spills*, stipulates that where incidents have multiple responsible parties, liability is "joint and several" which means that "each [responsible party] is liable for the entire amount of removal costs and damages resulting from a spill."[126]

In *GMD Shipyard Corp.*, plaintiff shipyard brought action against M/V ANTHEA Y and its owner to recover the removal cost of an oil spill which occurred while M/V ANTHEA Y was in GMD's dry dock for repairs.[127] Based upon evidence at trial, the court found that although GMD was in charge of the vessel and the dewatering, it operated on the basis of certain assumptions provided by the vessel owners.[128] GMD in fact caused the oil discharge, but it relied on inaccurate information provided by the vessel owners.[129] The court found both parties would have been responsible parties under OPA and liability imposed upon them under OPA would have been joint and several.[130] As a result, the court ordered them to share equally in all damages related to the cleanup of the oil discharged from the vessel.[131]

The United States District Court for the Eastern District of Louisiana has also recognized that OPA liability of responsible parties is strict, joint and several. *United States v. Bodenger* involved defendant's motion for leave to file a third-party complaint against the prior operator of an abandoned production facility located on the defendant's property that leaked oil, precipitating the government's proceeding against the

---

124. GMD Shipyard Corp. v. M/V Anthea Y, No. 03-CV-2748-RWS, 2004 WL 2251670 (S.D.N.Y. Oct. 6, 2004) (quoting 33 U.S.C. § 2702(a) (2006) (emphasis added)).

125. *Id.* at *12 n.3 (quoting 3 BENEDICT ON ADMIRALTY § 112(a)(2) (7th ed. rev. 2004)); *see also* H.R. CONF. REP. No. 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780 (describing the terms "liable" and "liability" under OPA 90 as expressing a standard of "strict, joint and several liability").

126. NAT'L POLLUTION FUNDS CTR., OIL SPILL LIABILITY TRUST FUND (OSLTF) FUNDING FOR OIL SPILLS, NPFCPUB 16465.2 (Jan. 2006).

127. *GMD Shipyard*, 2004 WL 2251670, at *1.

128. *Id.* at *5.

129. *Id.* at *6.

130. *Id.*

131. *Id.* at *1.

Bodengers for recovery costs pursuant to OPA.[132] In granting leave to file a third party complaint, the court provided an overview of OPA, and noted that liability of a "responsible party" under OPA is construed to be the same standard of liability under the CWA, which has been determined to be strict, joint and several liability.[133]

B. Subrogation/Contribution Rights Under OPA

As noted above, if a discharge is caused *solely* by the act of a *noncontracting* third party, the third party is "treated as a responsible party" and is subject to the same liability for damages as the responsible party.[134] In that event, pursuant to 33 U.S.C. § 2702 (d)(1)(A) and (B), the responsible party should be subrogated to the rights of the United States and any claimants to the extent it paid for removal costs or damages.[135]

If the responsible party is not able to establish that a third party was the sole cause of the discharge and/or there is a contractual relationship between the third party and the discharging vessel, there is authority for the proposition that OPA provides for an action in contribution.[136] OPA § 2709 provides: "A person may bring a civil action for contribution against any other person who is liable or potentially liable under this Act *or another law*."[137] Additionally, OPA § 2715 provides "[a]ny person . . . who pays compensation pursuant to this Act . . . shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law."[138] Unlike § 2702(d)(1), neither §§ 2709 or 2715 require "sole fault" or "responsible party treatment."

For example, in *Seaboats, Inc. v. Alex C Corp.*, because of contractual relationships between the discharging vessel (by definition an OPA responsible party) and the tug that caused the oil spill, the court determined that the tug could not be "treated as a responsible party" and the responsible party's subrogation claims against the tug were not available under 33 U.S.C. § 2702(d)(1)(B).[139] The court held, however, that the responsible party's subrogation and contribution claims against

---

132. No. CV-03-272, 2003 WL 2228517 (E.D. La. Sept. 25, 2003).

133. *Id.* at *3.

134. 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 18-2 (4th ed. 2008) (citing 33 U.S.C. §§ 2702(d)(1)(A), 2702(d)(1)(B); *M/V Emily*, 13 F. Supp. 2d at 147).

135. *Id.* (citing 33 U.S.C. § 2702(d)(2)).

136. Marathon Pipe Line Co. v. LaRoche Indus., Inc., 944 F. Supp. 476 (E.D. La. 1996) (citing 33 U.S.C. § 2709).

137. 33 U.S.C. § 2709 (emphasis added).

138. *Id.* § 2715.

139. No. 01-CV-12184-DPW, 2003 WL 203078, at *10-11 (D. Mass. Jan. 30, 2003).

the tug for recovery of removal costs and damages paid in the aftermath of the oil spill were proper under OPA §§ 2709 and 2715.[140] Additionally, in *Marathon Pipe Line Co. v. LaRoche Industries, Inc.*, the court acknowledged that "[s]hould the responsible party not be able to establish that a third party was the sole cause of the discharge, [thus the third party cannot be treated as a responsible party] the OPA provides for an action in contribution."[141]

Nevertheless, there is conflicting authority. In *Gabarick v. Laurin Maritime (America), Inc.*, M/V TINTOMARA collided with Barge DM-932 on the Mississippi River.[142] As a result of the collision, an oil spill occurred.[143] DM-932, which was owned by American Commercial Lines, LLC (ACL), was being towed by M/V MEL OLIVER, a towboat crewed, operated, and maintained by DRD, when it was struck by M/V TINTOMARA.[144] ACL, as owner of the DM-932, assumed its responsibilities under OPA and undertook the cleanup of the oil spill and provided possible third-party claimants with notices of where and how they could file their OPA claims.[145] Some third-party claims were settled by ACL and some were presented to the National Pollution Fund Center for its consideration as the trustee of the OSLTF.[146] Additionally, ACL filed a claim and answer in Tintomara's Limitation of Liability Action, alleging that Tintomara was a responsible party and, alternatively, seeking contribution from Tintomara interests under OPA and the general maritime law.

Tintomara's Motion for Partial Summary Judgment sought dismissal of ACL's claims for subrogation and contribution under OPA.[147] Tintomara argued, in pertinent part, that because ACL could not establish that Tintomara was solely at fault for the collision, Tintomara could not be treated as an OPA responsible party, and there is no claim under the Act for contribution against third parties if the third party is not a responsible party. ACL opposed the motion, arguing that OPA grants subrogation and/or contribution rights against any party who bears some proportion of the fault for the collision and subsequent oil spill, regardless of whether they qualify as a sole fault third party under 33

---

140. *Id.*
141. 944 F. Supp. 476, 479 (E.D. La. 1996).
142. No. 08-CV-4007, 2010 WL 147216 (E.D. La. Jan. 11, 2010).
143. *Id.* at *1.
144. *Id.*
145. *Id.* ACL also filed a declaratory judgment action seeking to have its charters with DRD declared void *ab initio*. If successful, DRD would then qualify as an OPA responsible party.
146. *Id.*
147. *Id.* at *2.

U.S.C. § 2703(a)(3). In support of its subrogation and contribution argument, ACL cited OPA §§ 2702(d)(1)(B), 2715, and 2709, in addition to *Seaboats*, for the proposition that a subrogation or contribution action can be maintained against a third party who does not qualify as a responsible party under 33 U.S.C. § 2703(a)(3) or does not qualify for treatment as a responsible party under 33 U.S.C. § 2702(d)(1).

On January 11, 2010, the district court granted Tintomara's Motion. Without citing any legal authority, and noting that the testimony of a DRD employee at a Coast Guard hearing reflects at least some fault attributable to DRD and/or ACL, the court held that "[u]nder the OPA, Tintomara—a non-discharging party—would be liable as a responsible party only if there was no fault on the part of ACL and no fault on the part of DRD."[148] The court then granted Tintomara's Motion for Partial Summary Judgment "as to the OPA claims," but noted that ACL "is not precluded from seeking contribution under any law other than the OPA."[149]

The matter is presently on appeal to the United States Court of Appeals for the Fifth Circuit. Because the court's order dismissed ACL's OPA contribution claim against the Tintomara interests, ACL may not be able to recover from the Tintomara interests any of the monies paid in cleanup and related costs and expenses it paid under OPA. The only maritime claims ACL might retain would be for the types of damages not covered by § 2702(b) of OPA.[150] In short, if the court's ruling stands, an OPA responsible party's subrogation and contributions rights may be severely prejudiced. Assuming the responsible party can maintain a contribution or subrogation action under general maritime law for OPA damages, which is questionable, under principles of *Robins Dry Dock*, a responsible party would not be able to recover amounts paid to OPA claimants for economic loss absent physical injury to a proprietary interest.

C. OPA Claims and Third-Party Liability

Notwithstanding *Gabarick*, and assuming that a responsible party is allowed to assert OPA subrogation and/or contribution claims against a non-sole-fault or contracting third party (discussed above), the issue arises as to a third party's limit of liability under OPA: is liability based on the weight of the discharging vessel or the weight of its own vessel?

---

148. *Id.*

149. *Id.* ACL could seek contribution under the general maritime law.

150. These damages would include the total loss of the Barge DM-932 and the cargo aboard her, as well as for the cost of removal of the wreck of the barge from the river bottom.

There is conflicting case law, but it appears that the more likely answer is that a non-sole-fault or contracting third party's liability should be based on the weight of its own vessel. OPA § 2702(d)(2)(A) provides that "[i]f the act or omission of a third party that causes an incident occurs in connection with a vessel . . . owned or operated by the third party, the liability of the third party shall be subject to the limits provided in section 2704 . . . as applied with respect to the vessel" (rather than the limitation applicable to the responsible party which applies "in any other case" per 33 U.S.C. § 2702(d)(2)(B)).

Seaboats is one of the only cases reviewed that provides guidance.[151] In *Seaboats*, the tug ALEX C collided with and punctured the hull of an oil tanker, the M/T POSAVINA, while assisting in the undocking of the tanker, causing 60,000 gallons of fuel oil to spill into the Chelsea Creek portion of Boston Harbor.[152] The owners and operators of POSAVINA undertook cleanup and recovery actions pursuant to their designation as OPA responsible parties. They incurred approximately $6 million in costs and damages for reimbursement of government expenses and payment of third-party damages.

Seaboats, a remaining third-party claimant, owned and operated two vessels in the vicinity of the oil spill. Seaboats alleged that fuel oil from the spill had contaminated both vessels, prompting the Coast Guard to prohibit the vessels from departing from Chelsea Creek. Seaboats sought recovery from both the owners/operators of POSAVINA, and the owners/operators of the tug ALEX C under OPA, the Massachusetts Release Act, and state and general maritime law for physical damage, as well as economic loss, including lost profits, lost charter hire, crew and operational expenses, demurrage, detention, and lost business opportunities. Alex C filed for limitation and both the tanker POSAVINA and Seaboats filed claims in the limitation proceeding.[153]

In reviewing Posavina's OPA claims against Alex C, the court determined the following:

- Because of contractual relationships between POSAVINA and ALEX C, Alex C was not an *OPA third party* and Posavina's claims against Alex C were not within the scope of 33 U.S.C. § 2702(d)(1)(B).[154]

151. Seaboats, Inc. v. Alex C Corp., No. 01-CV-12184-DPW, 2003 WL 203078, at *1 (D. Mass. Jan. 30, 2003).

152. *Id.*

153. *Id.* at *2.

154. *Id.* at *6.

- Posavina's subrogation and/or contribution claims against Alex C for recovery of removal costs and damages paid by them in the aftermath of the oil spill were proper under OPA § 2709 and 2715.[155]
- Because OPA §§ 2709 and 2715 apply, Alex C's liability was based on the more burdensome weight of the POSAVINA under § 2702(d)(2)(B) rather than the less burdensome weight of the ALEX C under § 2702(d)(2)(A).[156]

In reaching its conclusions, the *Seaboats* court reviewed OPA legislative history, *National Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atlantic Corp.*,[157] commentator criticism of *National Shipping*, and a leading treatise endorsing *National Shipping* and the application of § 2702(d)(2)(A) to Posavina's claim.[158] Under *National Shipping*, Alex C's potential liability would have been limited to the weight of the ALEX C under § 2702(d)(2)(A). The court rejected *National Shipping*, and held that Alex C's potential liability for Posavina's OPA claims should be calculated under § 2702(d)(2)(B).[159] As a result, Alex C's potential liability limits were *coincident with that of Posavina*.[160]

In the court's closing comments, it noted that the effect of its determination regarding OPA limitation of liability is "to some degree counterintuitive" because it leaves the partially responsible third party subject to greater potential liability than a solely responsible third party.[161] Accordingly, the court's order was issued without prejudice and it extended an invitation for a representative of the OSLTF to submit an *amicus curie* brief addressing the Fund's view with respect to the question of OPA's limitation of liability for third parties.[162]

National Shipping[163] involved a vessel owned and operated by NSCSA that collided with a tug owned by defendant Moran.[164] As a result of the collision, about 9000 gallons of fuel oil spilled from the NSCSA vessel into the Elizabeth River.[165] NSCSA accepted immediate

---

155. *Id.*

156. *Id.* at *6 n.5.

157. 924 F. Supp. at 1447-49, 1454-55 (E.D. Va. 1996), *aff'd*, 122 F.3d 1062 (4th Cir. 1997), *cert. denied*, 523 U.S. 1021 (1998). The *Seaboats* court later stated that the *National Shipping* decision was "[t]he only reported decision that appears to have touched on this question." *Seaboats*, 2003 WL 203078, at *9.

158. *Seaboats*, 2003 WL 203078, at *6.

159. *Id.* at *11.

160. *Id.*

161. *Id.* at *12.

162. *Id.*

163. *Id.*

164. Nat'l Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atl. Corp., 924 F. Supp. 1436, 1439 (E.D. Va. 1996).

165. *Id.*

responsibility under the OPA. NSCSA brought an action against Moran, claiming that the oil spill was caused by Moran's negligence and seeking reimbursements for cleanup costs and expenses incurred compensating victims of the spill in addition to its own property damage from the collision. The court held that NSCSA could recover the money it was forced to spend as a result of Moran's negligence under OPA's contribution provision, 33 U.S.C. § 2709.[166] The court also held that because Moran was liable under § 2709, its liability for OPA damages under § 2704(a) was limited to the weight of the MORAN tug under § 2702(d)(2)(A).[167]

The court discussed a hypothetical case as a "perfect example where contribution or subrogation under both OPA and state common law should be allowed."[168] For example, if an oil spill causes $1 million in damages, but the responsible party's liability under OPA is limited to $500,000, under state law the responsible party may have to pay for the full cost of the spill despite the OPA liability limit. If the spill was caused by the negligence of a third party, it is reasonable to assume that the responsible party may "(1) sue the third party for contribution under § 2709 of OPA; and (2) be subrogated to the rights of the state and of other claimants under the State Water Control Law." In this way, the responsible party could recover the full cost of the spill from the third party despite any liability limitation the third party might enjoy under OPA.

The court went on to consider NSCSA's collision damages and held they are not regulated by OPA and are recoverable under the general maritime law.[169] Because the collision resulted solely from the negligence of the MORAN tug, NSCSA was entitled to recover the full amount of its damages incurred as a direct result of the collision under general maritime law.[170] The court then awarded prejudgment interest pursuant to the general maritime law, finding that OPA's prejudgment interest provisions did not apply to actions brought by a responsible party.[171]

It has been suggested that the court in *National Shipping* erred by extending the benefits of OPA § 2702(d)(2)(A) to the negligent third party, thereby limiting its liability to the weight of its own vessel.[172]

---

166. *Id.* at 1448-49.

167. *Id.* (noting that OPA damages consist of money spent to clean up the spill and to compensate victims of the spill).

168. *Id.* at 1449.

169. *Id.* at 1453-54 (finding Moran was not an OPA "third party").

170. *Id.* at 1454.

171. *Id.*

172. Kiern, *supra* note 24, at 531-32.

Blameless in the discharge, but unable to avail itself of the third-party defense because of a contract with the tug, the *National Shipping* case reached the anomalous result of allowing the blameless party to incur losses in excess of the limitation of liability of the negligent third party.[173] Arguably, it would have been more equitable to apply OPA § 2702(d)(2)(B), where the liability limit of the negligent third party would be based on the weight of the discharging vessel. The innocent responsible party could then recover its full damages pursuant to its action for contribution.[174] This is precisely what occurred in *Seaboats*, which applied § 2702(d)(2)(B), discussed above. The issue of OPA's limitation of liability for a nonsole fault/contracting third party remains ripe for clarification by the courts.

VII. A RESPONSIBLE PARTY'S RIGHT TO RECOVER FROM THE OSLTF/CLAIM REQUIREMENTS

Under 33 U.S.C. § 2708, a responsible party may assert a claim to the OSLTF for oil removal costs and claims related to the oil spill if it can demonstrate entitlement to a defense under OPA § 2708(a) *or*, assuming that the responsible party is entitled to OPA limitation, that it paid damages in excess of the limits of liability provided in OPA § 2704.[175] Generally, only a finding of gross negligence or willful misconduct will defeat the assertion of a limitation of liability under OPA § 2704. Assuming that the responsible party is entitled to OPA limitation, the responsible party may assert a claim to OSLTF for those OPA damages it pays in excess of its OPA limit. Otherwise, as noted above, the responsible party may assert a claim to recover from OSLTF only if it can demonstrate its entitlement to a defense under OPA § 2708(a).

To the extent that a responsible party is entitled to make a claim to OSLTF, it must show the following:

(1) Documentation addressing each element of the complete defense to liability (33 U.S.C. § 2703) or limitation of liability (33 U.S.C. § 2704), as applicable.
(2) That other claimants paid by the responsible party presented their claims within OPA's time limits.

---

173. *Id.*

174. *Id.* It appears, however, that where the parties have contracted for full indemnification, a vessel operator may be able to take advantage of OPA's indemnification provision and recover contractual indemnification to the full extent of its potential liability as a responsible party.

175. 33 U.S.C. §§ 2704, 2408 (2006).

(3) That the responsible party presented its claim to the NPFC within three years of the date the paid claims were presented to the responsible party.
(4) Removal costs and damages for which compensation is requested are included under OPA, 33 U.S.C. § 2708.
(5) That individual claims paid meet the applicable regulatory requirements for claims against the OSLTF.
(6) If the claim is for costs in excess of the responsible party's OPA limit, it must disclose—
    (a) All costs and paid claims (not just those exceeding the limit of liability) and
    (b) How those costs and paid claims meet OPA requirements.[176]

If the claim is for costs in excess of the responsible party's OPA limit of liability, the NPFC will measure the total acceptable costs for the incident and will deduct the limit of liability amount from the measurement.[177]

VIII. HYPOTHETICAL CLAIMS[178]

A. Discharging Vessel Gets Oil on Its Hull

If the discharging vessel can establish the sole liability of an OPA third party in accordance with 33 U.S.C. § 2708, it may have a § 2702(b)(1) "Removal Cost" claim against the solely liable OPA third party.[179] OPA's presentation requirements should not apply to claims by a responsible party against an alleged sole cause third party.[180] The solely liable third party's limitation of liability should be subject to the weight of its own vessel under § 2702(d)(2)(A).[181] The responsible party may also submit a claim to the OSLTF.[182]

---

176. *See* CLAIMANT'S GUIDE, *supra* note 37, at 20-21.

177. *Id.*

178. Hypothetical claims assume application of OPA or general maritime law. As noted in Part I.D, the issue of whether a claim, not subsumed by OPA, is subject to maritime law or state law is beyond the scope of this Article and requires consideration of the Admiralty Extension Act, 46 U.S.C. app. § 740 (2006), which extends admiralty jurisdiction inland and provides coverage for injuries that occur on land but are caused by vessels on navigable waters.

179. CLAIMANT'S GUIDE, *supra* note 37.

180. Marathon Pipe Line Co. v. LaRoche Indus., 944 F. Supp. 476 (E.D. La. 1996). *Marathon* involved a declaratory judgment action by the responsible party against alleged sole fault third party seeking to declare the third party the responsible party for purposes of OPA. The alleged third party argued that the responsible party could not file suit against it as it had not presented its claim as required by OPA. The court held that § 2713 presentation requirement does not address claims *by* a responsible party against an alleged sole cause third party.

181. *See* Seaboats, Inc. v. Alex C Corp., No. 01-CV-12184-DPW, 2003 WL 203078 (D. Mass. Jan. 30, 2003); Nat'l Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atl. Corp., 924 F. Supp. 1436 (E.D. Va. 1996).

182. CLAIMANT'S GUIDE, *supra* note 37.

The discharging vessel's claim against a non-OPA third party for oil damage to its own vessel should be a general maritime claim,[183] *Robins Dry Dock/Testbank* should apply, and oil on the hull should satisfy the "physical damage" requirement under *Robins Dry Dock/Testbank*.[184] Because the claim is a general maritime claim, the non-OPA third party's liability may be subject to the Limitation Act.[185]

B. Discharging Vessel and/or Third Party Vessel Incur Collision Damage

Claims for collision damages should be a general maritime claim, *Robins Dry Dock/Testbank* should apply, and hull damage should satisfy the "physical damage" requirement under *Robins Dry Dock/Testbank*.[186] Because the claim is a general maritime claim, the Limitation Act my be available.[187]

C. Discharging Vessel Incurs Economic Loss

If the discharging vessel can establish entitlement to a defense to liability or limitation of liability in accordance with 33 U.S.C. § 2708, the discharging vessel may have an OPA § 2702(b)(2)(E) "Loss of Profits and Earning Capacity" claim against the solely liable OPA third party.[188]

If the discharging vessel cannot establish an OPA defense under 33 U.S.C. § 2708, its claim against a non-OPA third party would fall under general maritime law. If the claim is for pure economic loss without property damage, the claim would not satisfy *Robins Dry Dock/Testbank* requirements.[189] Because the claim is a general maritime claim, the non-OPA third party vessel owner may avail itself of the Limitation Act.[190]

---

183. *See Seaboats*, 2003 WL 203078; *Nat'l Shipping*, 924 F. Supp. 1436.

184. *See* Matter of Lloyd's Leasing Ltd., 697 F. Supp. 289 (S.D. Tex. 1988), *aff'd*, 868 F.2d 1447 (5th Cir. 1989), *reh'g denied*, 875 F.2d 858 (5th Cir. 1989). *Lloyd's Leasing* held that both physical and economic damages were recoverable where the "direct physical impact" of oil on various instrumentalities, "e.g. the hulls of boats" flowed directly from the discharging vessel via currents and waves. The foreseeability chain, in regard to direct physical impact damages, was not interrupted by third-party human intervention. *See also* Salaky v. Atlas Tank Processing Corp., 120 F. Supp. 225 (E.D.N.Y. 1953) (addressing a claim for oil sludge damage to boats in proximity to vessel discharging oil).

185. *See Seaboats*, 2003 WL 203078; *Nat'l Shipping*, 924 F. Supp. 1436.

186. *See Seaboats*, 2003 WL 203078; *Nat'l Shipping*, 924 F. Supp. 1436; *In re* Taira Lynn Marine Ltd. No. 5 LLC, 444 F.3d 371 (5th Cir. 2006).

187. *Seaboats*, 2003 WL 203078, at *11.

188. CLAIMANT'S GUIDE, *supra* note 37.

189. *See Taira Lynn*, 444 F.3d at 379.

190. *See Seaboats*, 2003 WL 203078; *Nat'l Shipping*, 924 F. Supp. 1436.

D. Partial-Fault and/or Contracting Third-Party Vessel Gets Oil on Hull and/or Sustains Economic Loss[191]

The partial-fault and/or contracting third-party vessel may have a § 2702(b)(1) "Removal Cost" claim and/or a § 2702(b)(2)(E) "Loss of Profits and Earning Capacity" claim against the responsible party under OPA.[192]

E. No-Fault Third-Party Vessel Gets Oil on Hull and/or Incurs Hull Damage and Economic Loss

The no-fault third-party vessel may have a § 2702(b)(1) "Removal Cost" claim and a § 2702(b)(2)(E) "Loss of Profits and Earning Capacity" claim against the OPA Responsible Party.

F. No-Fault Third-Party Vessel Does Not Get Oil on Hull but Incurs Economic Loss Due to Closure of Navigable Waterway

The no-fault third-party vessel may have a § 2702(b)(2)(E) "Loss of Profits and Earning Capacity" claim against the responsible party under OPA, to the extent that the claim is considered a loss due to injury, destruction, or loss of "natural resources." In order for the claimant to prevail, the claim will have to withstand proximate cause/foreseeability analysis.[193]

G. Shoreside Business Incurs Property Damage from Oil Release

A shoreside business that incurs property damage from oil release may have a § 2702(b)(2)(B) "Real or Personal Property Damage" claim under OPA. The claim may include economic loss. In order for the claimant to prevail, the claim will have to withstand proximate cause/foreseeability analysis.[194]

---

191. A sole-fault/noncontracting third-party vessel would be treated the same as a responsible party/discharging vessel.

192. CLAIMANT'S GUIDE, *supra* note 37.

193. *See Taira Lynn*, 444 F.3d at 378; *supra* Part V.

194. *Taira Lynn*, 444 F.3d at 378. The court will engage in a case-by-case analysis. *See* Lloyd's Leasing Ltd. v. Conoco, 868 F.2d 1447 (5th Cir. 1989) (holding that even claimants who suffered physical damage as a result of third parties "tracking" oil onto their property seventy miles from the spill could not recover because the damages were not foreseeable).

H. Shoreside Business Incurs Economic Loss with No Property Damage

A shoreside business that incurs economic loss with no property damage may have a § 2702(b)(2)(E) "Loss of Profits and Earning Capacity" claim under OPA if the economic loss is considered the result of injury, destruction, or loss of "natural resources." In order for the claimant to prevail, the claim will have to withstand proximate cause/foreseeability analysis.[195]

I. Non-Shoreside Business Incurs Economic Loss Due to Closure of Navigable Waterway

A non-shoreside business that incurs Economic Loss with no Property Damage may have a § 2702(b)(2)(E) "Loss of Profits and Earning Capacity" claim under OPA if the economic loss is considered the result of injury, destruction or loss of "natural resources." In order for the claimant to prevail, the claim will have to withstand proximate cause/foreseeability analysis.[196]

J. Loss of Tourism

Loss of tourism, with economic loss but with no property damage, may support a § 2702(b)(2)(E) "Loss of Profits and Earning Capacity" claim under OPA if the economic loss is considered the result of injury, destruction or loss of "natural resources." In order for the claimant to prevail, the claim will have to withstand proximate cause/foreseeability analysis.[197]

---

195. *See Taira Lynn*, 444 F.3d 371. Although the court in *Lloyd's Leasing* denied claimants pure economic loss claims based on *Testbank*, the case was a pre-OPA case and *Testbank* should no longer apply because of OPA. The claim will still need to meet proximate cause/foreseeability analysis.

196. *Id.* at 378; *see also* Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973). The court dismissed plaintiffs' complaints, stating that recovery required a damage particular to the individual that was different than that of the public generally.

197. *Taira Lynn*, 444 F.3d at 378.