

## Analyzing Uncertainty: Issues of Purely Economic Losses and Preemption Facing Individuals Injured by an Oil Spill

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*Abstract: Maritime tort liability involves a complex web of various state and federal laws. For over a century, courts have struggled to determine when potential state remedies are preempted by either federal statutory or general maritime law. Within this complicated framework lies the sub-issue of whether an individual can recover purely economic losses, that is, for torts that injure people’s economic well-being despite causing no physical damage to their property. The explosion of the Deepwater Horizon and subsequent oil spill brought both of these issues to the forefront. Lawsuits currently matriculating through the courts have revealed that despite Congress’s attempt to clarify these issues with the Oil Pollution Act of 1990, it failed in both respects. This article attempts to shed light on the uncertainty and unravel the appropriate interpretation of the law as it stands today. Congress could provide clarity to these issues by focusing on the underlying policy goals of maritime law: uniformity, fairness and predictability. These goals can be accomplished through a divided system, in which offshore oil drillers are strictly liable for the economic losses they cause to certain pre-determined foreseeable parties. All other maritime torts would be subjected to the traditional, bright-line Robins Dry Dock rule. Enacting this approach in a manner that clearly displaces the other relevant federal laws and preempts conflicting state laws would solve much of the uncertainty that has plagued maritime tort liability for far too long.*

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## I. Introduction

On April 20, 2010, while completing an exploratory well forty miles from the southeast coast of Louisiana, the Deepwater Horizon offshore drilling rig burst into flames.<sup>2</sup> The explosion killed eleven rig workers and started an oil spill that would devastate the Gulf of Mexico and its coastline.<sup>3</sup> The rig was at the forefront of industry technology, having recently drilled the longest well in history.<sup>4</sup> The well was connected to the Deepwater Horizon by a tube known as a “riser.”<sup>5</sup> A highly pressurized mix of petroleum and natural gas lingers at the bottom of an oil well.<sup>6</sup> When a small amount of methane escaped the well the resulting pressure ascended through the riser and triggered the deadly blast.<sup>7</sup> The Deepwater Horizon’s blowout preventer, designed to seal off the well in anticipation of an incident, failed to activate.<sup>8</sup> Months later the well was finally capped, but the oil that had already been released continued to spread throughout the Gulf: some of it formed a sheen atop the water while a substantial amount developed into plumes beneath the surface.<sup>9</sup> The spill caused tremendous damage to the marine environment in the Gulf and was described by

<sup>2</sup> Cutler Cleveland, *Deepwater Horizon Oil Spill*, EARTH PORTAL, <http://www.earthportal.org/?p=1964> (last visited May 26, 2011). The Deepwater Horizon was not drilling to produce oil at the time of the explosion. Instead, the casing that lined the well was set to be capped with a cement plug so that the well could later be used for production. See *Deepwater Horizon Oil Spill*, THE ENCYCLOPEDIA OF EARTH, [http://www.eoearth.org/article/Deepwater\\_Horizon\\_oil\\_spill](http://www.eoearth.org/article/Deepwater_Horizon_oil_spill) (last visited May 26, 2011).

<sup>3</sup> *Id.*

<sup>4</sup> Transocean, News and Events, *Deepwater Horizon Drills World’s Deepest Oil & Gas Well*, <http://www.deepwater.com/fw/main/IDeepwater-Horizon-i-Drills-Worlds-Deepest-Oil-and-Gas-Well-419C151.html> (stating that the Tiber Well in the Gulf of Mexico extended a vertical depth of 35,000 feet, or more than six miles).

<sup>5</sup> Emmet Mayer III & Dan Shea, *What Happened on the Deepwater Horizon*, NOLA.COM, May 6, 2010, [http://media.nola.com/news\\_impact/other/oil-cause-050710.pdf](http://media.nola.com/news_impact/other/oil-cause-050710.pdf).

<sup>6</sup> David Batty, *Deepwater Horizon Blast Triggered by Methane Bubble, Report Shows*, GUARDIAN NEWS AND MEDIA, May 8, 2010, <http://www.guardian.co.uk/environment/2010/may/08/deepwater-horizon-blast-methane-bubble>.

<sup>7</sup> *Id.*; See also, *What Happened*, *supra* note 5 (explaining that either the cement used to separate the metal casing from the sediment or the cement used to seal off the well allowed a “huge column of natural gas into the well pipe.”).

<sup>8</sup> Mika Grondahl, et. al, *Investigating the Cause of the Deepwater Horizon Blowout*, N.Y. TIMES, June 21, 2010, <http://www.nytimes.com/interactive/2010/06/21/us/20100621-bop.html>. The individual component of the blowout preventer that actually cuts the drill pipe before completely sealing the well, resulting in the physical separation of the rig from the well, is known as a blind shear ram. At least one worker on the rig hit the emergency button that should have triggered the blowout preventer’s blind shear ram within 30 seconds. *Id.*

<sup>9</sup> Robert Lee Holtz, *Oil Plume from Spill Persists, Data Show*, WALL STREET JOURNAL, Aug. 20, 2010, <http://online.wsj.com/article/SB10001424052748703791804575439551236042216.html> (citing one scientist’s estimation that a particular plume was the size of Manhattan).

some as the “worst environmental disaster America has ever faced.”<sup>10</sup> The Deepwater Horizon spill’s environmental effects are ongoing and will take years to fully understand.<sup>11</sup>

The Deepwater Horizon was owned by Transocean, the world’s largest offshore drilling contractor and leased at the time to British Petroleum (BP).<sup>12</sup> Employees of both companies were operating the rig at the time of the explosion.<sup>13</sup> At least four other companies are also potentially liable for the damage inflicted by the spill.<sup>14</sup> While BP agreed to set aside a \$20 billion fund to honor all “legitimate claims,”<sup>15</sup> lawsuits against the company have already been filed.<sup>16</sup> These lawsuits will continue to occur when some parties are inevitably dissatisfied with the discretionary payout they receive from the fund.<sup>17</sup>

This paper will focus on the legal remedies available to those injured by the Deepwater Horizon spill; not the non-legal remedies available to claimants through the BP fund. For the sake of clarity, this paper will refer only to the potential liability of BP, who has been designated a “responsible party,” with the understanding that the legal framework surrounding the Deepwater

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<sup>10</sup> President Barack Obama, Remarks by the President to the Nation on the BP Oil Spill, June 15, 2010, transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill>.

<sup>11</sup> See Elana Schor, *Oil Dispersants Shifting Ecosystem Impacts in Gulf, Scientists Warn*, N.Y. TIMES, July 30, 2010, <http://www.nytimes.com/gwire/2010/07/30/30greenwire-oil-spill-dispersants-shifting-ecosystem-impac-95608.html>. As the spill continued, BP sprayed two million gallons of dispersants at the site of the leaking oil, designed to rapidly breakdown oil droplets. *Id.* While the use of the dispersant reduced the visibility of the oil, some scientists warned that when mixed with oil it “pose[s] grave health risks to marine life and human health.” *Id.*

<sup>12</sup> Lisa Flam, *11 Workers Still Missing After Oil Rig Explosion*, AOLNEWS.COM, Apr. 21, 2010, <http://www.aolnews.com/nation/article/oil-rig-explodes-off-louisiana-workers-missing/19448238>.

<sup>13</sup> Derek Jones & Jason Kurtz, *Deepwater Horizon: Torrent of Oil, Flood of Insurance Issues*, MILLIMAN, INC., July 23, 2010, <http://insight.milliman.com/article.php?cntid=7272>.

<sup>14</sup> *Id.* BP owned 65% of the mineral rights to the well, with the remaining shares being owned by Anadarko Petroleum Corporation and Mitsui Exploration Company of Japan. *Id.* The blowout preventer that failed moments before the explosion was manufactured by Cameron International. *Id.* Additionally, Halliburton was responsible for providing drilling services to cement the well. *Id.*

<sup>15</sup> Press Release, BP, BP Establishes \$20 Billion Claims Fund for Deepwater Horizon Spill and Outlines Dividend Decisions (June 16, 2010), available at <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062966>.

<sup>16</sup> See, e.g. B.P. Defendants’ Reply Brief in Support of Their Motion to Dismiss Plaintiff’s Complaint, 2010 WL 3164006 (S.D. Ala. Aug. 10, 2010) (outlining the claims brought against BP by a yacht seller).

<sup>17</sup> *Id.* See also Sabrina Wilson, *BP Fund Administrator Faces Firestorm*, FOX8, Sept. 13, 2010, [http://www.fox8live.com/news/local/story/BP-fund-administrator-faces-firestorm/DgX0tWEO3kenNb\\_MFAYUcw.csp](http://www.fox8live.com/news/local/story/BP-fund-administrator-faces-firestorm/DgX0tWEO3kenNb_MFAYUcw.csp) (reporting that the fund’s administrator “faced boos and hissing when he met with scores of dissatisfied people.”). Florida Attorney General Bill Nelson stated the fund’s manager would “draw a line and those on the other side of the line are going to sue”). See *Feinberg Says He’s Not Trying to Restrict Payouts for Oil-Spill Claims*, M2M, July 6, 2010, <http://m2m.tmcnet.com/news/2010/07/06/4887209.htm>.

Horizon spill will be similar for most of the potential defendants.<sup>18</sup> As a result of this designation, BP is potentially liable without limit due to its disregard for warning signs<sup>19</sup> and multiple violations of industry guidelines.<sup>20</sup> This paper will address the potential recovery of private parties in Florida only, rather than government trustees.

In the months after the accident, oil surfaced onto various Florida beaches.<sup>21</sup> Unfortunately, the consequences of an oil spill extend much farther than the area it physically contacts. The mere specter of oil on the horizon can adversely impact major industries. Millions of people have traditionally traveled to Florida each year to visit its unspoiled beaches and consequently supplement the State's economy.<sup>22</sup> One economist estimated that Florida's tourism industry will experience a \$2.2 billion decrease in revenue and a loss of 39,000 jobs as a result of the spill.<sup>23</sup> A fishing moratorium, at one point covering approximately one third of the Gulf's waters,<sup>24</sup> cost

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<sup>18</sup> BP has been designated as the "responsible party" under the Oil Pollution Act of 1990 for the Gulf Oil spill because it held the drilling permit at the time of the incident. See NATHAN RICHARDSON, RESOURCES FOR THE FUTURE, DEEPWATER HORIZON AND THE PATCHWORK OF OIL SPILL LIABILITY LAW, <http://www.rff.org/RFF/Documents/RFF-BCK-Richardson-OilLiability.pdf>. The result of this designation is that BP can be held liable as the one who "caused" the spill, and will then have to sue other potentially liable parties in a contribution action to recover costs. *Id.*

<sup>19</sup> See Fact Sheet, BP, Government Claims and Funding Requests (Aug. 2010), [http://www.bp.com/liveassets/bp\\_internet/globalbp/globalbp\\_uk\\_english/gom\\_response/STAGING/local\\_assets/downloads\\_pdfs/Government\\_Claims\\_and\\_Funding\\_Requestsfact\\_sheet.pdf](http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/gom_response/STAGING/local_assets/downloads_pdfs/Government_Claims_and_Funding_Requestsfact_sheet.pdf) (acknowledging that the "responsible party" designation requires BP to pay whatever "legitimate claims" exist, so far as required by statutes and regulations.). Ian Urbina, *Documents Show Early Worries About Safety of Rig*, N.Y. TIMES, May 29, 2010, <http://www.nytimes.com/2010/05/30/us/30rig.html> (reporting that internal BP documents revealed a concern over critical apparatus, including the blowout preventer, months prior to the explosion); Michael Kunzelman, *BP Waives \$75M Cap for Some Oil Spill Claims*, ABCNEWS.COM, Oct. 18, 2010, <http://abcnews.go.com/Business/wireStory?id=11912068> (reporting that BP waived the Oil Pollution Act's \$75 million cap on its liability for certain economic damage claims).

<sup>20</sup> Paul Harris, *BP Accused of Ignoring Internal Report of Deepwater Leak*, GUARDIAN.CO.UK, July 20, 2010, <http://www.guardian.co.uk/environment/2010/jul/20/bp-oil-spill-cleanup-threatened-tropical-storms> (reporting that former President George W. Bush's interior secretary stated that "[i]f regulations on the books and industry best guidelines had been followed properly, there might not have been a blowout ... It appears that BP violated all those regulations that were on the books.").

<sup>21</sup> Associated Press, *Oil Touches Down on Florida Beaches*, USA TODAY, June 5, 2010, [http://www.usatoday.com/news/nation/2010-06-05-gulf-oil-spill\\_N.htm](http://www.usatoday.com/news/nation/2010-06-05-gulf-oil-spill_N.htm).

<sup>22</sup> See *Florida Quick Facts*, STATEOFFLORIDA.COM, <http://www.stateofflorida.com/Portal/DesktopDefault.aspx?tabid=95> (last visited Nov. 19, 2010) (noting that in 2004 76.8 million tourists visited Florida and that tourism contributes \$57 billion to Florida's economy).

<sup>23</sup> Michael Peltier, *Oil Spill Ripples through Florida Economy*, REUTERS, June 9, 2010, <http://www.reuters.com/article/idUSTRE65868720100609>. But see David Hammer, *Commission: Economic Impacts of Oil Spill, Drilling Moratorium, and Media Attention Discussed*, NOLA.COM, July 12, 2010, [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/07/commission\\_economic\\_impacts\\_of.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/07/commission_economic_impacts_of.html) (claiming that the extensive media coverage of the spill exasperated the negative effect on Florida's tourism industry).

<sup>24</sup> Press Release, Natural Resources Defense Council, Court Lifts Moratorium, Green Lights More Deepwater Drilling in the Gulf (June 22, 2010), <http://www.nrdc.org/media/2010/100622.asp>.

commercial fishermen in Florida and other coastal states approximately \$2.5 billion.<sup>25</sup> Moreover, these numbers do not take into account the lost revenue experienced by restaurants, fish markets, and grocery stores heavily reliant on the sale of Gulf seafood. In addition to the food and tourism industries, the value of real estate along the coasts of Gulf states like Florida may be driven down 10% over the next three years with losses totaling \$4.3 billion.<sup>26</sup>

Individuals seeking to recover for economic losses in which no oil physically contacted their property (i.e., “purely economic losses”) must sift through a complex web of state and federal laws. The goal of this article is to explore the uncertainty that surrounds the recovery of purely economic losses and how federal preemption of state law affects that recovery. In particular, this article will discuss how the laws of Florida fit into this framework. This article strives to simplify the uncertainty in a way that makes the major issues more comprehensible and to provide the most reasonable interpretation of them.

First, one must understand general maritime law, a judicially developed body of federal law extending from the high seas all the way to Florida’s coast. General maritime law provides the traditional backdrop for torts on the high seas. In the context of oil spills, general maritime law requires that individuals who seek economic losses must first prove that oil damaged their property, unless they are commercial fishermen. However, the states are vested with some amount of “police power” to protect their coasts and its citizens from oil pollution. How far state law can intrude into general maritime law to provide a remedy before it is preempted has perplexed courts for over a century. In 1990, Congress passed the Oil Pollution Act of 1990 (OPA) with the hope of providing clarity to this legal framework. Over twenty years after OPA’s enactment courts still cannot agree whether the statute provides for purely economic losses or how it affects general maritime law and state law. In the midst of the Deepwater Horizon spill the Florida Supreme Court decided *Curd v. Mosaic*.<sup>27</sup> According to some commentators, *Mosaic* provides individuals with a remedy under both state statutory and common law for purely economic losses.

The final section of this paper seeks to provide guidance. The goal of general maritime law is to provide uniformity for maritime commerce. However, the uncertainty surrounding federal preemption of state law and what role OPA plays prevents this goal from being accomplished. General maritime law also provides a predictable rule for parties seeking purely economic losses. But this rule is unfair to parties not classified as “commercial fishermen” because they cannot recover for purely economic losses. This paper will conclude with a proposal on how to create a system of liability that provides uniformity, predictability, and fairness in the realm of maritime torts.

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<sup>25</sup> Bryan Walsh, *With Oil Spill (and Blame) Spreading, Obama Will Visit Gulf*, TIME, May 1, 2010, <http://www.time.com/time/health/article/0,8599,1986323,00.html>.

<sup>26</sup> John Gittelsohn, *Oil Spill May Cost \$4.3 Billion in Property Values*, BLOOMBERG, June 11, 2010, <http://www.bloomberg.com/news/2010-06-11/bp-spill-may-cost-homeowners-4-3-billion-in-property-values-along-shore.html>.

<sup>27</sup> 39 So.2d 1216 (Fla. 2010).

## II. The Law Before OPA

### A. Basic Maritime Law

The Constitution extends federal judicial power to “all Cases of admiralty and maritime Jurisdiction.”<sup>28</sup> This federal jurisdiction, however, has never been exclusive.<sup>29</sup> The Judiciary Act of 1789<sup>30</sup> stated that the “suitsors ... [shall have] the right of a common law remedy, where the common law is competent to give it.”<sup>31</sup> The modern expression of this provision is not limited to “common law,” allowing for “all other remedies to which [suitsors] are otherwise entitled.”<sup>32</sup> Therefore, in determining liability for damages that stem from an accident on the high seas, a court must consider federal statutory and general maritime law, as well as state statutory and common law.

One might ask why the Framers were not content to simply leave admiralty law as a matter for the states alone to deal with. Similar to the rationale of allowing broad federal power under the Commerce Clause,<sup>33</sup> the goal of maritime law is to create a uniform and predictable set of rules.<sup>34</sup> If the authority to make rules concerning the United States’ collective waters were completely delegated to and divided up amongst each state then a vessel crossing from one jurisdiction to the next would have difficulty complying with different rules at every port; the vessel would also be subject to a different standard and extent of liability depending on the arbitrary zone through which it was currently traveling.<sup>35</sup>

Initially, a wrong must be identified as a “maritime tort” to fall within the admiralty jurisdiction,<sup>36</sup> and if so will be subject to the judicially developed general maritime law.<sup>37</sup> A tort meets this definition if it satisfies the “locality” and “maritime nexus” requirements.<sup>38</sup> The locality requirement is satisfied when the tort occurs on navigable waters or the injury that is suffered on land was caused by a vessel on navigable water.<sup>39</sup> The Deepwater Horizon was located in navigable waters when its explosion allowed oil to be released into the Gulf.<sup>40</sup>

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<sup>28</sup> U.S. CONST., art. III, § 2, cl. 1.

<sup>29</sup> *American Dredging Co. v. Miller*, 510 U.S. 443, 446 (1994).

<sup>30</sup> Judiciary Act of 1789, §9, 1 Stat. 76-77.

<sup>31</sup> *Id.*

<sup>32</sup> 28 U.S.C. § 1333.

<sup>33</sup> See Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 266 (2005) (observing that “the Framers of the Federal Constitution were deeply concerned with both ‘uniform rules’ and ‘uniform treatment’ in all commercial matters.”).

<sup>34</sup> See Steven R. Swanson, *Federalism, The Admiralty, and Oil Spills*, 27 J. MAR. L. & COM. 379, 380 (1996).

<sup>35</sup> *Id.* at 381. In fact, admiralty was considered so vital that it was “the only substantive area in which subject matter jurisdiction was specifically granted to the federal courts by the Constitution.” *Id.*

<sup>36</sup> *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 863-64 (1986).

<sup>37</sup> *Id.* at 865.

<sup>38</sup> *In re the Exxon Valdez*, 767 F. Supp. 1509, 1511 (D. Ala. 1991).

<sup>39</sup> *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 527 (1995).

<sup>40</sup> As mentioned, the Deepwater Horizon was located forty miles into the Gulf’s waters. See also *Sea Vessel, Inc. v. Reyes*, 23 F.3d 345 (11th Cir. 1994) (showing that even a vessel in dry dock on navigable waters undergoing repairs can satisfy the locality test).

The maritime nexus requirement is satisfied when: (1) the general features of the type of incident involved are potentially disruptive to maritime commerce and (2) the character of the activity is substantially related to traditional maritime activity.<sup>41</sup> The Deepwater Horizon spill was potentially disruptive to the routes of shipping vessels and led to a moratorium on areas frequented by commercial fishermen.<sup>42</sup> The character of the activity on the Deepwater Horizon was related to traditional maritime activity because offshore oil drilling has been occurring in U.S. waters for well over a hundred years.<sup>43</sup> While courts have held that activities like swimming or flying an airplane over the water do not meet the “maritime nexus” prong,<sup>44</sup> they have consistently held that oil spills can be maritime torts.<sup>45</sup> But while claimants seeking to recover for harm caused by the Deepwater Horizon spill may be subject to substantive maritime law, that body of jurisprudence can be supplemented by state law in certain circumstances. How much state law can supplement the general maritime law is crucial to determining whether a claimant can recover for purely economic losses.

### B. *The Economic Loss Rule*

In general maritime law, an individual cannot recover for economic losses absent physical injury to a property interest.<sup>46</sup> This principle is known as the *Robins Dry Dock* rule. However, courts have carved out a major exception to the *Robins Dry Dock* rule by allowing commercial fishermen to recover for economic losses without physical injury to a property interest.<sup>47</sup> The rationale for this

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<sup>41</sup> Jerome B. Grubart, Inc., 513 U.S. at 527 (describing how the maritime nexus requirement can be satisfied).

<sup>42</sup> See AP, *BP Well is Dead, but Gulf Challenges Live On*, MSNBC.COM, Sept. 9, 2010, [http://www.msnbc.msn.com/id/39263335/ns/us\\_news/t/bp-well-dead-gulf-challenges-live/](http://www.msnbc.msn.com/id/39263335/ns/us_news/t/bp-well-dead-gulf-challenges-live/) (reporting that the ban on fishing in the Gulf increased unemployment amongst commercial fishermen and caused a loss of 8,000-12,000 oil-related jobs); See also Bryan Walsh, *Is the Deepwater Drilling Moratorium Worse Than The Oil Spill*, TIME, July 13, 2010, <http://ecocentric.blogs.time.com/2010/07/13/is-the-deepwater-drilling-moratorium-worse-than-the-oil-spill/> (reporting that 9 out of 10 taxpayers in the Lafourche Parish in Southern Louisiana were part of the oil and gas industry and that that the post-Deepwater Horizon ban had a “crippling effect” on the economy there).

<sup>43</sup> See Bureau of Ocean Energy Management, Regulation and Enforcement, *History of the Offshore Oil and Gas Development in Louisiana*, [http://www.gomr.boemre.gov/homepg/regulate/enviro/louisiana\\_coast.html](http://www.gomr.boemre.gov/homepg/regulate/enviro/louisiana_coast.html) (noting that the first submerged oil wells in salt water were drilled in 1896 from piers extending off California’s Pacific coast).

<sup>44</sup> Jerome B. Grubart, Inc. 513 U.S. at 540.

<sup>45</sup> See, e.g., *La. ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985); *In re the Exxon Valdez*, 767 F. Supp. 1509, 1514 (D. Alaska 1991); *U.S. v. Bear Marine Serv.*, 509 F. Supp. 710, 717 (E.D. La. 1980).

<sup>46</sup> *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927) (disallowing recovery for a vessel charterer in maritime tort where damage was purely economic in nature). See also Thomas J Wagner, *Recoverable Damages Under the Oil Pollution Act of 1990*, 5 U.S.F. MAR. L.J. 283, 295 (1993) (noting that the Robins Dry Dock rule has become an “entrenched principle of maritime law”).

<sup>47</sup> *Union Oil Co. v. Oppen*, 501 F.2d 558, 567 (9th Cir. 1974); See also DONNA R. CHRISTIE & RICHARD G. HILDRETH, *COASTAL AND OCEAN MANAGEMENT LAW* 297 (1994) (observing that “[i]n the context of an oil spill ... the Robins Dry Dock rule would preclude recovery in maritime tort for businesses, such as fish processors, boat charterers, and lodges and for the use and enjoyment claims by recreational users, such as kayakers, photographers, and sport fishermen.”).

exception appears to be based on the fact that commercial fishermen make more direct use of the sea's resources than other potential claimants.<sup>48</sup> Of course, if a non-commercial fisherman can make an initial showing of physical damage they can then recover for any consequential damages (including economic losses) that may result.<sup>49</sup>

In contrast to general maritime law, some state laws permit individuals to recover for economic losses in certain situations where no physical damage has occurred.<sup>50</sup> Therefore, when a party seeks recovery for economic losses, whether a particular state law is preempted by general maritime law (or a federal statute) can be dispositive of his ability to recover anything at all.<sup>51</sup>

### C. *Pre-Askew Case Law*

In 1917, the decision in *Southern Pacific Co. v. Jensen*<sup>52</sup> represented the Supreme Court's most rigid adherence to uniformity in admiralty law.<sup>53</sup> In *Jensen*, the Court adopted a three-part test in finding that a state law is invalid if it: "contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of the law in its international and interstate relations."<sup>54</sup> The case concerned the permissibility of a New York workmens' compensation statute.<sup>55</sup> Despite observing that there was no federal legislation similar to the state statute, the Court struck down the state law due to the need for uniformity in maritime matters.<sup>56</sup>

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<sup>48</sup> Christie & Hildreth, *supra* note 47 (noting that while "it is not entirely clear that there exists a principled rationale to distinguish commercial fishermen from others who use the sea, this exception has been followed."). Additionally, even if a party is classified as a commercial fisherman they will still have to prove the standard elements of a tort. In particular, it may be difficult for a fisherman to show that an oil spill proximately caused his lost profits.

<sup>49</sup> 6 BRUNER & O'CONNOR CONSTRUCTION LAW § 19:10 (2010) (observing that economic losses stemming from a tort can be recovered when there is damage to the property).

<sup>50</sup> See, e.g., *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623 (1st Cir. 1994) (upholding a Rhode Island statute that provided for purely economic losses).

<sup>51</sup> See Steve Block, *Exclusively Economic Damages are not Recoverable In Maritime Tort, but they may be under State Law*, FORWARDERLAW, Sept. 1, 2008, [http://www.forwarderlaw.com/library/view.php?article\\_id=530](http://www.forwarderlaw.com/library/view.php?article_id=530) (stating that whether one can recover depends on which law applies and that when state law allows recovery for purely economic losses "state and federal courts have applied the law divergently and with different rationales.").

<sup>52</sup> 244 U.S. 205 (1917).

<sup>53</sup> Swanson, *Federalism*, *supra* note 34, at 382 (describing *Jensen* as the Supreme Court's "strongest endorsement of uniformity").

<sup>54</sup> 244 U.S. at 216.

<sup>55</sup> *Id.* at 210.

<sup>56</sup> *Id.*; Another case often analyzed alongside *Jensen* is *Knickerbocker Ice Co. v. Steward*, 253 U.S. 149 (1920). Swanson, *Federalism*, *supra* note 34, at 384. In *Knickerbocker* the Supreme Court struck down an attempt by Congress to explicitly allow state workmens' compensation statutes. *Id.* Many scholars have criticized the results of these decisions, but not necessarily the Court's reasoning for adherence to uniformity. *Id.* at 384-85.



Subsequent Supreme Court cases proved that there is room, possibly a substantial amount, for state remedies despite the presence of substantive general maritime law. In *Just v. Chambers*,<sup>57</sup> the Court declared that states have broad authority to create rights and liability within their borders, so long as the state action “does not run counter to federal laws or the essential features of an exclusive federal jurisdiction.”<sup>58</sup> Then, in *Romero v. International Terminal Operating Co.*,<sup>59</sup> the Court held that while state law must cease when it encounters the needs of a uniform system, the states are still left “a wide scope.”<sup>60</sup> The Court observed that the federal government has left the states much regulatory power in the area of maritime torts.<sup>61</sup>

#### D. Askew

The most important Supreme Court decision as to federal preemption of state oil pollution law is *Askew v. American Waterways Operators*.<sup>62</sup> In *Askew*, the Court analyzed whether the Florida Oil Spill Prevention and Pollution Control Act (Florida Act)<sup>63</sup> could withstand a facial challenge in light of Congress’s Water Quality Improvement Act of 1970 (Federal Act).<sup>64</sup> The Court stated that the Florida Act at issue would be upheld so long as it was not preempted or in “fatal conflict” with a federal statute, and if a state “constitutionally may exercise its police power respecting maritime activities concurrently with the Federal Government.”<sup>65</sup>

The Court first compared and contrasted the two statutes at issue.<sup>66</sup> The Florida Act imposed strict liability for any oil spill cleanup costs incurred by the state or private persons if they were caused by offshore facilities or vessels in the oil industry.<sup>67</sup> The Florida Act placed no limit on the amount of liability that a party could incur.<sup>68</sup> The Florida Act also required that the owners or operators of such facilities establish evidence of financial responsibility and provided that the state Department of Natural Resources could regulate certain equipment on ships and terminal facilities.<sup>69</sup>

The Federal Act concerned the liability that could be incurred by ship owners and terminal facilities for cleanup costs incurred by the federal government.<sup>70</sup> The damages recoverable under

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<sup>57</sup> *Just v. Chambers*, 312 U.S. 668 (1941) (upholding a Florida cause of action despite a federal provision for limitation of liability).

<sup>58</sup> 312 U.S. at 693.

<sup>59</sup> 358 U.S. 354 (1959).

<sup>60</sup> *Id.* at 373.

<sup>61</sup> *Id.*

<sup>62</sup> 411 U.S. 325 (1973); See also Swanson, *Federalism*, *supra* note 34, at 389 (describing *Askew* as the “seminal case relating to maritime preemption of state water pollution control laws”).

<sup>63</sup> 411 U.S. at 327 (citing FLA. STAT. § 376.011).

<sup>64</sup> *Id.* at 328 (citing 33 U.S.C. § 1161).

<sup>65</sup> *Id.* at 327.

<sup>66</sup> *Id.* at 327-38.

<sup>67</sup> *Id.* at 327 (citing FLA. STAT. § 376). Specifically, liability was imposed on any waterfront oil drilling facility, terminal facilities which handle oil, and any ships heading towards or departing from such facility.

<sup>68</sup> *Id.* (citing FLA. STAT. § 376).

<sup>69</sup> *Id.* at 327-28.

<sup>70</sup> *Id.* at 328 (citing 33 U.S.C. § 1161).

the Federal Act did not include those incurred by private parties.<sup>71</sup> The amount of liability that a party could incur was capped at a specified limit.<sup>72</sup> The limit on liability was lifted when a spill was caused by willful negligence or willful misconduct.<sup>73</sup> The Federal Act's savings clause stated, in part:

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any [vessel or facility] ... to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.

(2) Nothing in this section shall be construed as preempting any State ... from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.

(3) Nothing in this section shall be construed ... to affect any State ... in conflict with this section.<sup>74</sup>

Despite describing the Federal Act as a "pervasive system of federal control over discharges of oil ... onto navigable waters of the [U.S. and its shorelines]," the Court held that the Florida Act was not preempted by the Federal Act.<sup>75</sup> The Court cited the Federal Act's Conference Report, which observed that a state would be free to provide penalties and requirements similar to or in addition to those imposed in this section of the statute.<sup>76</sup> The Report stated that "[t]hese [penalties and requirements] ... would be separate and independent" from those in the Federal Act and enforced by states through their courts.<sup>77</sup>

Regarding the respective governments' entitlement to cleanup costs, the Court maintained that no conflict existed, since the Florida Act dealt with state cleanup costs and the Federal Act dealt with federal cleanup costs.<sup>78</sup> The Court described these provisions as "harmonious parts of an integrated whole," noting that the Federal Act directs the President to prepare a National Contingency Plan for the containment, dispersal, and removal of oil.<sup>79</sup> Additionally, the Court reasoned that the Federal Act's savings clause clearly anticipated federal and state cooperation.<sup>80</sup> The Court noted that while Congress was concerned only with federal cleanup costs, they permitted states to establish "any requirement or liability" in regards to oil spills.<sup>81</sup> The Court stated that this permitted Florida to enact remedies for both state and private interests, and

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 330.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 329.

<sup>75</sup> *Id.* at 329-37.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 331.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

observed the obvious state concerns of protecting public beaches and the livelihood of commercial fishermen.<sup>82</sup>

The Court did not reach the issue of whether state removal costs could exceed those specified in the Federal Act.<sup>83</sup> The Court also held that it could not assess potential preemption issues as to rules concerning containment gear until they were actually promulgated.<sup>84</sup> Additionally, the Court left open the question of whether the Federal Act preempted the Limitation of Liability Act,<sup>85</sup> which provides that a vessel owner's liability shall not exceed the value of the vessel after the incident.<sup>86</sup>

After concluding that there was no serious conflict between the state and federal statutes the Court gave particular notice to the fact that these tort cases had traditionally been within the state's police power.<sup>87</sup> In 1948, however, Congress had enacted the Admiralty Extension Act<sup>88</sup> extending the boundaries of maritime law to damages incurred on shore.<sup>89</sup> The Court noted that subsequent to the Admiralty Extension Act it had even upheld state legislation regulating air pollution from ships under state police power, noting the police power could protect maritime activities concurrent with the federal government.<sup>90</sup> Therefore, the Court reasoned, the states' traditional police power over "sea-to-shore pollution" was not silently taken away by the Admiralty Extension Act.<sup>91</sup>

The Court stated that the Federal Act's waiver of preemption was valid unless *Jensen* made it so that any state law arising in admiralty jurisdiction was automatically preempted.<sup>92</sup> The Court stated affirmatively that *Jensen* was confined to suits involving the relationship of vessels on the high seas and navigable waters, and their crews;<sup>93</sup> and that the Admiralty Extension Act did not automatically preempt state laws.<sup>94</sup>

After *Askew*, courts had difficulty applying the opinion to their own state laws.<sup>95</sup> In addition to state law and general maritime law, courts also had to deal with an array of federal statutes other than the Water Quality Act at issue in *Askew*.<sup>96</sup> And while the *Askew* decision has been neither

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<sup>82</sup> *Id.* at 333-34.

<sup>83</sup> *Id.* at 336.

<sup>84</sup> *Id.* at 336-37.

<sup>85</sup> *Id.* at 332 (referencing 46 U.S.C. § 30505).

<sup>86</sup> 46 U.S.C. § 30505.

<sup>87</sup> 411 U.S. at 337.

<sup>88</sup> *Id.* at 340 (citing 46 U.S.C. § 740).

<sup>89</sup> *Id.* at 340 n. 10 (quoting § 740 of the Admiralty Extension Act).

<sup>90</sup> *Id.* at 343.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 344.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See, e.g., *Commw. of Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652 (1st Cir. 1980) (allowing state pollution law to apply to shore damages); *Mobil Oil Corp. v. Town of Huntington*, 380 N.Y.S.2d 466 (N.Y. Sup. Ct. 1975) (interpreting *Askew* more expansively than the court did in *Commonwealth of Puerto Rico*).

<sup>96</sup> See Steven R. Swanson, *The Oil Pollution Act of 1990 After Ten Years*, 32 J. MAR. L. & COM. 135, 136 (2001) (listing the federal statutes affecting oil spill liability before OPA to include the Clean Water Act, the Outer Continental Shelf Lands Act, the Trans-Alaska Pipeline Authorization Act, and the Limitation on Liability Act).

overruled nor broadened by subsequent decisions,<sup>97</sup> the laws affecting oil spill liability would once again be altered, and its scope greatly expanded, nearly two decades later.

### III. Congress' Response: The Oil Pollution Act of 1990

#### A. *The Basics of OPA*

In 1989 the *Exxon Valdez* oil tanker ran aground the Bligh Reef, spilling more than 11 million gallons of crude oil into Alaska's pristine Prince William Sound.<sup>98</sup> At that time, the spill was the largest ever in U.S. waters.<sup>99</sup> The spill brought public attention to the devastating effects an oil spill is capable of inflicting on both the environment and the economy.<sup>100</sup> In the fifteen years prior Congress had been divided on how to reform oil spill legislation.<sup>101</sup> However, when the cleanup response proved inadequate Congress enacted the Oil Pollution Act of 1990 (OPA)<sup>102</sup> within the following year.<sup>103</sup> OPA was designed to improve prospective oil spill cleanup and provide substantial liabilities for the industry in the case of another accident.<sup>104</sup>

OPA provides that the party responsible for a spill resulting from an offshore facility will be liable for all removal costs plus up to \$75 million in damages<sup>105</sup> and requires evidence of financial responsibility up to that limit.<sup>106</sup> The \$75 million limit will be lifted, however, if it can be shown that the responsible party proximately caused the incident through gross negligence, willful misconduct, or through a violation of federal safety, construction, or operating regulations.<sup>107</sup> As

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<sup>97</sup> See, Swanson, *Federalism*, *supra* note 34, at 393 (asserting that "[n]o Supreme Court decision since *Askew* has broadened its holding").

<sup>98</sup> *Exxon Valdez*, EPA.GOV, <http://www.epa.gov/oem/content/learning/exxon.htm>.

<sup>99</sup> *The Exxon Valdez Oil Spill: A Report to the President (Executive Summary)*, EPA. GOV, <http://www.epa.gov/history/topics/valdez/04.htm>.

<sup>100</sup> Swanson, *Federalism*, *supra* note 34, at 379; See also Melanie Dorsett, *Exxon Valdez Oil Spill Continued Effects on the Alaskan Economy*, COLONIAL ACADEMIC ALLIANCE UNDERGRADUATE RESEARCH JOURNAL (Oct. 2010), <http://digitalarchive.gsu.edu/cgi/viewcontent.cgi?article=1020&context=caaurj> (estimating that commercial fishermen lost \$136.5 million in the first year alone and that in the direct aftermath of the spill 250,000 sea birds died, as well as 22 killer whales, 2,800 sea otters and 300 harbor seals).

<sup>101</sup> Swanson, *Ten Years*, *supra* note 96, at 136.

<sup>102</sup> Oil Pollution Act of 1990, 33 U.S.C. § 2701.

<sup>103</sup> Swanson, *Ten Years*, *supra* note 96 at 136-37.

<sup>104</sup> *Id.* at 137.

<sup>105</sup> 33 U.S.C. § 2704(a)(3).

<sup>106</sup> *Id.* § 2716(a).

<sup>107</sup> *Id.* § 2704(c)(1)(A)-(B).

mentioned previously, BP has been designated as a “responsible party”<sup>108</sup> and the cap on damages will likely be lifted.<sup>109</sup> OPA includes several affirmative defenses which are not at issue here.<sup>110</sup>

Particularly important as to the issue of preemption is OPA’s savings clause, which is titled “Relationship to other law.”<sup>111</sup> One of its subsections, titled “Preservation of State Authorities; Solid Waste Disposal Act” provides that “[n]othing” in OPA nor the Limitation of Liability Act shall:

- (1) Affect, or be construed or interpreted as preempting, the authority of any State ... 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; or
- (2) Affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under ... State law, including common law.<sup>112</sup>

Additionally, the subsection titled “Additional requirements and liabilities; penalties” states that “nothing” in OPA nor the Limitation of Liability Act affects any State from “impos[ing] additional liability.”<sup>113</sup>

Section 2702 of OPA covers the liability of a responsible party as to removal costs and damages.<sup>114</sup> Non-private claimants, such as trustees for both the federal and state governments can recover for injury to natural resources.<sup>115</sup> These entities can also recover for the costs of lost tax

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<sup>108</sup> Sen. Sheldon Whitehouse has proposed a measure that would allow parties injured by an oil spill to recover their losses from any of the companies involved in an oil spill, not just the designated “responsible parties.” See Katie Howell, *Offshore Drilling: Whitehouse Offers Bill to Ensure Victims Can Sue All Companies in Spills*, ENVIRONMENT & ENERGY DAILY, Sep. 29, 2010; See also Jesse Westbrook, *Transocean Request to Cap Liability ‘Unconscionable,’ U.S. Says*, BUSINESSWEEK.COM, May 30, 2010, <http://www.businessweek.com/news/2010-05-30/transocean-request-to-cap-liability-unconscionable-u-s-says.html> (reporting that the U.S. Coast Guard also designated Transocean as a “responsible party”).

<sup>109</sup> See *supra* text accompanying notes 19 and 20 (evidencing gross negligence and multiple violations by BP); See also David Hammer, *BP Acknowledges It Never Followed Blowout Preventer Law, Blames MMS*, TIMES-PICAYUNE, June 17, 2010,

[http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/06/bp\\_acknowledges\\_it\\_never\\_follo.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/06/bp_acknowledges_it_never_follo.html) (reporting that BP did not follow a federal law “requiring it to certify that a blowout preventer device would be able to block a well in case of an emergency”). BP, however, blames that failure on the Minerals Management Service, a federal oversight agency, for not asking it to comply with the law. *Id.*

<sup>110</sup> 33 U.S.C. § 2703(a)(1)-(3) (listing an act of God, an Act of war and an act or omission of a third party who is not an employee, agent, or in contractual privity with the responsible party as defenses). Therefore even if it was shown that the accident was caused entirely by another party (e.g., Haliburton or Transocean) BP could still be sued due to their contractual privity and would then have to sue that party for contribution. *Id.* § 2709.

<sup>111</sup> *Id.* § 2718.

<sup>112</sup> *Id.* § 2718(a).

<sup>113</sup> *Id.* § 2718(c).

<sup>114</sup> *Id.* § 2702.

<sup>115</sup> *Id.* § 2702(b)(2)(A).

revenue and increased public services used in the removal process.<sup>116</sup> The loss of subsistence use of natural resources is recoverable by any claimant regardless of ownership.<sup>117</sup>

Relevant to the issue of recovering purely economic losses are the remaining two subsections of § 2702. Subsection B, titled “Real or personal property,” states that “[d]amages for injury to, or economic losses resulting from destruction of, real or personal property” are recoverable by “a claimant who owns or leases that property.”<sup>118</sup> Subsection E, titled “Profits and earning capacity” states 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” are recoverable by “any claimant.”<sup>119</sup>

### B. Courts’ Interpretations of OPA and Purely Economic Losses

Before assessing which, if any, state laws are permissible in light of OPA, it will be helpful to first understand how OPA might alter the longstanding *Robins Dry Dock* rule from general maritime law. As opposed to the other states abutting the Gulf of Mexico, Florida has statutorily prohibited offshore oil drilling in state territorial waters.<sup>120</sup> The result has been a lack of precedent in Florida regarding how subsections B and E affect state law. Therefore, Florida courts may look at how other jurisdictions have interpreted OPA’s damages provisions. Unfortunately, no consistent interpretation has emerged.

The first case to interpret subsection E did so narrowly. In *Cleveland Tankers, Inc.*,<sup>121</sup> plaintiffs sought recovery for lost profits after an oil spill closed the channel along which their businesses were located.<sup>122</sup> The U.S. District Court for the Middle District of Michigan dismissed the claims stating that the plaintiffs had not alleged any injury, destruction, or loss to “their property” under

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<sup>116</sup> *Id.* §§ 2702(b)(2)(D), (F).

<sup>117</sup> *Id.* § 2702(b)(2)(C).

<sup>118</sup> *Id.* § 2702 (b)(2)(B).

<sup>119</sup> *Id.* § 2702(b)(2)(E).

<sup>120</sup> FLA. STAT. 377.242(5) (stating that “no structure intended for the drilling for, or production of, oil, gas, or other petroleum products may be permitted or constructed north of 26°00’00” north latitude off Florida’s west coast to the western boundary of the state bordering Alabama as set forth in s. 1, Art. II of the State Constitution, or located north of 27°00’00” north latitude off Florida’s east coast to the northern boundary of the state bordering Georgia as set forth in s. 1, Art. II of the State Constitution, within the boundaries of Florida’s territorial seas as defined in 43 U.S.C. s. 1301”); *See also Active Leases and Infrastructure*, BOEMRE, <http://www.gomr.boemre.gov/homepg/lseale/visual1.pdf> (last visited Nov. 18, 2010) (showing an abundance of oil and gas structures near all of the Gulf states except Florida). One year prior to the Deepwater Horizon spill the Florida House of Representatives passed a bill that would allow offshore drilling in state waters but it died in the Senate. *See Florida House of Representatives, HB 1219 - Regulation of State Lands and Oil and Gas Resources*, available at <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=41518>. Shortly after the spill began Florida Governor Charlie Crist initiated a proposal to ban offshore drilling by amending the state constitution but the measure was rejected. *See Steve Bousquet, et al, Florida Legislature Adjourns, Rejecting Vote on Constitutional Amendment Banning Oil Drilling*, ST. PETERSBURG TIMES, July 20, 2010, <http://www.tampabay.com/news/business/energy/article1109979.ece>.

<sup>121</sup> *Petition of Cleveland Tankers, Inc.*, 791 F. Supp. 669 (E.D. Mich. 1992).

<sup>122</sup> *Id.* at 670.

subsection E.<sup>123</sup> In other words, the court held that subsection E codifies the *Robins Dry Dock* rule.<sup>124</sup>

The U.S. District Court for the Eastern District of Louisiana also interpreted subsection E as requiring damage to a proprietary interest before recovery for lost profits were permitted.<sup>125</sup> In *Sekco Energy*, the owner of a drilling platform brought suit for economic losses against an individual whose vessel towed a seismic cable into the leg of the drilling platform.<sup>126</sup> Oil subsequently spilled, leading to a temporary ban on offshore drilling.<sup>127</sup> Both parties agreed that the owner suffered economic losses and that the losses were not a result of the physical damage to the drilling platform.<sup>128</sup> After the court held that the plaintiff's claim must be dismissed under subsection B since there was no destruction to real or personal property, the court refused to dismiss the claim under subsection E.<sup>129</sup> The court stated that the plaintiff's property interest in drilling on the outer continental shelf was the type of property contemplated by subsection E.<sup>130</sup>

In contrast, the U.S. Court of Appeals for the First Circuit interpreted subsection E more broadly.<sup>131</sup> In *Ballard Shipping Co. v. Beach Shellfish*, an oil tanker ran aground and spilled 300,000 gallons of oil into a Rhode Island bay.<sup>132</sup> The court considered whether general maritime law preempted a state statute providing for purely economic losses.<sup>133</sup> Although OPA did not apply to the spill because it occurred prior to OPA's enactment,<sup>134</sup> the court looked to subsections B and E to inform its decision.<sup>135</sup> The court stated that if "the 'natural resources' injury provision in subsection E were limited to those owned by a claimant 'who owns or leases that property' then subsection E would be redundant in light of subsection B."<sup>136</sup> Therefore, the court reasoned, Congress intended to allow a claimant who does not own any damaged property to recover for purely economic losses stemming from an injury to natural resources.<sup>137</sup> While the First Circuit's commentary was dicta, other courts have cited *Ballard's* interpretation of subsection E with approval.<sup>138</sup> The Fifth Circuit, for example, held that subsection E allows a claimant to "recover for

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<sup>123</sup> *Id.* at 678-79.

<sup>124</sup> *But see* Swanson, *Ten Years*, *supra* note 96, at 155 (arguing that *Cleveland Tanker* seems to be "out of step" and that "most decisions relating to economic loss have liberally allowed recovery under the Act.").

<sup>125</sup> *See* *Sekco Energy, Inc. v. M/V Margaret Chouest*, 820 F.Supp. 1008, 1015 (E.D. La. 1993).

<sup>126</sup> *Id.* at 1010.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* This case exemplifies the difficulties facing a Deepwater Horizon spill claimant, because even though the court allowed the claim under subsection E, the plaintiff still eventually lost when he was unable to establish proximate cause. *See* Swanson, *Ten Years*, *supra* note 96.

<sup>131</sup> *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623 (1st Cir. 1994) (interpreting subsection E as providing for purely economic losses).

<sup>132</sup> *Id.* at 624.

<sup>133</sup> *Id.* at 625.

<sup>134</sup> *Id.* at 630-31.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 631.

<sup>137</sup> *Id.*

<sup>138</sup> *See, e.g., In re Taira Lynn Marine Ltd. No. 5, LLC*, 444 F.3d 371, 382 (5th Cir. 2006) (citing *Ballard* favorably in its interpretation of subsection E).

economic losses resulting from damage to another's property" so long as the claimant can show that there was physical damage to *someone's* property.<sup>139</sup>

C. *Purely Economic Losses Should be Recoverable Under OPA*

As the case law to date has shown, there is no consensus among the courts on whether subsections B and E alter the *Robins Dry Dock* rule. The statute's language is not a model of clarity.<sup>140</sup> OPA does not define the terms "destruction," "injury," or "loss."<sup>141</sup> Since these words are not defined it is hard to know what exactly must occur in order to trigger a particular subsection.<sup>142</sup> One possible interpretation is that that subsection B codifies the *Robins Dry Dock* rule, since that subsection requires "destruction," rather than the less demanding terms "injury" or "loss."<sup>143</sup> Subsection B also appears to imply a concern for those whose property is actually contacted by oil because it only provides a remedy to those who own or lease the property that is destroyed.<sup>144</sup> As to subsection E, it might codify the exception to the *Robins Dry Dock* rule and thus allow purely economic losses for commercial fishermen only.<sup>145</sup> On the other hand, it may be that subsection E itself codifies the *Robins Dry Dock* rule as held in *Cleveland Tankers, Inc.* and *Sekco Energy*.

OPA's legislative history seems to slightly favor the interpretation that OPA codifies the *Robins Dry Dock* rule. In a Conference Report, Rep. Jones of North Carolina stated that the "polluter should pay and the victim should receive full compensation for direct, proven [economic] damages ... to third parties such as fishermen and beachfront property owners who ... meet requirements for standing."<sup>146</sup> Rep. Jones's reference to "direct" damages for two classes of individuals that are likely to suffer physical contact with oil may simply codify the general maritime approach. Another Conference Report, while noting that a claimant need not be the owner of damaged property or resources to recover lost profits, cites the example of commercial fishermen.<sup>147</sup>

Despite the difficulty courts have had in interpreting OPA, its plain language indicates that purely economic losses are recoverable. Subsection B provides recovery for an owner or lessee of damaged property.<sup>148</sup> Conversely, subsection E provides that "any party" can recover for lost profits due to damage to property or natural resources.<sup>149</sup> This distinction between owner/lessee and "any party" shows that an individual should be able to recover for lost profits despite it not being his

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<sup>139</sup> *Id.* at 382-83.

<sup>140</sup> See Wagner, *supra* note 46, at 297 (describing the language of OPA as "imprecise[e] and "ambigu[ous]" and noting that "[w]ith typical indifference, Congress declined to define several key terms").

<sup>141</sup> 33 U.S.C. § 2701.

<sup>142</sup> See Wagner, *supra* note 46, at 297 (stating that "[w]hile statutory definitions of such common terms is ordinarily unnecessary, clarity becomes critical" because both subsection B and E provide for "economic loss").

<sup>143</sup> 33 U.S.C. § 2702(b)(2)(b).

<sup>144</sup> *Id.*

<sup>145</sup> Christie & Hildreth, *supra* note 47 (stating that subsection E "apparently codifies the exception in maritime law ... that allows damages for economic losses for commercial fishermen.").

<sup>146</sup> See H.R. Conf. Rep. No. 136, 101<sup>st</sup> Cong., 2d Sess. H6933-02 (1990).

<sup>147</sup> See H.R. Conf. Rep. No. 653, 101<sup>st</sup> Cong., 2d Sess. 103 (1990). This may be a reaffirmation of the *Robins Dry Dock* rule's exception for commercial fishermen.

<sup>148</sup> 33 U.S.C. § 2702 (b)(2)(B).

<sup>149</sup> *Id.* § 2702 (b)(2)(E).



own property that was damaged. This interpretation is also logical because subsection E's title suggests a concern with the impairment of "[p]rofits and earning capacity" rather than tangible property.<sup>150</sup> Since subsection B provides for the recovery of "economic losses" for those who own or lease destroyed property, it seems that all that is left for subsection E's "economic losses" to cover is instances in which property has not been physically contacted.<sup>151</sup> Some scholars have concluded that subsection E effectively removes the *Robins Dry Dock* rule.<sup>152</sup> One could argue that subsection E does in fact require actual damage to *someone's* property before a non-owner can make a claim. But this is not a major issue since subsection E can be triggered by damage to natural resources and major oil spills commonly cause widespread damage to the environment.<sup>153</sup>

There is some legislative history apparently supporting a broad interpretation of subsection E. Rep. Schneider of Rhode Island seemed to interpret OPA's coverage to apply to parties who would have no remedy in general maritime law.<sup>154</sup> Rep. Schneider observed that OPA would require compensation for losses suffered by a more distant set of parties, including fish dealers, fish processors, and bait and tackle store owners.<sup>155</sup> Legislative commentary from the proposed act preceding OPA includes commentary from Rep. Fields of Texas, who stated that H.R. 1465 would provide compensation for injured parties such as a hotel owner.<sup>156</sup> While neither one of these statements is overwhelming, it is possible that they refer to parties who would not own or lease any property physically touched by oil.

The most obvious problem with interpreting OPA to provide for purely economic losses is that it provides no guidance to courts on how far to extend liability.<sup>157</sup> For example, it is not clear who can recover economic losses stemming from damage to natural resources under subsection E. OPA also does not shed light on how individuals are to prove that the oil spill actually caused their economic losses.<sup>158</sup> This is unfortunate because it means that courts will have to derive an arbitrary test, perhaps resorting to tort's highly indeterminate proximate causation analysis, to determine who can recover purely economic losses from subsection E. Regardless, the way in which a court interprets subsection E may not be quite as important in light of OPA's savings clause.

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* § 2702 (b)(2)(B).

<sup>152</sup> Wagner, *supra* note 46, at 296 (noting that "several commentators have concluded that OPA eliminates any application of the [*Robins Dry Dock* rule], and that even remote claimants indirectly impacted by an oil spill may recover purely economic losses"); See also Christie & Hildreth, *supra* note 47, at 304 (quoting authors who were counsel with the House Merchant Marine and Fisheries Committee at the time of OPA's enactment for the notion that OPA "deletes a limitation ... requiring that the claimant show physical damage to a proprietary interest before economic damage could be awarded.").

<sup>153</sup> 33 U.S.C. § 2702(b)(2)(E) (allowing recovery for damage to natural resources).

<sup>154</sup> See Material in Extension of Remarks No. 136, 101<sup>st</sup> Congress, 2d Sess. E2109-01 (1990).

<sup>155</sup> *Id.*

<sup>156</sup> See Congressional Record No. 135, 101<sup>st</sup> Cong., 2d Sess. H8120-03 (1990).

<sup>157</sup> Thomas Wagner stated that Congress's failure to "define and delimit these new remedies with precision" means that the "public and the courts [must] undertake the difficult, expensive, and time-consuming task of divining Congressional intent." Wagner, *supra* note 46, at 300.

<sup>158</sup> See also Harvard Law Review Association, *The Requirement of Certainty in the Proof of Lost Profits*, 64 HARV. L. REV. 317, 325 (1950) (observing that as a general matter the "multiplicity of factors involve[d] ... make it impossible to forecast with precision how much certainty [is] required" in proving lost profits).

D. OPA's Savings Clause Allows for State Oil Spill Liability

A court's interpretation of a statute begins with its text,<sup>159</sup> and it is hard to imagine how the text of OPA's savings clause could be more clear.<sup>160</sup> In total, Congress spoke out against preemption three different times, stating that "nothing" in OPA: preempts a state from imposing additional liability; modifies the liability of a person under state law; or affects a state from imposing additional liability.<sup>161</sup> Similarly, in *Askew* the Court cited three provisions opposing preemption in allowing the Florida Act to stand.<sup>162</sup> While *Askew* did not answer the question of whether the Limitation of Liability Act preempts state law,<sup>163</sup> OPA clearly states that it does not.<sup>164</sup> *Askew* also did not answer the question of whether state removal costs could exceed federal removal costs.<sup>165</sup> But while the Federal Act in *Askew* did not explicitly allow for "additional" state costs,<sup>166</sup> OPA states that "additional" state liability can be imposed.<sup>167</sup>

The structure of OPA further indicates that states should be permitted to provide remedies for oil spill damages as they please. In *U.S. v. Locke*,<sup>168</sup> the Supreme Court stated that the location of OPA's savings clause within the statute provides context for its interpretation.<sup>169</sup> OPA contains nine titles, with the first one labeled "Oil Pollution Liability and Compensation."<sup>170</sup> It is within Title I that OPA's savings clause can be found.<sup>171</sup> "Congress," the Court reasoned, "intended to preserve state laws of a scope similar to the matters contained in Title I."<sup>172</sup> The Court reasoned that Congress's placement of the savings clause in Title I evidenced an intent to preserve state liability laws, rather than state requirements for vessel design and operation.<sup>173</sup>

OPA's legislative history also indicates that Congress did not intend for OPA to preempt state law in certain areas. In the years prior to OPA's enactment the Senate and House heavily debated whether federal oil spill law should preempt state laws.<sup>174</sup> Certain members of the Senate believed that federal legislation should set a minimum level of liability and permit states to provide a more

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<sup>159</sup> *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (stating that "precedents make clear that the starting point for [a court's] analysis is the statutory text.").

<sup>160</sup> See James Garner, *The Oil Pollution Act of 1990: Interplay with State and General Maritime Law*, GLGGROUP, July 9, 2010, <http://www.glggroup.com/News/The-Oil-Pollution-Act-of-1990-Interplay-with-State-and-General-Maritime-Law-49419.html> (stating that "at the very least OPA is not intended to preempt state law imposing or regulating liability for oil releases that cause damage to states and their citizens.").

<sup>161</sup> 33 U.S.C. §§ 2718 (a), (c).

<sup>162</sup> *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 329 (1973).

<sup>163</sup> *Id.* at 332.

<sup>164</sup> 33 U.S.C. §§ 2718(a), (c).

<sup>165</sup> 411 U.S. at 332.

<sup>166</sup> *Id.* at 329.

<sup>167</sup> 33 U.S.C. §§ 2718(a), (c).

<sup>168</sup> *U.S. v. Locke*, 529 U.S. 89 (2000) (holding that state tanker regulations are preempted by OPA).

<sup>169</sup> *Id.* at 105.

<sup>170</sup> *Id.* at 101.

<sup>171</sup> *Id.* at 105.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Michael P. Donaldson, *The Texas Response to Oil Pollution: Which Law to Apply*, 25 ST. MARY'S L.J. 533, 559 (1994) (detailing the preemption debate in Congress).

stringent standard.<sup>175</sup> But proponents of preemption in the House believed that a unified, comprehensive approach would provide the best system for cleaning up oil spills and providing compensation.<sup>176</sup> Those who favored preemption sought to ratify an international agreement known as the 1984 Protocols.<sup>177</sup> If adopted, the 1984 Protocols would have provided specific liability standards that preempted any other federal or state schemes going further than the international scheme.<sup>178</sup> Congress ultimately rejected the international liability scheme in favor of OPA.<sup>179</sup> Scholars have also interpreted the enactment of OPA as evidence that opponents of preemption won out.<sup>180</sup>

In sum, it appears that OPA allows states to provide remedies for purely economic losses in addition to the purely economic losses recoverable under subsection E of OPA. While that may seem redundant, the distinction between purely economic losses under each law is important since not all states provide in tort for purely economic losses. For affected individuals in these states they must look solely to OPA for recovery if no oil touched their property. However some states, such as Rhode Island, explicitly provide for purely economic losses by statute.<sup>181</sup> Florida may also allow recovery for purely economic losses.<sup>182</sup> If the test for how far liability extends under both subsection E and a particular state remedy are identical then this discussion becomes a moot point. On the other hand, because the existence of a state remedy may provide a court with more guidance in determining purely economic losses than OPA does,<sup>183</sup> the state remedy may be easier to prove depending on how a court analyzes subsection E.

While OPA's impact on state law has been discussed, one might wonder if general maritime law still lingers in the background. As compensation for persons injured by an oil spill, OPA displaces general maritime law.<sup>184</sup> A court is to apply general maritime law only in the absence of a "relevant federal statute."<sup>185</sup> Since OPA provides a "comprehensive scheme for the ... compensation of those injured by oil spills, the general maritime law does not apply to recovery of [those] types of damages."<sup>186</sup> The Supreme Court has stated that OPA's savings clause is intended

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> George J. Mitchell, *Preservation of State and Federal Authority under the Oil Pollution Act of 1990*, 21 ENVTL. L. 237, 239 (1991) (discussing the preemption dispute in Congress).

<sup>178</sup> *Id.* at 240.

<sup>179</sup> Christie & Hildreth, *supra* note 47, at 17.

<sup>180</sup> *See, e.g.* Donaldson, *supra* note 174, at 565; Mitchell, *supra* note 177, at 247.

<sup>181</sup> *See supra* note 138 (referencing Rhode Island's statute in *Ballard*).

<sup>182</sup> *See infra* text accompanying notes 193-223.

<sup>183</sup> For example, a judicially developed state common law remedy may provide important factors for courts to analyze; a state statute may provide courts with guidance in how to determine whether purely economic losses occurred or provide considerations to be given through jury instructions. A court may also limit purely economic losses under subsection E to commercial fishermen only, in which case a court's interpretation of a state remedy is vital to any non-commercial fishermen.

<sup>184</sup> *See also* Garner, *supra* note 160 (stating that "OPA ... preempted general maritime law" through its damages provisions).

<sup>185</sup> *Nat'l Shipping Co. of Saudi Arabia v. Moran Mid-Atlantic Corp.*, 924 F. Supp. 1436, 1447 (E.D. Va. 1996).

<sup>186</sup> *Id.* at 1447.

to preserve state laws concerning liability.<sup>187</sup> Therefore, any interpretation that would result in a state law being permitted under OPA yet preempted by general maritime law would defy Congressional intent.<sup>188</sup>

#### IV. *Mosaic* And its Applicability Within the OPA Regime

##### A. *Curd v. Mosaic Fertilizer*

Just two months after the Deepwater Horizon exploded and as oil continued to billow into the Gulf of Mexico, the Florida Supreme Court decided *Curd v. Mosaic Fertilizer*.<sup>189</sup> In *Mosaic*, a state agency warned a fertilizer storage company that their pond dike was narrower than required, resulting in wastewater being dangerously close to exceeding the safe storage level.<sup>190</sup> The dike broke, spilling pollutants into the Tampa Bay.<sup>191</sup> Several local commercial fishermen claimed that the spilled pollutants caused the loss of underwater plant and marine life.<sup>192</sup> At no point did the fishermen claim to have an ownership in the damaged plant or marine life.<sup>193</sup> The fishermen sought recovery for lost profits, which they claimed resulted from damage to the reputations of the fishery-related products they could otherwise catch and sell.<sup>194</sup> The fishermen brought claims under common law theories of negligence and strict liability, as well as recovery under Florida's Pollutant Discharge Prevention and Control Act,<sup>195</sup> specifically FLA. STAT. § 376.313(3) (herein "section 313").<sup>196</sup> After being denied recovery at both the trial and appellate level, the commercial fishermen were granted *certiorari* by the Florida Supreme Court.<sup>197</sup>

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<sup>187</sup> U.S. v. Locke, 529 U.S. 89, 105 (2000).

<sup>188</sup> See also 2 ADMIRALTY & MAR. LAW § 18-2 (4<sup>th</sup> Ed.) (2010) (observing that "OPA probably preempts maritime tort liability not only for ship owners and operators, but also for third parties.").

<sup>189</sup> 39 So.2d 1216 (Fla. 2010).

<sup>190</sup> *Id.* at 1218.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 1218-19.

<sup>194</sup> *Id.* at 1219.

<sup>195</sup> FLA. STAT. 376.011. Interestingly, this is the same Florida Act that was at issue in *Askew*, although it has been modified since *Askew* was decided. While the Florida Act in *Askew* did not limit state cleanup costs, the updated Florida Act does. See FLA. STAT. § 376.012(2) (limiting cleanup costs for a vessel of 3,000 tons transporting pollutants, for example, to the greater of \$12 million or \$1,200 per gross ton). However that cap will be lifted if gross negligence can be shown. *Id.* § 376.012(3). This distinction may not be relevant for this paper because the commercial fishermen claimed economic losses stemming from natural resource damage, which is not capped. *Id.* § 376.13(5) (stating responsible party is liable to the *fund* for "all natural resource damages"). And while that provision regards damages to "the fund," the court nonetheless stated that section 376 contains a private cause of action and that a party is liable for "all damages." *Id.* § 376.313(3). Other differences are that the old Florida Act concerned only oil spills while the updated Florida Act covers all "pollutants," including "oil of any kind." *Id.* § 376.031(16).

<sup>196</sup> 39 So.2d at 1219 (citing FLA. STAT. § 376.313(3)).

<sup>197</sup> *Id.* at 1218-19.

The first question the court addressed was whether the private cause of action recognized in section 313 permits commercial fishermen to recover for economic losses despite the fact that the fishermen did not own any property damaged by the pollution.<sup>198</sup> Section 313 provides that:

nothing ... prohibits any person from bringing a cause of action ... for all damages resulting from a discharge or other condition of pollution ... [Except in certain circumstances] it is not necessary for such person to plead or prove negligence in any form or manner ... [They must only prove] that the prohibited discharge or other pollutive condition ... has occurred.<sup>199</sup>

Although the wording of the statute seems closer to a savings clause than one creating a cause of action, the court noted that they had already interpreted this clause as creating a cause of action.<sup>200</sup> While the creation of a cause of action from this language has been criticized, the court's opinion is binding.<sup>201</sup> Although section 313 concerns individual causes of action for pollution of surface and ground waters, the court noted that section 376.205 also provides for an individual cause of action for pollution of coastal land and waters.<sup>202</sup> Courts have interpreted section 376.205, however, as providing a cause of action only for clean up or removal of the prohibited discharge.<sup>203</sup>

The statute defines damages as “the documented extent of any destruction to or loss of any real or personal property, or the documented extent ... of any destruction of the environment and natural resources [defined to include all living things except humans] ... as the *direct* result of the discharge of a pollutant.”<sup>204</sup> The court dismissed the company's argument that economic damages were not recoverable since the commercial fishermen did not own damaged property, reasoning that the definition of “damages” included damage to natural resources.<sup>205</sup> The court also reasoned that “lack of property ownership” was not an available defense under the statute.<sup>206</sup> The court specifically emphasized that “the language of [section 313] allows *any person* to recover for damages.”<sup>207</sup>

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<sup>198</sup> *Id.* at 1219-20.

<sup>199</sup> *Id.* at 1220.

<sup>200</sup> 39 So.2d at 1221-22 (referencing its finding of a cause of action in *Aramark Uniform and Career Apparel, Inc. v. Easton*, 840 S.2d 20 (Fla. 2004)).

<sup>201</sup> See *Kaplan v. Peterson*, 674 So.2d 201 (Fla. 5th DCA 1996) (stating that the statute is “so badly drafted that if it does intend to create a cause of action, it opens up a real can of worms in terms of who can sue, where, and for what”).

<sup>202</sup> 39 So.2d at 1234 n.1.

<sup>203</sup> See *Italiano v. Jones Chemicals, Inc.*, 908 F.Supp. 904, 906 (M.D. Fla. 1995) (holding that § 376.205 creates a private cause of action but that “such damages must be connected with the cleanup or removal of the prohibited discharge”).

<sup>204</sup> 39 So.2d at 1221 (citing § 376.031(5)) (emphasis added). Some have argued that the *Mosaic* court clearly misinterpreted the statute. The definition of “damage” that the court cites explicitly applies to sections 376.011-376.21, not section 376.313. See Sidney F. Ansbacher et al., *Strictly Speaking, Does .FS. §376.313(3) Create a Duty to Everybody, Everywhere?*, 84 FLA. BAR J. 36 (2010) (acknowledging that despite this error, the court's “interpretation of the state statute is binding.”).

<sup>205</sup> 39 So.2d at 1222.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 1221.

After holding that the fishermen could bring a cause of action under section 313, the court next addressed whether “commercial fishermen can recover for economic losses proximately caused by the negligent release of pollutants” even though they did not own any damaged property.<sup>208</sup> The appellate court had held that any claim under negligence was barred because the fishermen did not sustain any bodily injury or property damage but rather sought purely economic damages.<sup>209</sup> The Florida Supreme Court dismissed this argument, holding that this was not a situation where the economic loss rule applied.<sup>210</sup> In Florida the rule only arises in situations involving both contractual privity and a tort or in situations involving certain damage from product defects.<sup>211</sup>

Having dismissed any threshold issues barring purely economic recovery under Florida common law the court analyzed the matter under traditional negligence principles of duty, breach, proximate cause, and damage.<sup>212</sup> While it recognized that some courts have denied that any duty is owed to a party who suffers purely economic losses, the court reasoned that this determination ultimately turns on whether there is a “foreseeable zone of risk arising from the acts of the defendants.”<sup>213</sup> The court held that the facility was obliged to protect those exposed to harm in the zone of risk created by the facility’s activities.<sup>214</sup> It was foreseeable, the court reasoned, that if the facility released pollutants into this zone it would cause damage to marine and plant life, as well as human activity.<sup>215</sup> Additionally, the court observed that within this zone of risk the fishermen had a special interest not shared by the general community.<sup>216</sup> The court supported this assertion by noting that the fishermen had licenses to conduct special activities in the Tampa Bay waters and also because their ability to earn a livelihood was dependent on those waters.<sup>217</sup>

After finding that the facility owed a duty to the fishermen, the court found that the facility breached its duty by interfering with the fishermen’s special interests by discharging pollutants into those public waters.<sup>218</sup> The breach of duty gave rise to a cause of action in negligence, with the only remaining requirement that the fishermen must prove causation and damages (i.e. loss of profits).<sup>219</sup>

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<sup>208</sup> *Id.* at 1222.

<sup>209</sup> *Id.* at 1223.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* The court stated that the case was also controlled by “strict liability principles.” However at the end of the opinion the court states narrowly that “this breach of duty has given rise to a cause of action sounding in negligence.” *Id.* at 1216-28. Therefore, I will only be discussing the negligence claim.

<sup>213</sup> *Id.* at 1223-28.

<sup>214</sup> *Id.* at 1229.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

## B. Reflections on Mosaic

While the *Mosaic* decision left many uncertainties in its wake, it does not appear that section 313 stands for the proposition that an individual can recover economic losses when there has been no physical damage at all.<sup>220</sup> Instead, the court made it apparent that once natural resource damage was established, commercial fishermen (and maybe others) could *then* recover consequential economic damages.<sup>221</sup> Importantly, a Deepwater Horizon spill claimant can easily show evidence of damage to natural resources.<sup>222</sup> The more important question is *who* can recover for damage to these natural resources?

The question certified to the court was whether “commercial fishermen” could recover damages for loss of income.<sup>223</sup> But in answering in the affirmative the court clearly emphasized that “any” person could recover for damage to natural resources.<sup>224</sup> The obvious question is what scope of individuals fall under the umbrella of “any?” In contrast to the court’s negligence analysis, its statutory analysis provides little insight.<sup>225</sup> Since the definition of “damage” provides recovery for “direct” damage, *Mosaic* may imply that only those who directly use the water’s resources can recover, such as restaurants that serve fresh fish and charter fishing boat operators.<sup>226</sup> On the other hand, the court may have intended for parties like beachfront hotels (i.e., those who indirectly use the water’s resources to profit by attracting tourists) to recover.<sup>227</sup> Another possibility is that the court only meant “any” to include commercial fishermen just like the *Robins Dry Dock* rule’s exception. The *Mosaic* decision provides no real guidance to future courts in discerning where the

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<sup>220</sup> The *Mosaic* court considered whether the commercial fishermen could recover for damage to natural resources before contemplating economic losses, since it was the “damage” that triggered the cause of action. *Id.* at 1221.

<sup>221</sup> 39 So.2d at 1218 (holding that section 313 allows commercial fishermen to recover “damages for their loss of income” despite not owning any damaged property).

<sup>222</sup> While “natural resources” is not defined in the statute, the term “damage,” according to the court, includes any destruction to natural resources “including all living things except human beings.”) FLA. STAT. § 376.031(5). Six months after the spill scientists were still finding evidence of damage. See Nick Valencia, *Scientists Find Damaged Marine Life Near BP Spill Site*, CNN, Nov. 6th, 2010, <http://www.cnn.com/2010/US/11/06/gulf.coral.damage/index.html> (reporting that scientists found “dramatic damage to deep-sea coral near the site of the Gulf oil disaster that one biologist called a shocking find” and that the damage is “widespread”).

<sup>223</sup> *Id.* at 1216.

<sup>224</sup> *Id.* at 1221.

<sup>225</sup> See Ansbacher, *supra* note 204, at 13 (questioning whether under *Mosaic* “potential defendants owe so broad a duty that statutory claims for economic damages extend to ... charter boat owners? Captains? Deck hands? To those whose income is dependent on a tourism industry whose reputation is affected by a discharge?”).

<sup>226</sup> See Sarah Parsons, *Restaurants Set to Sue BP Over Deepwater Horizon Spill*, CHANGE.ORG, May 19, 2010, [http://food.change.org/blog/view/restaurants\\_set\\_to\\_sue\\_bp\\_over\\_deepwater\\_horizon\\_spill](http://food.change.org/blog/view/restaurants_set_to_sue_bp_over_deepwater_horizon_spill) (reporting that “restaurants and seafood distributors in Florida, Mississippi, Alabama, and Louisiana recently filed lawsuits against BP seeking compensation.”).

<sup>227</sup> Florida’s Attorney General Bill McCollum would extend liability under *Mosaic* even further. He claimed that under state law “a Key West hotel that is losing business because of the misperception of oily water and beaches could still get damages.” *Feinberg Says He’s Not Trying to Restrict Payouts for Oil-Spill Claims*, M2M, July 6, 2010, <http://m2m.tmcnet.com/news/2010/07/06/4887209.htm>.

line between direct and indirect damage occurs under section 313. It is clear that the proximity between the act that caused the spill and its effect on natural resources was much more direct in *Mosaic* than it will be for most Florida claimants seeking damages from the Deepwater Horizon spill.<sup>228</sup>

The court's analysis of purely economic recovery under negligence at least provided a rule: when a tortfeasor creates a zone of risk, he owes a duty to an individual who, within that zone, has a special interest separate from the community, for any foreseeable harm that the tortfeasor may cause there.<sup>229</sup> Yet the court's decision also left a multitude of questions. For a company operating an offshore drilling rig, how far does their "zone of risk" extend? After all, the Deepwater Horizon was located off the coast of Louisiana, hundreds of miles from Florida's coastal waters. On the other hand, BP knew that the well potentially contained vast amounts of oil.<sup>230</sup> If the "special interest" requires something akin to a license of use within that established zone of risk (as the commercial fishermen in *Mosaic* had) then the number of potential claimants is very limited. That interpretation bars virtually all businesses on land whose profits were impaired by the Deepwater Horizon spill. However a "special interest" may just mean anyone whose profits are heavily reliant on the ocean since this is distinct from the general community. The most likely prong that BP will satisfy is "foreseeable harm" since it was obvious that their carelessness could lead to devastating effects. In spite of all these possibilities there is also a chance that courts will simply confine *Mosaic* to its facts. Subsequent courts may hold that since *Mosaic* did not concern an oil spill, the Deepwater Horizon claimants cannot rely on the decision.

After *Mosaic*, various commentators proclaimed the importance of this decision for individuals seeking recovery after the Deepwater Horizon spill.<sup>231</sup> Some attorneys stated that *Mosaic* would allow commercial fishermen to sue BP despite not owning any damaged property.<sup>232</sup> Others interpreted *Mosaic* more broadly to allow economic recovery for hotels, boat rental businesses, seafood restaurants, and others.<sup>233</sup> In addition to the shortcomings of *Mosaic* previously discussed,

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<sup>228</sup> See Michael Bradford, *Far-Flung Claimants Complicate BP Oil Spill Fund*, BUSINESSINSURANCE, Nov. 15, 2010, <http://www.businessinsurance.com/article/20101114/ISSUE01/311149993> (stating that claims for the fund have been filed "from restaurants and fishing equipment companies located hundreds of miles from the coastal area where the oil washed up.").

<sup>229</sup> 39 So.2d at 1217.

<sup>230</sup> Of course that was the point of drilling the well in the first place. See also Jessica Vander Velde, *Test Show Oil Clouds Drifting More than 100 Miles from Deepwater Horizon Site*, ST. PETERSBURG TIMES, June 9, 2010, <http://www.tampabay.com/news/environment/article1100796.ece> (scientists reported that oil-related chemicals were seen 42 miles northeast of the Deepwater Horizon rig and 142 miles to the southeast, with some of the oil being founds two-thirds of a mile below the surface).

<sup>231</sup> See, e.g., *Florida Court Says Fishermen Can Sue Polluter; Is BP Next?*, INSURANCE JOURNAL, June 23, 2010, <http://www.insurancejournal.com/news/southeast/2010/06/23/110989.htm> (stating that the lawyers for the fishermen in *Mosaic* felt that case could set a precedent for economic damage lawsuits by Floridians against BP).

<sup>232</sup> *Id.*; See also *Florida Supreme Court Rules that Fishermen Can Sue for Economic Loss*, BANKRUPTCYLAWYERBETHESDA.COM, July 5, 2010, <http://www.bankruptcylawyerbethesda.com/news/florida-supreme-court-rules-that-fishermen-can-sue-for-economic-loss> (stating that "the ruling may be used as precedent for Florida fishermen to sue BP.").

<sup>233</sup> Richard Rusak & Keith Brais, *Florida Supreme Court Allows Commercial Fishermen to Recover Lost Profits Caused by Polluters*, MARITIMELAWBLOG.COM, Aug. 25, 2010,



many of these commentators failed to contrast the facts underlying *Mosaic* with the facts that will give rise to suits by Deepwater Horizon spill claimants.<sup>234</sup>

In *Mosaic*, the act that caused the spill occurred on land while the injury occurred in state territorial waters. This was not a maritime tort because a fertilizer phosphate plant is not a “traditional maritime activity” and moreover the “locality” of the wrong did not occur on the navigable waters or high seas.<sup>235</sup> Since the Deepwater Horizon was a maritime tort, and because OPA displaced general maritime law in this area, the permissibility of Florida’s laws must be analyzed solely within OPA.

### C. Florida’s Private Cause of Action for Natural Resources Damage and OPA

As previously discussed, OPA’s language, structure, and legislative history strongly oppose preemption. However there are two counterarguments that one might assert in regards to section 313.<sup>236</sup> First, OPA provides that certain trustees for the federal and state governments may bring an action for natural resource damages.<sup>237</sup> Private parties are not given this same right under OPA.<sup>238</sup> Federal courts have consistently held that private natural resource claims are to be brought by statutory trustees, not private citizens.<sup>239</sup>

Second, OPA authorizes the use of an oil pollution fund which may be used to pay for natural resource damages if the responsible party does not have sufficient funds.<sup>240</sup> Chapter 376’s section on “Liability for damage to natural resources” notes that the state shall work with federal trustees as defined in OPA to ensure that no double recovery occurs.<sup>241</sup> Consequently, any money that one party recovers from the fund is money that another trustee will not be able to take advantage of. Both chapter 376 and OPA hold that a party may recover only one time for natural resource

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<http://www.maritimelawblog.net/2010/08/florida-supreme-court-determin.html>.

<sup>234</sup> See BANKRUPTCYLAWYERBETHESDA.COM, *supra* note 232 (discussing the importance of *Mosaic* in light of the Deepwater Horizon spill but providing no further analysis of the differences between the two situations).

<sup>235</sup> Even if one were to argue that the wrong occurred on navigable waters, both prongs must be met and the first one clearly is not.

<sup>236</sup> In addition to the two arguments for preemption presented in this section there are two more: (1) OPA was designed, in part, to establish the current federal requirements of the Federal Water Pollution Control Act (FWPCA). The *Mosaic* majority emphasized that chapter 376 should be construed to effect the purposes of the FWPCA. Therefore, one might argue that chapter 376 is intended to effectuate OPA. The purpose of OPA (in its establishment of current FWPCA requirements) would therefore not be effectuated if chapter 376 provided a remedy not found in OPA. See Ansbacher, *supra* note 204, at 18. (2) In *Askew*, the Court stated that one reason the Florida Act was not preempted is because the Federal Act dealt only with cleanup costs, therefore allowing the states to impose liability for damages suffered by both the State and private interests. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 336 (1973). In contrast, OPA provides for a much broader range of damages. 33 U.S.C. § 2702.

<sup>237</sup> 33 U.S.C. § 2702(b)(1)(A).

<sup>238</sup> *Id.*

<sup>239</sup> See Ansbacher, *supra* note 204, at 21 (stating that [f]ederal courts have uniformly held that private natural resource claims are barred in favor of statutory trustees.”).

<sup>240</sup> 33 U.S.C. § 2712.

<sup>241</sup> FLA. STATE. § 376.121.

damage.<sup>242</sup> This rationale was explained by the U.S. Court of Appeals for the Ninth Circuit, which held that since the federal and state trustees had already recovered for natural resource damages, recreational fishermen could not recover for those same damages under the principle of *res judicata*.<sup>243</sup> The court reasoned that since the fishermen were in privity to the trustees (as members of the public) their interests were already represented.<sup>244</sup> The court observed that allowing the fishermen to *also* recover in their private capacity would represent an unpermitted double recovery.<sup>245</sup>

While these two arguments are largely unpersuasive because of OPA's language, structure, and legislative history, there is an additional reason why section 313 should not be preempted: Unlike claims by recreational fishermen, commercial fishermen like those in *Mosaic* are seeking to recover for an interest not represented by a trustee. In other words, commercial fishermen are not in privity with a trustee like recreational fishermen are. While trustees can sue for losses suffered by the public, such as the "cost of restoring, rehabilitating [or] replacing ... damaged natural resources,"<sup>246</sup> commercial fisherman would be suing for economic losses they suffered personally. At least one commentator has observed that "[t]he bar to private recovery of natural resource damages does not prohibit related claims for purely private economic damages."<sup>247</sup> In support of this rationale, the U.S. Circuit Court of Appeals for the Tenth Circuit held that *res judicata* did not prevent a "purely private" claim by an individual when the natural resource trustee had no standing to bring such a claim.<sup>248</sup> From this rationale it would follow that any other types of private parties that courts allow to bring suit under section 313 would not have their claims preempted, so long as those claims are based on some type of economic interest.

As if enough possibilities did not already exist, there is one more: it may be that section 313 is identical to subsection E of OPA. *Mosaic* held that section 313 allowed "any" person to recover economic losses if they could first show damage to natural resources.<sup>249</sup> Subsection E could be interpreted as also providing economic losses for "any" person that can first show damage to natural resources.<sup>250</sup> If these two provisions are identical then a court may preempt Florida's section 313 cause of action if it is deemed to be in conflict with subsection E.<sup>251</sup> Then again, a court may construe OPA's subsection E to provide recovery only for commercial fishermen and *Mosaic* to provide a remedy for a broader class of individuals. In that case, the remedy would not exist under federal law and thus would not be preempted. Moreover, this broader state remedy would be considered "additional" liability under OPA's savings clause.<sup>252</sup>

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<sup>242</sup> See § 1006(d)(3) in OPA and § 276.121(3) in the Florida Act.

<sup>243</sup> *Alaska Sport Fishing Assn. v. Exxon*, 34 F.3d 769, 772 (9th Cir. 1994).

<sup>244</sup> *Id.* at 772.

<sup>245</sup> *Id.*

<sup>246</sup> 33 U.S.C. § 2706(d)(1)(A).

<sup>247</sup> See Ansbacher, *supra* note 204, at 23.

<sup>248</sup> *Satsky v. Paramount Comm's*, 7 F.3d 1464 (10th Cir. 1993).

<sup>249</sup> *Mosaic*, 39 So.2d at 1221.

<sup>250</sup> 33 U.S.C. § 2702(b)(2)(E).

<sup>251</sup> In *Askew* the court upheld the Florida Act only after first concluding that there was no "fatal conflict between the statutory schemes" when compared to the Federal Act. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 331 (1973).

<sup>252</sup> 33 U.S.C. §§ 2718 (a), (c) (allowing states to impose additional liability).

D. Florida Common Law Negligence and OPA

It also appears that OPA's savings clause, at least in certain areas, permits claims under state common law. By stating that OPA shall not "affect ... or modify in any way the obligations or liability of any person under ... State law, including common law,"<sup>253</sup> Congress clearly opposed outright federal preemption of state common law oil pollution remedies.

Besides the fact that OPA's language, structure, and legislative history oppose preemption, judicial precedent also shows that state common law claims are not preempted by OPA in regard to oil spill liability. In a case prior to OPA, a New York Appellate Court held that because the various federal pollution statutes at issue contained savings clauses for private rights under state law the plaintiffs' common law claims of nuisance were not preempted.<sup>254</sup> Cases after OPA have held similarly. In *Dostie Development v. Arctic Peace*,<sup>255</sup> the U.S. District Court for the Middle District of Florida held that negligence claims were not preempted by OPA.<sup>256</sup> The Middle District reasoned that OPA's savings clause permits states to enforce their common law liability, and that this principle is sound because "Congress does not view ... expansion of liability to cover purely economic losses ... as an excessive burden on maritime commerce."<sup>257</sup> The U.S. District Court for the Eastern District of Louisiana has stated that OPA does not preempt state common law claims of strict liability or negligence.<sup>258</sup> Moreover, the U.S. District Court for the Middle District of Maryland interpreted *Locke* as effectively foreclosing any argument that state common law claims concerning oil spill liability are preempted.<sup>259</sup>

However, OPA might treat state common law differently than state statutory law. It may be that states can enact statutory liability that exceeds OPA, but that state common law liability cannot. Out of the three provisions within OPA's savings clause, only one explicitly mentions state common law.<sup>260</sup> The other two provisions loosely say that a state is not preempted from "imposing" (which perhaps means *enacting* a statute that imposes) any "additional" liability.<sup>261</sup> It may be that since those two provisions do not explicitly mention common law they do not include it. The provision that mentions common law does not explicitly allow for additional liability. Instead, the common law provision merely says that OPA does not "affect" or "modify" state common law.<sup>262</sup> However, the Florida district court in *Dostie*, while allowing a state negligence claim, stated that the purpose of OPA's savings clause is to allow states to impose liability "above" that of OPA.<sup>263</sup> Of course none of this is entirely clear because if Congress only intended the

<sup>253</sup> *Id.*

<sup>254</sup> *Leo v. General Elec. Co.*, 145 A.D.2d 291, 295 (N.Y. App. Div. 1989) (holding that state nuisance claims were not preempted by the FWPCA or CERCLA).

<sup>255</sup> *Dostie Development, Inc. v. Arctic Peace Shipping, Co., Ltd. Inc.*, 1996 WL 866119, No. 95-808-CIV-J-MMP at \*3 (M.D. Fla. 1996).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Isla Corp. v. Sundown Energy, LP*, 2007 WL 1240212, No. 06-8645, at \*2 (E.D. La. 2007).

<sup>259</sup> *Williams v. Potomac Elec. Power Co.*, 115 F.Supp.2d 561, 563 (D.Md. 2000).

<sup>260</sup> 33 U.S.C. § 2718(a)(2).

<sup>261</sup> *Id.* §§ 2718(a)(1), (c).

<sup>262</sup> *Id.* § 2718(a)(2).

<sup>263</sup> *Dostie Development, Inc.*, 1996 WL 866119, No. 95-808-CIV-J-MMP at \*3.

provisions including “additional liability” to mean statutes they could have easily made it more explicit.

## V. How to Provide Clarity

### A. Why a Divided System of Liability is Needed

As this paper has shown there are very few certainties in the context of oil spill liability. The goal of maritime law is to provide uniformity, yet even before OPA the issue of preemption was contentious.<sup>264</sup> In view of OPA’s broad savings clause this goal has still not been accomplished.<sup>265</sup> OPA has also failed to clear up whether federal law provides for purely economic losses and if states can offer similar remedies. Before OPA, general maritime law provided the predictable *Robins Dry Dock* rule for parties damaged by an oil spill. However this rule is unfair to many individuals who suffer purely economic losses and are not commercial fishermen.<sup>266</sup> OPA sought to provide fair compensation for injured parties, yet many courts simply interpret OPA to reaffirm *Robins Dry Dock*.<sup>267</sup>

Congress is the only entity with the power to establish a nationwide regime that can resolve these issues. Therefore, Congress should provide a system of oil spill liability that reasonably balances the goals of uniformity, predictability, and fairness.<sup>268</sup> This system should be divided into two categories: maritime torts that involve spills from offshore oil drilling, and all other maritime torts. At the outset this system would clearly displace general maritime law and preempt any state laws that provide a private remedy for an injury classified as a maritime tort.<sup>269</sup>

For the non-oil drilling maritime torts, the *Robins Dry Dock* rule should be codified. For maritime torts caused by an offshore oil spill the operator of the rig should be strictly liable for damages suffered by certain listed categories of claimants. (herein referred to as “foreseeable

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<sup>264</sup> See Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility*, 24 TUL. MAR. L.J. 481, 507 (2000) (noting that “in 1986 both the House and Senate passed similar comprehensive oil pollution bills only to have them die in conference because the conferees were unable to resolve political and philosophical differences over preemption.”).

<sup>265</sup> See Swanson, *Ten Years supra* note 96, at 174 (stating that the “goals of an oil spill liability ... system should be uniformity and predictability.”).

<sup>266</sup> See *Thompson v. United States*, 266 F.2d 852, 856 (4th Cir. 1959) (holding that a yacht owner was unable to recover damage for the loss of use of a pleasure craft, but stating that “it strikes one as fundamentally unfair.”).

<sup>267</sup> See Swanson, *Ten Years, supra* note 96, at 174 (stating that “OPA was meant to provide an effective system for prompt oil spill removal and fair compensation for those damages by such spills.”).

<sup>268</sup> Fairness should be a goal not just because it is rational, but also because a fair system was intended by the Framers when they originally provided for maritime law. See Major B. Harding, *Judicial Decision-Making Analysis of Federalism Issues in Modern United States Supreme Court Maritime Cases*, 75 TUL. L. REV. 1517, 1529 (2001) (stating that “fairness and predictability are two primary reasons the Framers decided to place maritime matters within national control.”).

<sup>269</sup> Since this paper has focused mainly on private recovery of economic losses and preemption, this system does not propose a solution to issues outside that scope, such as cleanup costs.

parties”).<sup>270</sup> For any maritime tort, if an individual can show that oil actually injured a proprietary interest of his then he can proceed under the *Robins Dry Dock* rule. Thus the *foreseeable parties* approach applies exclusively to purely economic losses caused by an offshore oil spill.

### B. Why Offshore Drilling Requires Special Treatment

It is not uncommon for society to impose a different legal standard on conduct that is considered risky.<sup>271</sup> For example, while an individual must act unreasonable to be found negligent,<sup>272</sup> an individual who engages in “abnormally dangerous” activity can be found liable regardless of whether or not they acted unreasonably.<sup>273</sup> The rationale for having a different legal standard for offshore drilling than for other maritime activities is the same.

As to any individual oil spill, offshore drilling accidents typically release a larger volume of oil than in other kinds of oil spills.<sup>274</sup> The Deepwater Horizon allowed the release of approximately 206 million gallons of oil into the Gulf: an amount that would have continued to rise had it not been capped months later.<sup>275</sup> In contrast, the *Exxon Valdez* tanker spilled about 11 million gallons.<sup>276</sup> In fact, since 1991 the “major” oil spills in the U.S. that were not the result of offshore drilling add up to less than 6% of the total released in the Deepwater Horizon spill.<sup>277</sup>

Riskiness in the offshore drilling industry is also a result of the fact that most “easy” targets have already been developed in the search for underwater oil.<sup>278</sup> This means that offshore drillers continue to explore areas that are more geologically complex, located in deeper waters, and

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<sup>270</sup> Similar to OPA, the operator of the rig could be designated as “responsible” and required to sue other liable parties in contribution.

<sup>271</sup> Restatement (Second) of Torts § 519 (stating that “one who carries on an abnormally dangerous activity is subject to liability for harm ... although he has exercised the utmost care to prevent the harm.”).

<sup>272</sup> *Id.* § 282 (defining negligence as subjecting others to “unreasonable” harm).

<sup>273</sup> *Id.* § 519.

<sup>274</sup> Andrea Thompson, *FAQ: The Science and History of Oil Spill*, LIVESCIENCE, Apr. 23, 2010, <http://www.livescience.com/environment/oil-spill-faq-100423.html>.

<sup>275</sup> Harry R. Weber, *Deepwater Horizon's Blowout Preventer Pulled from Gulf, FBI Present*, HUFFINGTONPOST, Sept. 9, 2010, [http://www.huffingtonpost.com/2010/09/05/deepwater-horizons-blowou\\_n\\_705991.html](http://www.huffingtonpost.com/2010/09/05/deepwater-horizons-blowou_n_705991.html).

<sup>276</sup> *How Much Oil Really Spilled from the Exxon Valdez*, NPR, June 18, 2010, <http://www.onthemedial.org/transcripts/2010/06/18/01>.

<sup>277</sup> See *Oil Spills and Disasters*, INFOPLEASE, <http://www.infoplease.com/ipa/A0001451.html> (last visited Nov. 10, 2010) (estimating that since 1991 seven different non-drilling accidents released about 12 million gallons of oil into U.S. waters). Approximately seven million of those gallons were released from pipelines, storage tanks, and industrial plants when Hurricane Katrina struck Louisiana. *Id.* But one might note that over the last 50 years tanker accidents have spilled 4 million tons of oil whereas offshore drilling has spilled 1 million. *Id.* Steven F. Hayward, *How to Think About Oil Spills*, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, June 21, 2010, <http://www.aei.org/article/102181>. The problem is that these numbers take into account worldwide totals. Because Congress already rejected an international scheme due to worries that liability will not be stringent enough, this paper assumes a U.S.-specific approach is favored by Congress.

<sup>278</sup> Chris Rowan, *Drilling for Oil is More Risky than it Used to Be*, SCIENCEBLOGS, May 4, 2010, [http://scienceblogs.com/highlyallochthonous/2010/05/drilling\\_for\\_oil\\_is\\_more\\_risky.php](http://scienceblogs.com/highlyallochthonous/2010/05/drilling_for_oil_is_more_risky.php) (describing how offshore oil drilling is getting more difficult as the more easily accessible spots are depleted).

therefore present more technological challenges than did wells in the past.<sup>279</sup> The increased difficulty makes it more likely that problems will arise.<sup>280</sup> While it is obvious that offshore drilling presents potential dangers to society not present with other non-oil related maritime activities,<sup>281</sup> offshore drilling rigs should also be analyzed separately from oil tankers. OPA requires that single hull oil tankers be phased out and that new oil tankers possess a double hull design.<sup>282</sup> The double hull design reduces the likelihood of an oil spill.<sup>283</sup> But while the safety of oil tankers has improved through regulation, offshore drilling rigs have continued to push the boundaries of technology.<sup>284</sup> The design of an oil tanker is much simpler than that of an offshore drilling rig. So while the government is capable of effectively regulating the structural integrity of oil tankers, it will be much more difficult to effectively regulate the complex, cutting edge technology needed for offshore drilling.<sup>285</sup> Because of this difficulty, the appropriate safeguard is enhanced liability.<sup>286</sup> Regarding

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<sup>279</sup> *Id.* The technology employed by deepwater drilling rigs is riskier than shallow water rigs because the blowout preventer on shallow water rigs is located above the water's surface, making it easier to routinely inspect. The Deepwater Horizon was, obviously, a deepwater rig, drilling in 18,000 feet of water. See *Offshore Oil Drilling in Shallow Water: Good Safety Record, Less Risky*, INSTITUTEFORENERGYRESEARCH, Oct. 21, 2010, <http://www.canadafreepress.com/index.php/article/29068> (comparing deep water and shallow water drilling). But shallow water drilling is also dangerous, as evidenced by the Ixtoc blowout in 1979, the largest oil spill in the Gulf of Mexico prior to the Deepwater Horizon spill. *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> Cruise ships, fishing boats, jet ski rentals, and other popular activities on the water do not present a realistic threat of billions of dollars in losses to people hundreds of miles away.

<sup>282</sup> 46 U.S.C. § 3703(a).

<sup>283</sup> OCIMF, *DOUBLE HULL TANKERS- ARE THEY THE ANSWER?* (2003),

<http://www.ceida.org/prestige/Documentacion/dobrecascopetroleiros.pdf> (stating that all other factors being equal, a double hull is less likely to spill oil than a single hull tanker).

<sup>284</sup> Ian Urbina, *BP Is Pursuing Alaska Drilling Some Call Risky*, N.Y.TIMES, June 23, 2010, <http://www.nytimes.com/2010/06/24/us/24rig.html?pagewanted=all> (stating that in its promotional materials BP boasted that their Liberty project in Alaska would "push the boundaries of drilling technology."). The project included extended reach drilling, the type employed on the Deepwater Horizon. Engineers have criticized the technology, saying that it is "risky" and is "less safe than conventional types of drilling because gas kicks that can turn into blowouts are tougher to detect as they climb more slowly toward the rig." *Id.*

<sup>285</sup> See Siobhan Hughes, *Spill Panel Says Rig Culture Failed on Safety*, WALL STREET JOURNAL, Nov. 10, 2010, <http://online.wsj.com/article/SB10001424052748704635704575604622510434324.html> (quoting Exxon Mobil's CEO, who said that "it would be tough for regulatory agencies to hire people skilled enough in the complex technology of deepwater drilling to oversee such operations effectively."). The CEO also stated that his industry hires the "best and brightest people" and pays them accordingly, and it would be tough for a regulatory agency to "have people at the same level of competency." *Id.*

<sup>286</sup> Of course an alternative would be to ban offshore drilling completely. This paper assumes that offshore drilling is a socially desirable activity due to the United States' reliance on oil. President Obama has stated a goal to eventually phase out U.S. reliance on foreign oil and convert to clean energy. However these plans call for a very gradual shift over the coming decades, not an abrupt end to oil production. Karina Rusk, *Obama Pledges to End Oil Dependency*, ABCLOCAL.COM, Aug. 29, 2009, <http://abclocal.go.com/kgo/story?section=news/politics&id=6359976>.

foreign oil tankers, Congress has already addressed these vessels by applying more stringent regulations than is applicable to those flying a U.S. flag.<sup>287</sup>

### C. The “Foreseeable Parties” Approach

While the divided system should provide the bright line *Robins Dry Dock* rule for non-drilling maritime torts,<sup>288</sup> offshore drilling should be subject to the more flexible *foreseeable parties* approach. The goal of the *foreseeable parties* approach is to provide more guidance than remedies like subsection E of OPA, yet still be flexible enough to provide a fair remedy to certain parties who suffer purely economic losses. There are two steps within the *foreseeable parties* approach. The first step is that an individual must fall within the scope of a listed category of claimants. The second step is that the individual must prove causation.

The first step of the *foreseeable parties* approach provides that only certain types of individuals can bring suit for purely economic losses.<sup>289</sup> Congress should identify the types of individuals that are most likely to suffer significant economic impact from an offshore oil spill. This list would include owners, lessees, and employees of businesses such as: hotels, seafood restaurants, commercial fishing boats, tour providers, those who regularly lease out property in the area and those who rent equipment to be used in affected waters.<sup>290</sup> The listed claimant requirement would reduce litigation since an individual who is not in one of these categories will have their claim promptly dismissed.

The purely economic interest that a listed claimant seeks must be lost profits. The “loss of real estate value” should not be recoverable as a purely economic interest. The listed categories focus on individuals who make their livelihood off of the ocean. The real estate value of one’s home or business is not generally what an individual relies on for their livelihood.<sup>291</sup> The decision to draw the line in this manner is a policy decision: it reaches a balance between providing a discernable type of recoverable interest yet providing a fair remedy only to those who truly need it.

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<sup>287</sup> See REGION IV REGIONAL RESPONSE TEAM, U.S. COAST GUARD, MARINE OIL SPILL PREVENTION, [http://ocean.floridamarine.org/ACP/STPACP/Documents/PDF/RRTIVDocs/34\\_RRT4\\_Oil\\_Spill\\_Prevention\\_Pamphlet.pdf](http://ocean.floridamarine.org/ACP/STPACP/Documents/PDF/RRTIVDocs/34_RRT4_Oil_Spill_Prevention_Pamphlet.pdf) (stating that “more than 90% of commercial port calls in U.S. waters are by vessels flying foreign flags.”).

<sup>288</sup> Note that the divided system’s *Robins Dry Dock* rule for non-drilling maritime torts would not include the exception for commercial fishermen. The *foreseeable parties* approach provides for these individuals and there is no logical reason to treat them differently than others who similarly rely on the ocean as part of their business.

<sup>289</sup> Functionally this is an expanded approach to the *Robins Dry Dock* exception for commercial fishermen.

<sup>290</sup> This list would include everything from charter fishing boats to scuba rentals companies and jet ski rental companies. Although it might be seen as unpopular, it would likely be appropriate to include offshore drillers as a listed category. Many individuals make a living off the ocean just like others and if they are able to do so in a safe manner they should not be barred from recovery by another company’s carelessness.

<sup>291</sup> Of course the *foreseeable parties* list could include real estate agents, as they are an exception to this assertion. Congress could further limit liability by barring claims from those beyond a certain distance from the area oil contacts.

The second step of the *foreseeable parties* approach is proving causation. An individual must be able to show that as a matter of fact, the oil spill actually caused their purely economic losses.<sup>292</sup> To establish factual causation for purely economic losses an individual should first be able to show that “but for” the oil spill, it is reasonably certain that such profits would have been realized. To accomplish this, a claimant must first show the period of time that the oil affected their economic well-being. Next, the individual should be able to provide evidence of their usual economic situation during this same time frame in past years. Then, the individual must show that their economic situation during the affected period is distinctly different from that same time frame in recent years. Because the difference must be distinct, the claimant’s economic situation should not be in line with general market trends for the type of economic loss they are alleging. A claimant could also use this method to recover lost future profits by showing that the period during which oil will likely affect their economic situation is different than past time frames.

After showing factual causation, the claimant should also be able to show that their damages are within the fair scope of liability for the offshore driller.<sup>293</sup> Some courts instead use the term “proximate cause.”<sup>294</sup> However this term has been criticized because unlike a reference to the scope of liability, proximate cause does not accurately tell a jury what they should be deciding.<sup>295</sup> Therefore, instructions should be crafted to inform a jury that for liability to be imposed, the harm that occurred must be a result of the hazards that made that conduct tortious in the first place.<sup>296</sup>

#### D. Uniformity, Fairness, and Predictability

The fundamental goal of maritime law has always been to provide uniformity in the law for the benefit of maritime commerce. Treating offshore drilling different than other maritime activities provides this uniformity. The Framers were concerned with the negative affect on maritime commerce that would be caused by vessels traveling from port to port and having to comply with a different set of regulations and liability at each one.<sup>297</sup> While modern offshore drilling rigs are

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<sup>292</sup> Restatement (Third) of Torts § 29 (2010) (discussing the differences between factual causation and proximate causation).

<sup>293</sup> See *id.* (discussing how factual causation and proximate causation are different and should be treated separately). Note that this Article’s analysis has focused on drilling rigs, which drill and cap the well, rather than production platforms, which subsequently pump the oil or gas out of the well for production. Production platforms are also capable of producing an oil spill. However, absent evidence that oil spills resulting from production platforms are comparable to those resulting from drilling rigs, both in frequency and severity, they should be excluded from this analysis and treated as any other non-drilling maritime tort.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* (stating that some juries interpret “proximate cause” to mean close in space or time, which is not necessarily a requirement for being within the fair scope of liability). Kenneth Feinberg, who oversees the fund BP set up to satisfy “legitimate claims,” stated that “proximate cause” will be the determining factor in who can recover. See Andrew Restuccia, *Feinberg Takes Control*, THE FLORIDA INDEPENDENT, Aug. 23, 2010, <http://floridaindependent.com/6321/feinberg-takes-control-of-spill-compensation-fund-dismisses-criticisms-from-mccollum>. The article also notes that use of the term “proximate cause” is ambiguous and provides little guidance. *Id.*

<sup>296</sup> Restatement (Third) of Torts §29 (2010).

<sup>297</sup> See Major B. Harding, *supra* note 268, at 1529 (stating that “commerce would, arguably, be burdened if maritime players were subject to different rules in different ports.”).



mobile, they do not move cargo from port to port like oil tankers do. Also, the vast majority of oil wells in an area like the Gulf of Mexico are located in federal waters and companies must obtain a federal permit to drill there.<sup>298</sup> Consequently, the main concern of offshore drilling rigs is complying with the federal government, and they will only be subject to state liability in the event that a spill happens to affect a state. This system would provide uniformity to the types of vessels that need it the most.

The proposed system would accomplish both uniformity and predictability through its preemption of state remedies. Scholars have noted OPA's shortcomings and proposed a return to a more uniform system.<sup>299</sup> Those engaging in maritime activities that do not involve drilling will know in advance that any maritime torts fall under the *Robins Dry Dock* rule. This will allow them to assess their businesses' potential liability accordingly. While the causation analysis necessary for offshore drilling will not be quite as clear, it will still be an improved approach since it is limited to a particular industry.<sup>300</sup> Also, the guidelines laid out in the *foreseeable parties* approach will provide for a streamlined system. Courts assessing purely economic losses will be provided with a better framework than they currently are and attorneys can better advise clients as to whether they have a viable claim. The United States has long favored the use of juries to decide factual issues of causation.<sup>301</sup> By providing these juries with more guidance on causation a system that is both fair and predictable has been laid out. Moreover, due to the infrequent occurrence of offshore drilling spills in the U.S. the *foreseeable parties* analysis will rarely be needed.<sup>302</sup>

The goal of fairness can also be accomplished by the proposed system. Since this system would already provide recovery for purely economic losses at the federal level an individual could bring a claim despite the fact that his state may not provide a similar remedy. The *foreseeable parties* approach is also fairer to many individuals since their jurisdiction may interpret OPA's subsection E narrowly. This remedy is needed because the *Robins Dry Dock* rule's restriction of purely economic recovery to commercial fishermen is unfair to others who are similarly situated. It is not clear why other individuals who rely on the ocean as part of their business, whether it be a seafood restaurant or a hotel catering to beach-seeking tourists, should not also be compensated. But while the *Robins Dry Dock* rule can be harsh, it also provides a bright line rule.

Fairness must be balanced alongside predictability. The balance of these two interests should be determined based on the risks of the particular situation. While applying the *Robins Dry Dock* rule to non-drilling maritime torts may seem strict, the likely alternative is to provide a "proximate

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<sup>298</sup> See BOEMRE, VISUAL 1: ACTIVE LEASES AND INFRASTRUCTURE (Sept. 29, 2010), <http://www.gomr.boemre.gov/homepg/lseale/visual1.pdf> (last visited May 27, 2011); See also Margaret A. Walls, *Federalism and Offshore Oil Leasing Resources*, 33 NAT. RESOURCES J. 777, 778 (1993) (observing that "under the current system the federal government has jurisdiction and control over leasing.").

<sup>299</sup> Swanson, *Federalism*, *supra* note 34, at 407 (calling for a return to the more uniform *Jensen* approach).

<sup>300</sup> If a state law provides for purely economic losses then in the event of a maritime tort in their water a court will have to address difficult causation questions for numerous claimants. Under the divided system approach only maritime torts that stem from an offshore spill will subject a court to this.

<sup>301</sup> Terry Carter, *Jury Trial*, 3 No. 48 ABA J. E-REPORT 6 (2004) (quoting U.S. Supreme Court Justice Sandra Day O'Connor for the observation that "[o]ur nation relies on the determinations of juries of our peers ... because [they] are the ones capable of deciding who is to be believed and what the facts are.").

<sup>302</sup> See *Oil Spills and Disasters*, InfoPlease, <http://www.infoplease.com/ipa/A0001451.html> (last visited July 11, 2011) (noting that before the Deepwater Horizon the last major offshore drilling spill near U.S. waters occurred in 1979).

causation” approach to all maritime torts. This approach would clearly not satisfy the goal of predictability. The opposite approach would be to apply the *Robins Dry Dock* rule to all maritime torts. But as this paper has shown, such an approach would be unfair to many. Because it is practically impossible to establish a system that completely satisfies uniformity, predictability, and fairness, the proposed system should balance these interests in a way that benefits society. The divided system provides that balance.

E. *The Offshore Drilling Industry Can Withstand Increased Liability*

The divided system, and in particular the *foreseeable parties approach*, may increase the potential liability of offshore drilling rigs. Courts entertaining tort claims have long been hesitant to expose parties to “crushing liability.”<sup>303</sup> However the offshore drilling industry is largely immune from this for two reasons. First, offshore oil drilling is incredibly profitable. In 2010 it was reported that of the six U.S. companies with the highest revenues, three were in the oil industry.<sup>304</sup> Months after the Deepwater Horizon spill BP estimated that the disaster had cost it \$40 billion, yet the company was already in the process recovering \$30 billion by selling off assets.<sup>305</sup> The company had also sold four oil and gas fields for \$650 million and was confident that other allegedly responsible parties would assist in splitting the costs.<sup>306</sup> Second, because a spill from an offshore drillings rig is rare, a company who takes proper precautions is unlikely to subject itself to extensive liability. When a party like BP undertakes an incredibly profitable, yet risky venture like offshore oil drilling and ignores clear warning signs, it does not seem unfair to subject them to the damage they ultimately cause.

F. *The Divided System is Consistent with the U.S. Clean Energy Policy*

Finally, the divided system may help further the United States’ clean energy initiative.<sup>307</sup> President Obama has put in measures to decrease the emission of carbon pollution and also to convert to clean energy.<sup>308</sup> While the primary purpose of the divided system is to achieve the goals already mentioned, the proposal might pressure certain companies to invest more heavily in energy development that does not stem from fossil fuels. Because any company who seeks to enter the offshore drilling market will be exposed to a wider scope of potential liability it will be more difficult for them to obtain financing and more expensive to acquire various forms of insurance.

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<sup>303</sup> See *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 36 (N.Y. App. Ct. 1985) (stating that courts have a responsibility “in fixing the orbit of duty ‘to limit the legal consequences of wrongs to a controllable degree’ and to protect against crushing ... liability”).

<sup>304</sup> *Rankings of Largest U.S. Companies by Revenue*, FORTUNE, [http://money.cnn.com/magazines/fortune/fortune500/2010/full\\_list/](http://money.cnn.com/magazines/fortune/fortune500/2010/full_list/) (last visited July 11, 2011) (listing Exxon Mobil, Chevron, and ConocoPhillips in the top six).

<sup>305</sup> AP, *BP Returns to Profits After Gulf Oil Spill*, CBSNEWS, Nov. 2, 2010, <http://www.cbsnews.com/stories/2010/11/02/business/main7013714.shtml>.

<sup>306</sup> *Id.*

<sup>307</sup> See President Barack Obama, June 15, 2010 Speech on Energy and the Environment, *available at* <http://www.whitehouse.gov/issues/energy-and-environment>.

<sup>308</sup> *Id.*

Companies who are already major players in the offshore drilling industry may seek to diversify the way in which they engage in energy production. Although it is unlikely that the initial returns on wind farms or solar panel communities would be as substantial as those from offshore drilling, the increased exposure to liability may increase the overall attractiveness of these alternatives. Some major oil companies have already begun to diversify their business with clean energy initiatives.<sup>309</sup> The divided system would provide a further impetus for these companies to convert to clean energy since the potential liability of those ventures would be less than with offshore drilling.

## VI. Conclusion

As long as offshore oil drilling in the Gulf continues, the threat to Florida's environment and economy looms over the horizon. Yet the uncertainty discussed in this paper has shown that the problem is not exclusive to just Florida. The last century has seen numerous failed attempts by the courts and Congress to try and provide clarity to oil spill liability. However it is unlikely that any system will make everyone happy. The best evidence of this occurred in the months after the Deepwater Horizon spill. Angry citizens pleaded with the government to clean up the spill faster and prevent it from ever happening again.<sup>310</sup> In its haste to figure out a solution the Federal Government placed a moratorium on offshore drilling in the Gulf.<sup>311</sup> Rather than improve the situation, the ban devastated many Gulf Coast residents who rely on the oil and gas industry for their livelihood.<sup>312</sup> Whether it is the environment or the economy there are simply too many interests to reach a perfect balance. However, by factoring in fairness with the historical principles favoring uniformity and predictability, it is possible to implement a superior system than the one currently governing oil spill liability.

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<sup>309</sup> See, BP, *Clean Energy*, BP.COM, <http://www.bp.com/multipleimagesection.do?categoryId=7042&contentId=7051420> (last visited July 11, 2011).

<sup>310</sup> Kelly Cobiella, *Ala. Angry Over Slow Spill Cleanup, Compensation*, CBSNEWS, June 9, 2010, <http://www.cbsnews.com/stories/2010/06/09/national/main6564115.shtml> (quoting Alabama residents upset that despite the sight of oil washing into their bays there was a pile of unused boom on dry land and "one boat with a shovel.").

<sup>311</sup> Penny Starr, *Republicans Say Obama's Drilling Moratorium Could have Taxpayers Picking up Tab for More Unemployed Oil Workers*, CNSNEWS, July 29, 2010, <http://www.cnsnews.com/news/article/70190>.

<sup>312</sup> See Alastair Good, *Drilling Moratorium Devastates Louisiana Business*, GulfCoastProject, <http://gulfcoastproject.org/gulf-of-mexico-oil-spill/drilling-moratorium-devastates-louisiana-business> (last visited July 11, 2011) (reporting that a Louisiana business that sold drilling mud lost 95% of their business overnight).