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Oil Spill Litigation: Private Party Lawsuits and Limitations

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OIL SPILL LITIGATION: PRIVATE PARTY LAWSUITS AND LIMITATIONS

*Bruce B. Weyhrauch**

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I. INTRODUCTION

Oil spills leave more than an environmental mess in their wake. They usually leave a mess of litigants and court dockets jammed with lawsuits filed by private and public parties, making claims for damages based upon a myriad of theories of liability. This article discusses the types of private parties who bring lawsuits after an oil spill, and the grounds for their suits.

Cleaning oil-fouled beaches and restoring natural resources damaged by an oil spill are typically functions of state and federal governments. Still, beach owners, users of beaches, sport and commercial fishermen, and businesses often claim to have suffered damages after an oil spill. Thus, private party litigation plays an important role in oil spill cleanup.

This article also overviews both the types of damages private parties seek and the federal environmental laws with citizen suit provisions under which private litigants may sue. Most federal environmen-

tal laws do not allow parties to recover private damages. Rather, available federal statutes allow private parties to bring suit to enforce environmental laws when the government does not enforce those laws.[1] Usually, private party claims for damages are brought by property owners, businesses, and fishermen who have suffered direct physical or economic effects from an oil spill.

Most of the remedies available to private plaintiffs suing for environmental damages derive from the common law.[2] Other causes of action available to private parties arise from state oil spill liability laws.[3]

Part II sets the stage for this article through the *Exxon Valdez* oil spill. This oil spill, which occurred in 1989 in Alaska's Prince William Sound, led to several legal developments. Congress, for example, reacted by passing the Oil Pollution Act of 1990 (OPA).[4] Litigants flocked to courts around the country, causing jurists and litigants to reevaluate the theories and limitations to oil spill lawsuits.[5]

Part III of this article sets forth various theories of recovery included in private party lawsuits filed after oil spills. The primary causes of action alleged by private parties suing after an oil spill include nuisance, trespass, negligence, and statutory strict liability.

Part IV examines several categories of private party plaintiffs who may potentially file lawsuits after an oil spill. Typical private party plaintiffs suing for damages after an oil spill include fishermen, beach property owners, recreational users, and businesses that claim adverse effects by an oil spill.

Part V discusses the types of damages claimed by private party plaintiffs. Besides direct compensatory damages, these private parties may claim damages to their real property, reduced income, and incidental, emotional, and punitive damages.

Part VI describes relevant federal environmental laws, notably the Clean Water Act (CWA)[6] and the Oil Pollution Act of 1990,[7] with provisions that authorize private parties to sue to enforce the laws on behalf of the government.[8] Congress passed most of these federal laws

1. *See, e.g.*, The Clean Water Act, 33 U.S.C.S. §§ 1251-1387 (Law Co-op. 1987 & Supp. 1991), Part VI(B).
2. *See infra* Part III.
3. *See, e.g.*, ALASKA STAT. § 46.03.822 (1991) (Alaska's statute providing for strict liability for oil spill damages).
4. *See infra* Part VII(C).
5. Parties filed *Exxon Valdez* oil spill-related lawsuits in Alaska, Washington, New York, California, Florida, and District of Columbia courts. *See infra* notes 16-22 and accompanying text.
6. 33 U.S.C. §§ 1251-1387 (Law. Co-op. 1988 & Supp. 1991).
7. 33 U.S.C. §§ 2701-2761 (Law. Co-op 1988 & Supp. 1991). *See infra* Part VII(C).
8. *See infra* Part VII(C). See also discussions of the Trans-Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C.S. §§ 1651-1656 (Law Co-op. 1980 & Supp. 1991), which allowed private parties to recover for damages for Trans-Alaska Pipeline oil spills, *infra*, Part VIII(A).

over the last twelve years. Of these laws, only the OPA allows private parties to receive compensation for oil spill damages.

Part VII reviews both salient federal laws and judicial decisions that limit private damage claims. The key statute limiting an oil spiller's liability is the federal Limitation of Liability Act (LLA).[9] The seminal case of *Robins Dry Dock & Repair Co. v. Flint*[10] articulated the common law's limitation on private party damage claims for maritime torts when there is no physical impact or injury.

Part VIII reviews three Alaska cases resulting from oil spills in Alaska: *Glacier Bay I*,[11] *Glacier Bay II*,[12] and *Exxon Valdez*.[13] Each case occurred before passage of the OPA. Each contains common law claims for damages and limitations of liability analysis. In addition, each contains discussions of federal law that are relevant to private party lawsuits.

Part IX concludes that private parties have a variety of legal theories available to bring a claim against an oil-spilling defendant. Plaintiffs should not ignore the opportunity to present oil spill damage claims directly to the oil spiller. Formal or informal discussions and out-of-court, pre-litigation settlements in lieu of litigation avoid what may be a long, tedious, expensive and unsatisfactory legal process in favor of a quick settlement with the spiller. The spiller may also benefit from these pre-litigation (or non-litigation) settlements by avoiding (or minimizing) additional or continuing unfavorable publicity that usually accompanies an oil spill.

II. THE 1989 *EXXON VALDEZ* OIL SPILL

On March 24, 1989, the oil tanker *Exxon Valdez* went aground on Bligh Reef in Prince William Sound, Alaska. The grounding resulted in the release of about 10 million gallons of Trans-Alaska Pipeline North Slope crude oil.[14] The *Exxon Valdez* oil spill became the largest tanker oil spill in United States waters. After that oil spill, the federal government filed criminal charges against the Exxon defend-

9. 46 U.S.C. app. §§ 181-195 (1988).
10. 275 U.S. 303 (1927).
11. *In re* Glacier Bay, 741 F. Supp. 800 (D. Alaska 1990), *aff'd* 944 F.2d 577 (9th Cir. 1991); *see infra* Part VIII(B).
12. *In re* Glacier Bay, 746 F. Supp. 1379 (D. Alaska 1990); *see infra* notes 222-34 Part VIII(C).
13. *In re* Exxon Valdez, 767 F. Supp. 1509 (D. Alaska 1991); *see infra* Part VIII(D).
14. A great deal has already been written about the *Exxon Valdez* spill and will not be repeated here. For a detailed account of the spill, the response and the aftermath, *see* ART DAVIDSON, IN THE WAKE OF THE *Exxon Valdez* (1990). While the *Exxon Valdez* was the largest spill by an oil tanker in United States waters, the *Exxon Valdez* spill was far from the largest oil spill. The following are the top ten oil spills between 1967 and 1989:

ants.[15] In addition, thousands of plaintiffs filed hundreds of lawsuits against Exxon defendants, Alyeska Pipeline Service Company, and others, seeking damages resulting from the *Exxon Valdez* oil spill.[16]

Litigants seeking a variety of damages also filed lawsuits against Exxon defendants in Washington, D.C.,[17] California,[18] New York,[19]

RANK	*DATE*	*SPILL*	*LOCATION*	*VOLUME**
1	1979-80	Ixtoc I, Well Blowout	Mexico	139-428
2	1983	Nowruz Oil Field, Well Blowout(s)	Persian Gulf	80-185
3	1983	*Casillo de Bellver*/Broke, Fire	South Africa	50-80
4	1978	*Amoco Cadiz*/Grounding	France	67-76
5	1979	*Aegean Captain/Atlantic Empress*	off Tobago	49
6	1980-81	D-103 Libya, Well Blowout	Libya	42
7	1979	*Atlantic Empress*/Fire	Barbados	41.5
8	1967	*Torrey Canyon*/Grounding	England	35.7-38.6
9	1980	*Irenes Serenade*/Fire	Greece	12.3-36.6
10	1972	*Sea Star*/ Collision, Fire	Gulf of Oman	35.3

* in millions of gallons

UNITED STATES CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, COPING WITH AN OILED SEA: AN ANALYSIS OF OIL SPILL RESPONSE TECHNOLOGIES 4 (Mar. 1990) (available from the United States Printing Office in Washington, D.C., # OTA-BP-O-63). The *Exxon Valdez* oil spill ranks 35th on this list. *Id.* In the first half of 1991, oil tankers spilled seven times the amount spilled in all of 1990 and twice the amount spilled in 1989. *See* Alan Abrams, *'91 Oil Spills Worst in Decade*, ANCHORAGE DAILY NEWS, Oct. 25, 1991, at C1. About 425,000 tons of oil had already been spilled from various sources in the first half of 1991. *Id.*

15. United States District Court Judge H. Russell Holland rejected a plea bargain between Exxon defendants and the United States concerning criminal fines, and subsequently the guilty plea in the criminal case was withdrawn. *Judge Rejects $100M Exxon Criminal Plea Bargain*, 3 OIL SPILL LITIG. NEWS 3057 (1991). On October 8, 1991, Judge Holland approved a subsequent plea agreement. In addition, Exxon defendants, the State of Alaska and the federal government settled their civil litigation. *Court Accepts State-Federal Pact With Exxon Defendants*, 3 OIL SPILL LITIG. NEWS 3795, 3807-26 (1991).

16. The Federal District Court for the District of Alaska indicates that roughly 190 cases have been filed in that court, which have between 5,500 and 6,000 plaintiffs. Telephone Interview with Mr. Tom Murtiashaw, Docket Clerk, United States District Court for the District of Alaska (April 7, 1992). The State of Alaska, Anchorage Superior Court indicates that 212 cases have been filed in state court, which involve about 3,248 plaintiffs. Telephone Interview with Ms. Diane Alford, Legal Technician, Anchorage Trial Court Administration (April 7, 1992). Both Mr. Murtiashaw and Ms. Alford indicated that it is very difficult to know with certainty the number of plaintiffs involved in these lawsuits because of the myriad types of lawsuits that have been filed (e.g., class actions, shareholder derivative actions, individual lawsuits, etc.).

17. *See, e.g.*, Native Village of Chenega Bay v. Lujan, No. 91-5042, 1991 WL 40471

Washington,[20] and Florida.[21] Even Alabama showed an interest in this Alaska oil spill.[22]

III. COMMON LAW DAMAGE CLAIMS

There are four primary legal theories that private parties typically may assert when making claims for damages to private property. These theories are trespass, negligence, nuisance, and strict liability. After an oil spill, each of these theories probably will be set forth by private party plaintiffs.[23] A party seeking oil spill damages usually pleads one or all of the following actions: (1) causes of action contained in statutes such as strict liability statutes; (2) negligence *per se* as found in statutes or regulations; (3) common law negligence; (4) common law trespass to property; and (5) common law nuisance.

A. *Nuisance*

A nuisance cause of action requires the plaintiff to prove an unreasonable and substantial interference with the use and enjoyment of land.[24] This may include impacts on scenery and on the sensitivities of property owners.[25] The burden of proving nuisance is fairly high, and tangible impacts may have to be shown on the use and enjoyment of plaintiff's property before the plaintiff sets forth a valid claim. Therefore, simply because an oil spill affects aesthetic values, a court may not recognize such a claim.[26] An oil spill in a pristine area is more

(D.C. Cir. Mar. 8, 1991) (several Alaska native villages seeking stay of federal government's settlement with Exxon for spill damages); Native Village of Chenega Bay v. Lujan, No. 91-483, 1992 WL 26014 (D.D.C. Jan. 29, 1992).

18. *See, e.g.*, Benefiel v. Exxon Corp., No. 90-56055, 1992 WL 54005 (9th Cir. Mar. 24, 1992), *aff'g*, No. CV 90-2184, 1990 WL 180503 (C.D. Cal. July 27, 1990) (class action suit by California motorists seeking damages over rise in gasoline prices after the *Exxon Valdez* oil spill); *see infra* note 266-69 and accompanying text.

19. *See, e.g.*, Goldsmith v. Rawl, 755 F. Supp. 96 (S.D.N.Y. 1991) (shareholders suit against Exxon officers and directors over *Exxon Valdez* oil spill).

20. *See, e.g.*, All Alaskan Seafoods, Inc. v. Exxon Corp., No. C90-1598 (W.D. Wash. 1990) (seafood processor seeking damages from *Exxon Valdez* oil spill).

21. *See, e.g.*, Allapattah Serv. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. 1991) (suit by Exxon retailers for lost business because of alleged failure by Exxon to maintain good public image after the *Exxon Valdez* oil spill).

22. Motion to File *Amicus* Brief, *In re* Exxon Valdez, (D. Alaska 1990) (A89-095CI) (motion by Alabama Attorney General to file *amicus* statement on the ability to enforce the state water pollution control statute and on the issue that federal maritime common law does not preempt state oil pollution protection laws).

23. Thomas R. Post, *A Solution to the Problem of Private Compensation in Oil Discharge Situations*, 28 U. MIAMI L. REV. 524, 527 (1974).

24. *See* RESTATEMENT (SECOND) OF TORTS § 821D (1977) (private nuisance is non-trespassory invasion of another's interest in private use and enjoyment of land). For a thorough discussion of nuisance, *see* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 86, at 616-27 (5th ed. 1984).

25. *See* RESTATEMENT (SECOND) OF TORTS § 832 (1977); KEETON, *supra* note 24, at 627-28.

26. *See* Mathewson v. Primeau, 395 P.2d 183, 189 (Wash. 1964); *see also* Allison v. Smith, 695 P.2d 791, 794 (Colo. Ct. App. 1984) (junkyard held nuisance); Charles J.

likely to be considered a nuisance than an oil spill in an area subject to many oil spills that does not have undisturbed visual qualities.[27] This is because, under all the surrounding circumstances, an oil spill in the pristine area may be an unreasonable and substantial interference to a property owner's use and enjoyment of that property. However, an oil spill in a heavily industrialized area with a history of unsightly pollution may not be an unreasonable and substantial interference with use and enjoyment.[28]

The two types of nuisance actions a private party may bring are public nuisance and private nuisance.[29] A public nuisance affects the public in general and the government usually brings an action to abate it.[30] A private party usually brings an individual action or restraining orders to abate a private nuisance.[31] In cases of public nuisance, individuals usually do not obtain a remedy unless they suffer some particular harm.[32] In general, individual state statutes now address actions for public nuisance and have replaced common law nuisance actions.[33]

Courts consider commercial fisheries affected by an oil spill to be distinct from other types of groups and thus have awarded compensation to commercial fishermen on nuisance grounds.[34] Losses by an entire community[35] affected by an oil spill "nuisance" are only a "com-

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Doane, Comment, *Beyond Fear: Anticipating a Modern Doctrine in Anticipatory Nuisance for Enjoining Improbable Threats of Catastrophic Harm*, 17 B.C. ENVTL. AFF. L. REV. 441, 448-52 (1990).

27. *See Allison*, 695 P.2d at 794.

28. *Id.*

29. *See* RESTATEMENT (SECOND) OF TORTS §§ 821B, 821D (1977); KEETON, *supra* note 24, §§ 87, 90.

30. KEETON, *supra* note 24, § 90, at 643; RESTATEMENT (SECOND) OF TORTS § 821B (1977).

31. RESTATEMENT (SECOND) OF TORTS § 822 cmt. d (1977).

32. *Id.* § 821C cmt. a; KEETON, *supra* note 24, § 90, at 646.

33. RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (1977). For example, Alaska law describes "nuisance" at ALASKA STAT. §§ 09.45.230.250 (1983). The following are a number of cases that address claims made for nuisance in the context of oil or chemical spills. Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc., 271 Cal. Rptr. 596, 603-04 (Cal. Ct. App. 1990) (state may recover damages in a public nuisance action); Exxon Corp. v. Yarema, 516 A.2d 990, 1002 (Md. Ct. Spec. App. 1986) (party may recover in nuisance even when no tangible or physical impact on plaintiff's property); People Express Airlines, Inc. v. Consolidated Rail Corp., 495 A.2d 107 (N.J. 1985) (economic loss damages available even if no physical damages suffered if plaintiff knew or had reason to know defendants were likely to suffer); Biddix v. Henredon Furniture Indus., Inc., 331 S.E.2d 717 (N.C. Ct. App. 1985) (statutory provisions regarding water pollution do not preempt common law, nuisance, or trespass actions); New Jersey Transp. Dep't v. PSC Resources, Inc., 419 A.2d 1151 (N.J. Super. 1980) (oil waste discharge into lake is nuisance as abnormally dangerous activity and liability is absolute).

34. *See, e.g.*, Hampton v. North Carolina Pulp Co., 27 S.E.2d. 538 (N.C. 1943) (long-time, in-river fisherman made a claim for special damages under nuisance when pulp mill destroyed his business).

35. Examples of businesses suffering community losses include beachfront hotels, restaurants, gas stations, and drug stores. These businesses may have problems filling employee slots because oil spill cleanup contractors diminish the labor pool.

mon misfortune."[36] Therefore, they should not expect to obtain compensation for lost profits or reduced incomes after an oil spill.[37] However, there have been cases where beachfront owners who had property affected by oil pollution, and who were precluded from fishing, swimming, boating, or "enjoying" their property could recover under a theory of nuisance because they suffered particular damages.[38]

When an oil spill causes interference with maritime property (such as beachfront property), admiralty and common law courts permit nuisance actions.[39] A plaintiff who establishes that a nuisance exists may seek damage remedies, equitable relief, or abatement.[40] Normally, the measure of damages to property is the depreciation in the market value.[41] Where the damages are not permanent, a private party may seek depreciation in the rental or use of the property while the nuisance existed, plus any damages the plaintiff may incur during the period of the nuisance, such as inconvenience in using the property, relocation costs, or any illness the plaintiff suffered that was caused by the spill.[42]

B. Trespass

Trespass is the physical invasion of property.[43] In order to successfully bring a trespass action, a plaintiff must prove a direct physical invasion of the plaintiff's property. Therefore, a trespass claim is more suitable for plaintiffs who can prove that oil washed up on their beach.[44] Many damage claims made on a nuisance theory can also be made under trespass, including loss of business profits due to property

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36. *See* Burgess v. M/V Tamano, 370 F. Supp. 247 (S.D. Me. 1973), holding that fishermen plaintiffs have a direct economic injury and can recover following a tanker spill of 100,000 gallons of bunker oil. However, beach businessmen (such as tourist trade-related businesses) did not show damages distinct from the public at large and were thus denied recovery. *Id.* at 251.

37. *Id.* For example, after the *Exxon Valdez* oil spill, many workers in Valdez were hired by firms contracted to assist in the cleanup of the oil spill. These cleanup contractors offered higher wages to their employees than some other businesses in Valdez such as gas stations and restaurants. Consequently, those businesses which could not compete with the cleanup contractors for labor allegedly suffered an inability to hire employees. This affected their ability to effectively serve the public, which in turn, according to some, led to reduced profits. *See, e.g.*, Allapattah Serv. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. 1991).

38. *See infra* Part IV(E) (damage claims by beach owners and users).

39. *See* People v. Mack, 97 Cal. Rptr. 448 (Cal. Ct. App. 1971).

40. Keeton, *supra* note 24, § 88, at 637.

41. Tamalunis v. City of Georgetown, 542 N.E.2d 402, 409 (Ill. App. Ct. 1989); Adams v. Arkansas City, 362 P.2d 829, 838-40 (Kan. 1961).

42. KEETON, *supra* note 24, § 89, at 638-39.

43. *See* RESTATEMENT (SECOND) OF TORTS §§ 157-164 (1964) (definition of trespass on land).

44. *See* Wilson v. McLeod Oil Co., 383 S.E.2d 392 (N.C. Ct. App. 1989) (common law cause of action for trespass still available under comprehensive statutory anti-pollution scheme).

damage.[45]

C. Negligence

Negligence is the most common cause of action brought by private plaintiffs for damage to private property. To prevail in a negligence action, plaintiffs must prove that an oil spiller had a duty to exercise a standard of care, breached that duty, and proximately caused damages. As either the danger of an activity or the activity's potential to cause harm increases, the degree of care that must be exercised increases.[46]

Private parties affected by an oil spill usually prefer negligence as their first cause of action because of the breach of a duty to carry oil in a reasonably safe manner.[47] In addition to pleading common law negligence, plaintiffs may turn to state or federal laws which specifically provide for liability of negligent defendants.[48] Further, a party may plead negligence *per se* if a statute defines a standard of reasonable conduct and a spiller acts outside the standard prescribed.[49]

D. Strict Liability

Statutes may provide strict liability for damages by an oil spiller.[50] The transportation of oil may be deemed to be "abnormally dangerous," "inherently dangerous," or "ultrahazardous" and thus give rise to strict liability.[51] In general, a plaintiff recovering oil spill damages under a strict liability statute can recover damages from the oil spiller even though there was no negligence involved in the spill. Both the OPA and state laws provide for instances of recovery to pri-

45. Trespass also is interference with a property owner's use of land. *See* KEETON, *supra* note 24, § 13, at 70.

46. The question of what is an "inherently dangerous activity" is mentioned by several courts and commentators. The rule of what constitutes an inherently dangerous activity "applies equally to work which, although not highly dangerous, involves a risk recognizable in advance that danger inherent in the work itself, or in the ordinary or prescribed way of doing it, may cause harm to others." RESTATEMENT (SECOND) OF TORTS § 427 cmt. c (1964). Inherently dangerous activities must present foreseeable and significant risks of harm to others if not carefully conducted. *See* Western Stock Center, Inc. v. Sevit, Inc., 578 P.2d 1045 (Colo. 1978).

47. See *infra* notes 54-68 and accompanying text for causes of action and legal theories available to various plaintiffs.

48. *E.g.*, 43 U.S.C. § 1653 (Law. Co-op. 1980 & Supp. 1991); 33 U.S.C. § 2702 (Law. Co-op. 1988 & Supp. 1991).

49. RESTATEMENT (SECOND) OF TORTS § 288B (1964); KEETON, *supra* note 24, § 36, at 220-31. In other words, if no excuse exists, the courts presume negligence if they find a statute designed to protect the plaintiff against the harm that occurred. Causation and damages must still be proven. *Id.* at 229-30.

50. *See, e.g.*, ALASKA STAT. § 46.03.822.

51. The Restatement provides that "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm." RESTATEMENT (SECOND) OF TORTS § 519(1) (1976).

vate parties from oil spill damages based on strict liability.[52]

IV. POTENTIAL PRIVATE PARTY PLAINTIFFS

There are many private parties that could file suits for damages after an oil spill. The number and types of private parties suing after an oil spill probably will depend on the size and scope of the spill, who spilled the oil, who owned the oil, and, if a tanker spills oil, what company's name was on the tanker spilling the oil.[53] The types of potential private parties discussed here are not exhaustive and are only intended to exemplify various categories of plaintiffs who may be expected to file suits after an oil spill. In addition, enumeration of these plaintiffs and their claims does not indicate that the claims have merit or that these plaintiffs could prevail in bringing their claims.

A. *Tourist Industry*

Tourist booking agents may sue for the loss of business caused by a decline in the number of tourists coming to coastal areas affected by an oil spill.[54] These plaintiffs would be "indirect" plaintiffs.[55] Courts probably would find that tourist industry litigants suffer only a "common misfortune" or "general misfortune," not specific injury, and therefore could not recover damages.[56]

B. *Waterfowl Guides and Photographers*

Oil spills along a flyway or in a waterfowl nesting area may lead to diminished populations of waterfowl species. Waterfowl hunting guides or photographers might bring claims for damages resulting

52. 33 U.S.C. § 2702(a) (Law. Co-op. 1988 & Supp. 1991).

53. Many of the claims discussed in this section seem very remote, yet they are the types of claims private parties might bring after an oil spill, depending on the size and scope of the spill and the name of the party who spilled the oil (*e.g.*, a "big oil" company vs. small operator). So too will the location of a spill dictate the vigor of litigation. It is probably more likely that a large oil company will be sued longer, harder, and more often, than, say, "Bob's Oil Transport Company."

54. *See* Burgess v. M/V Tamano, 370 F. Supp. 247 (S.D. Me. 1973).

55. In a claim for damages resulting from the tanker *World Prodigy* oil spill on July 23, 1989 in Narraganset Bay, Rhode Island, Barbara and Richard Zacharczyp sued the tanker owner on the basis of negligence and strict liability (claiming the tanker was an inherently dangerous instrumentality containing a hazardous substance). *See* In the Matter of Ballard Shipping Co., No. 89-0685 (D.R.I. Sept. 17, 1991). The Zacharczyps claimed they suffered harm because they were neither able to enjoy their vacation home near the spill nor host a party they had planned for 25 invited guests on June 25, 1989, two days after the spill. The Zacharczyps claimed that the oil spill ruined their vacation and they sought damages for the wages lost when they took time off for vacation, the rent of the vacation home, and the unused food which they could not use during their vacation. *See* Claim of Damages of Barbara and Richard Zacharczyp *in re* Complaint of Ballard Shipping Company for Exoneration From or Limitation of Liability, No. 89-0685L, (D.R.I. Mar. 5, 1990) *reprinted in* 2 OIL SPILL LITIG. NEWS 1803 (1990).

56. *See supra* note 36. *See also infra* note 198.

from reduced business (i.e., reduced number of guide trips due to cancellations). This group, too, would suffer only a general harm and probably would have difficulty recovering damages.[57]

C. *Sportfishermen and Sport Hunters*

An oil spill might result in closures of sport fisheries or a reduced harvest of game in an area. This would reduce the number of sport opportunities and, consequently, would reduce the number of sport hunters and sportfishermen. These parties may bring claims for lost opportunities to hunt and fish. They also may bring claims against the spiller for increased costs due to the need to purchase food if they typically dined on fish and game obtained by their hunting and fishing efforts (like subsistence hunters and fishermen). Or, they may bring claims for incidental costs if they traveled to alternative hunting and fishing sites further away from the spill site.[58] These parties likewise suffer only a general harm and probably could not recover damages.

D. *Natural Resource Developers in an Oil Spill Area*

There are other rather esoteric claims that could be made against an oil spiller by private parties.[59] For example, developers of natural resources may sue an oil spiller for bringing about an unexpected change in regulatory climate because of the oil spill. In addition, if the oil spill is large enough, the regional regulatory atmosphere, economic base, or transportation networks may be generally disrupted. This disruption might lead to higher costs to developers. Those persons who have sought to develop various projects in an area based on certain scenarios may find those scenarios disrupted after an oil spill and, consequently, may find problems in obtaining venture capital for their project because of that disruption.[60]

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57. *See supra* note 56 and accompanying text. Photographers sought damages in *In re* Exxon Valdez, 767 F. Supp. 1509, 1511 (D. Alaska 1991). The claim has not yet been resolved.

58. Taxidermists who rely on sportfishermen for their business may bring a suit against an oil spiller for a reduction in business. If they cannot stuff fish or game because of the oil spill, they might claim economic damages against the spiller. Again, this type of litigant would have a difficult time collecting damages.

59. These claims, in the author's opinion, might only be brought by parties searching for a "deep pocket." *See supra* note 53.

60. Waterfield Eng'g Ass'n Inc. v. Exxon Corp., 3AN-90-3091 CI (Alaska Super. Ct. 1990). In *Waterfield Eng'g*, a gold miner alleged that national news of the *Exxon Valdez* oil spill caused apprehension on the part of investors plaintiff sought to assist in developing mining claims in the area of the oil spill. Plaintiff claimed these investors then put their investments elsewhere. The plaintiff also alleged that oil spill cleanup activities made "transportation facilities" (undefined in the complaint) unavailable to plaintiff. In addition, plaintiff argued that the oil spill caused environmentalists to give plaintiff's development permits greater scrutiny than if the spill had not occurred. *Id.* The claim is unresolved as of this writing.

E. Beach Property and Resort Owners and Users

Oil spilled offshore that drifts onto beaches would affect beach owners and persons using beaches for recreation and for hunting, fishing and gathering activities.[61] Operators of fishing lodges and resorts are one type of private party that can be expected to bring claims for oil spill damages if oil washes up on their beaches. The oil has the potential to harm docks, boats and motors. This oil on beaches could lead to visitor cancellations and fewer resources available to users of beaches, such as beach combers, clam diggers and bathers.[62] So too could resort owners make claims for damages if patrons refused to come to their resort because of an oil spill, provided the resort owner could prove damages.[63]

F. Commercial Fishermen

Courts favor claims by commercial fishermen for economic damages incurred because of an oil spill.[64] Commercial fishermen may generally recover lost profits even though they do not have a property

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61. *See, e.g.*, Fort Worth & R.G. Ry. Co. v. Hancock, 286 S.W. 335 (Tex. Civ. App. 1926) (the operator of a resort that included a bathing pool in the channel of a river was awarded damages for loss of patronage after the railroad company polluted the river with oil).

62. Claim of Gooseberry Beach, Inc., CA-89-0685 (D.R.I. Mar. 2, 1990), *reprinted in* 2 OIL SPILL LITIG. NEWS 1797 (1990). Gooseberry Beach, Inc. is a private corporation which charges persons for parking of motor vehicles and use of beach facilities. On June 23, 1989, the *World Prodigy* spilled oil in Narraganset Bay. According to the Gooseberry Beach, Inc. complaint, the state of Rhode Island closed beaches to swimming for two days, which resulted in profit losses to the beach corporation. The beach corporation based its claim on negligence and asked for lost income of $3,800 which was calculated on the basis of average weekend receipts during the summer of 1989. Another party sued the *World Prodigy* using the theories of negligence, inherently dangerous instrumentality carrying a hazardous substance (an oil tanker), and strict liability. This party claimed that it could neither use and enjoy its waterfront property nor enjoy his daughter's wedding because of the overpowering stench from the oil spill. *See id.* at 1801-02. *See also* 2 OIL SPILL LITIG. NEWS 1639 (1990) (condominium association near *World Prodigy* oil spill suing for loss of use and enjoyment of property, condominium amenities, and the value of investment for the time the beach is rendered unusable due to oil presence).

63. *See* Masonite Corp. v. Steede, 21 So. 2d 463 (Miss. 1945) (owner of a fishing resort on a river that was fed by a tributary defendant polluted could recover damages if proven that the defendant depleted the fish resource around which her business necessarily centered). *Accord* Maddox v. Int'l Paper Co., 105 F. Supp. 89 (W.D. La. 1951).

64. *See* Middlesex County Sewerage Auth. v. National Seaclammers Ass'n, 453 U.S. 1 (1981) (fishermen should look for injunctive relief and damages under state law, not federal common law, in water pollution cases); Milwaukee v. Illinois, 451 U.S. 304 (1981); State of Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985), *cert. denied sub nom.* (commercial fishermen are entitled to damages from Santa Barbara oil well blowout); White v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986); Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974) (commercial fishermen with reduced catch due to Santa Barbara oil spill blowout could recover lost profits); Pruitt v. Allied Chem. Corp., 523 F. Supp. 975 (E.D. Va. 1981).

interest in fish until they are caught.[65] Commercial fisherman may claim that an oil spill generally depressed their markets, leading to reduced prices for the fish they do land, and lost income. Similarly, an oil spill might close an area to fishing. Fishermen may then travel to other distant fishing grounds. These fishermen may claim increased expenses in going to the new fishing grounds, decreased catches because of inexperience in those grounds, or decreased catches because of increased competition on those grounds. The fishermen might also claim that there was more competition for a limited number of fish in a smaller area because of the closed fishing grounds.[66]

G. Commercial Fish Processors

Fish processors in an oil spill area may bring claims for reduced income because they would be processing and selling less fish. Like fishermen, processors may face diminished prices from consumers during, and perhaps after, an oil spill if the spill damages the reputation of seafood. Alternatively, processors may face difficulties in hiring workers if competing oil spill cleanup firms hire those workers to work on a cleanup. Consequently, the processor may have to pay a higher wage to those it does employ. These higher wages probably would not have been necessary were it not for an oil spill cleanup.[67]

H. Fishing Industry Employees

Workers employed by seafood processing facilities may bring lawsuits against an oil spiller if the workers are laid off because of closed fishing seasons. Furthermore, fish processors may not even hire workers if an oil spill occurs before the fishing season. The worker may file a claim against an oil spiller for lost wages, set off by necessary mitigation measures.

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65. *See* Emerson G.M. Diesel, Inc. v. Alaskan Enter., 732 F.2d 1468 (9th Cir. 1984) (vessel down time relating to poor product performance can allow fishermen to recover pecuniary damages); Miller Indus. v. Caterpillar Tractor Co., 733 F.2d 813 (11th Cir. 1984); Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974). *See infra* notes 179-98 and accompanying text.

66. *See* Allred v. Exxon Corp., 3HO-90-234 (Alaska Sup. Ct. Apr. 12, 1990). Allred and others were commercial fishermen who claimed damage to their livelihood from the *Exxon Valdez* oil spill. The fishermen claimed that the oil spill damaged quality of life and fishing opportunities. Fishermen sought damages based on Alaska's strict liability statutes, common law strict liability alleging that transportation of oil was an abnormally dangerous and ultrahazardous activity and pleaded negligence, nuisance, interference with prospective economic advantages, and negligent infliction of emotional distress. They also sought compensatory and punitive damages, and fees and costs. 2 OIL SPILL LITIG. NEWS 1522 (1990). *See also* Hampton v. North Carolina Pulp Co., 27 S.E. 2d 538 (1943) (owner of fishery in a stream has a cause of action for special damages for injury to his business damages).

67. *See, e.g.* Allapattah Serv. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. 1991). *See also supra* the accompanying text to note 21.

I. Gear and Tackle Shops

Gear and tackle shops also may bring suits if fishermen cannot fish in an area because of an oil spill. There would be less of a demand for these suppliers' products, which in turn could lead to reduced income.[68]

V. PRIVATE PLAINTIFF DAMAGE CLAIMS

A. Compensatory

Compensatory damages is the major type of damage claimed by private plaintiffs after an oil spill.[69] Plaintiffs may seek damages for inconvenience caused by contamination of their property by an oil spill.[70] Private parties may attempt to recover for the disruption in their lives after an oil spill, particularly if they live in remote areas and the oil spill prevents them from getting to and from their homes by trail or skiff.

Fishing lodge and resort owners might bring compensatory claims for damage to their beach property. The types of claims that these property owners might bring are: loss of expected value, diminished use and enjoyment of property, economic loss, and losses that an owner may not realize until the owner attempts to sell the property. For example, a prospective buyer may not want to pay a premium price because the beach has been "oiled." Private beach property owners also may attempt to bring a claim for tortious interference with contractual expectancy in the event visitors cancel contracts for

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68. Conley v. Amalgamated Sugar Co., 263 P.2d 705 (Idaho 1953) (owners of grocery store partially built over a creek that defendant polluted were awarded damages because smell from the waste drove away plaintiff's customers and caused a loss of business). *See generally* Global Petroleum Corp. v. Northeast Petroleum, 539 N.E. 2d 1022 (Mass. 1989) (riverfront business denied economic business losses when river blocked by collapsed retaining wall); Palumbo v. Boston Tow Boat Co., 487 N.E. 2d 546 (Mass. App. Ct. 1986) (restaurant owner denied economic damage losses when bridge closed and shut off flow of customers).

69. *See* Andrew W. McThenia & Joseph E. Ulrich, *A Return to Principles of Corrective Justice in Deciding Economic Loss Cases*, 69 VA. L. REV. 1517 (1983); David C. McIntyre, Note, *Tortfeasor Liability for Disaster Response Costs: Accounting for the True Cost of Accidents*, 55 FORDHAM L. REV. 1001 (1987). *See also* RESTATEMENT (SECOND) OF TORTS § 903 (1977)(compensatory damages replace the loss, or compensate for the loss).

Plaintiffs may seek damages for the loss of the pleasure they obtained from living in an unspoiled area. "Hedonic damages" compensate for the loss of life and pleasure of living. *See* Tina M. Tabocchi, Note, *Hedonic Damages: A New Trend in Compensation?*, 52 OHIO ST. L.J. 331 (1991). For additional discussions of hedonic damages *see* Recent Case, *New York Court of Appeals Denies Loss-of-Enjoyment Damages to Comatose Plaintiffs*, 103 HARV. L. REV. 811 (1990); Kyle R. Crowe, Note, *The Semantical Bifurcation of Noneconomic Loss: Should Hedonic Damages be Recognized Independently of Pain and Suffering Damage?*, 75 IOWA L. REV. 1275 (1990); Erin A. O'Hara, Note, *Hedonic Damages for Wrongful Death: Are Tortfeasors Getting Away with Murder?*, 78 GEO. L.J. 1687 (1990).

70. *See* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1211 (6th Cir. 1988).

using a fishing lodge or resort. If the property owners participate in beach cleanup activities, they may bring claims for damage to their clothing and boats used in the cleanup.

B. *Emotional*

Private parties may attempt to sue an oil spiller for emotional damages. Claims for emotional damages may include damages caused by apprehension, distress, or physical or visual exposure to harmful fumes or substances.[71] Alleviation of the health risk would limit a plaintiff's emotional distress damages.[72]

C. *Punitive*

Punitive damages may be awarded against an oil spiller if the spill occurred because of outrageous, reckless, or malicious conduct. The purpose of punitive damages is to punish a wrongdoer and deter future oil spillers.[73] To support a punitive damages claim, the outrageous conduct of an oil spiller must occur "with malice or bad motives or a reckless indifference to the interests of another."[74] Whether oil is spilled with "malice" is a question of fact for the jury.[75] In addition, all the facts of the case must be considered before making an award of punitive damages.[76] Factors considered in determining punitive damages include the total amount of damages awarded, the type of offense, the wealth of defendant, and others.[77]

VI. PRIVATE PARTY LAWSUITS BROUGHT UNDER FEDERAL LAW

During the past ten years, Congress adopted stiff federal environmental laws with provisions authorizing private citizens to bring suit to enforce these laws.[78] Still, few of these federal laws allow citizens to

71. *See* the following examples for these types of emotional claims: Haggerty v. L & L Marine Servs., 788 F.2d 315, 318-19 (5th Cir. 1986) (exposure to chemical dripolene); Herber v. Johns Manville Corp., 785 F.2d 79 (3d Cir. 1986) (fear of getting cancer from breathing asbestos); Mink v. University of Chicago, 460 F. Supp. 713 (N.D. Ill. 1978); Villari v. Terminex Int'l, Inc., 663 F. Supp. 727 (E.D. Pa. 1987). *See also supra* note 69 for a discussion of hedonic damages.

72. *See* Clark v. United States, 660 F. Supp. 1164, 1175 (W.D. Wash. 1987), *aff'd* 856 F.2d 1433 (9th Cir. 1988).

73. Alyeska Pipeline Serv. Co. v. Beadles, 731 P.2d 572, 574 (Alaska 1987). *See* KEETON, *supra* note 24, §§ 9, 14.

74. *Beadles*, 731 P.2d at 574.

75. *See* Alyeska Pipeline Serv. Co. v. O'Kelley, 645 P.2d 767, 774 (Alaska 1982). Negligence does not warrant an award of punitive damages. *Beadles*, 731 P.2d at 574 (citing Hayes v. Xerox, 718 P.2d 929 (Alaska 1986)). Courts cannot instruct juries to award punitive damages as those awards are within the discretion of the trier of fact. Smith v. Wade, 461 U.S. 30, 52 (1983).

76. *See supra* note 75 and accompanying text.

77. RESTATEMENT (SECOND) OF TORTS § 908 (1977).

78. The federal laws described here are relevant to oil spills on marine waters. This discussion is not intended to be an exhaustive analysis of federal laws having

sue for private damages. Instead, when a party spills oil, federal law provides a mechanism for citizens to sue the oil spiller if the government fails to enforce the law.[79] Thus, citizen suits under federal law generally may result in enforcement of the federal law, but not in an award of damages to a plaintiff.[80]

The latest oil spill-related legislation enacted by Congress, the OPA,[81] continues the trend in federal environmental law of allowing citizen suits to ensure enforcement and compliance of federal law. However, the OPA differs in a significant way from earlier federal environmental laws like the CWA.[82] The OPA specifically allows private parties to recover for damages to private property caused by a spill.[83]

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citizen suit provisions. Other commentators discuss citizen suits under federal law in more detail. *See* Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833 (1985); Barry Breen, *Citizen Suits for Natural Resource Damages: Closing a Gap in Federal Environmental Law*, 24 WAKE FOREST L. REV. 851 (1989); Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121 (1985); M. Casey Jarman, *Marine Pollution: Injury Without a Remedy?*, 24 SAN DIEGO L. REV. 603 (1987); David S. Mann, Comment, *Polluter-Financed Environmentally Beneficial Expenditures: Effective Use or Improper Abuse of Citizen Suits Under the Clean Water Act*, 21 ENVTL. L. 175 (1991).

79. *See, e.g.*, federal laws cited *infra* note 83.

80. For example, a plaintiff can sue to enforce provisions of the CWA, but not to recover private damages. *See infra* notes 98-99 and accompanying text.

81. 33 U.S.C.S. §§ 2701-2761 (Law. Co-op. Supp. 1991).

82. 33 U.S.C.S. §§ 1251-1387 (Law. Co-op. 1987 & Supp. 1991).

83. Five other federal acts not discussed in detail here may be relevant in certain oil spill cases and offer statutory remedies to private citizens experiencing impacts from an oil spill. These five acts are: the Deepwater Port Act, 33 U.S.C.S. §§ 1501-1524 (Law. Co-op. 1987 & Supp. 1991); the Outer Continental Shelf Lands Act, 43 U.S.C.S. §§ 1801-1866 (Law. Co-op. Supp. 1991); the Submerged Lands Act, 43 U.S.C.S. §§ 1301-1356 (Law. Coop. 1980 & Supp. 1991); the Marine Protection Research and Sanctuaries Act, 16 U.S.C.S. §§ 1431-1435 (Law. Co-op. Supp. 1991), 33 U.S.C. §§ 1401-1445 (Law. Co-op. 1987 & Supp. 1991); and the Rivers and Harbors Act, 33 U.S.C.S. §§ 401-467(e) (1988). Passage of the OPA affected, amended, or repealed portions of these acts relating to oil spill damages and cleanup.

The Deepwater Port Act (DPA) regulates the operation of deepwater ports in waters beyond the territorial limits of the United States. Presently, only one deepwater port operates in U.S. waters—in the Gulf of Mexico. The DPA authorizes citizens to seek equitable relief for violations of the DPA. If a violation occurs, persons bringing an action under the DPA may recover reasonable attorney's fees and expert witness fees. Citizens may recover for damages to real or personal property, the marine and coastal environment, and to all affected lands, fish, wildlife, and structures. 33 U.S.C. § 1515 (1988).

Congress repealed major portions of the Outer Continental Lands Shelf Act (OCSLA) in section 2004 of the OPA. 33 U.S.C. § 2004 (1988). Citizen suit provisions allowing enforcement of the OCSLA are found in the Submerged Lands Act (SLA). For the most part, the SLA provides a framework for developing the Outer Continental Shelf, studying the impacts of that development, and providing for ordered leasing and permitting of OCS operations. Obtaining relief for oil spills or blowouts resulting from OCS development would primarily be sought under the CWA, state laws, and now, the OPA. However, the SLA provides that a private citizen with an affected interest may sue to compel compliance with the SLA. A court may award reasonable attorney's and expert witness fees to a private party bringing a suit under the SLA. 43 U.S.C. § 1349 (1988).

The Marine Protection, Research, and Sanctuaries Act (MPRSA) regulates and

This part of the article provides only a limited discussion of the Comprehensive Environmental Response and Liability Act (CERCLA)[84] and the Resource Conservation and Recovery Act (RCRA)[85] because these Acts do not apply to oil spills (although their names imply otherwise). The focus in this part is on provisions in these federal acts that (1) allow for citizen suits; (2) give authority to persons to bring claims for private property damages resulting from oil spills; and, (3) allow recovery for other kinds of damages.

A. *CERCLA and RCRA*

Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980.[86] Congress enacted CERCLA, in part, to (1) respond to hazardous waste disposal problems; (2) deal with those responsible for disposing of hazardous substances; and (3) inventory hazardous wastes.[87] However, the use of the word "comprehensive" in the title of CERCLA is somewhat misleading because CERCLA excludes petroleum and crude oil from its definition of "hazardous substance."[88] Moreover, CERCLA does not contain specific provisions for removing spilled oil, nor does it authorize a private citizen to sue an oil spiller for damages to private property.[89] Instead, CERCLA references the Clean Water Act (CWA),[90] which directs the government to prepare national contingency plans

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provides for research of ocean dumping and transportation of waste material. The MPRSA defines "material" to mean garbage and waste, and includes oil if taken aboard a vessel for the purpose of dumping. The MPRSA authorizes civil suits by private parties to enjoin any violations of the MPRSA. Parties bringing suit under the MPRSA may be awarded attorney's and expert witness fees, but not damages to personal or real property. 33 U.S.C. § 1415(g) (1988).

The Rivers and Harbors Act (RHA) while offering important protections for navigable waters and water pollution, does not contain provisions to allow private parties to bring citizen suits to enforce the RHA. Parsell v. Shell Oil Co., 421 F. Supp. 1275 (D. Conn. 1976), *aff'd mem. sub. nom.* East End Yacht Club, Inc. v. Shell Oil Co., 573 F.2d 1289 (2d Cir. 1977), sets forth an excellent analysis of the RHA's "citizen suit" provision, holding that the RHA does not imply a private right of action. 421 F. Supp. at 1278-82.

84. 42 U.S.C.S. §§ 9601-9675 (Law. Co-op. 1989 & Supp. 1991).

85. 42 U.S.C. §§ 6901-6987 (1988).

86. 42 U.S.C.S. §§ 9601-9675 (Law. Co-op. 1989 & Supp. 1991).

87. H.R. REP. No. 1016, 96th Cong., 2nd Sess., pt. 1, at 1, 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119-20. CERCLA authorizes any "person" to commence a civil action against any person violating CERCLA's provisions. 42 U.S.C. § 9659(a) (1988). A party must give notice of a violation before filing suit and may not commence an action if the government is already pursuing action under CERCLA. *Id.* § 9659(d). "Person" includes the United States or any other governmental entity, individuals, and business entities. *Id.* § 9601(21). See 40 C.F.R. § 302.6 (1991) for detailed information on notice procedures and requirements.

88. 42 U.S.C. § 9601(33) (1988). Hazardous substance "does not include petroleum, including crude oil or any fraction thereof which is not specifically listed or designated as a hazardous substance . . . ." *Id.* § 9601(14)(F).

89. *Id.* § 9605. *See* George Pendygraft et al., *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 IND. L. REV. 117 (1988).

90. 33 U.S.C.S. §§ 1251-1387 (Law. Co-op. 1987 & Supp. 1991).

to remove oil and hazardous substances.[91]

Private plaintiffs also may attempt to sue under the Resource Conservational Recovery Act (RCRA).[92] RCRA's citizen suit provisions allow damage recovery for solid waste discharges.[93] Since passage of the OPA, the terms of RCRA would not apply to oil spills.[94] OPA's comprehensive scheme of oil spill penalties and restoration is the more appropriate statute to use in oil spill lawsuits.[95]

B. Clean Water Act

In 1972, Congress passed the CWA.[96] Under section 505 of the CWA,[97] citizens may commence a civil action against a person violating any effluent standard or effluent limitation order issued by the EPA or a state.[98] In addition, citizens may bring civil actions against the EPA if the EPA fails to perform an act or duty required by the CWA.[99] However, there is no provision in the CWA for private parties to recover damages.

The CWA prohibits suits in two instances: (1) if a state or federal government is commencing and diligently prosecuting the action under relevant state or federal law,[100] and (2) if the government has issued a final order not subject to further judicial review and has as-

91. *Id.* § 1321 (oil and hazardous substance liability under the CWA). The CWA is the federal law most relevant to oil spills because CERCLA excludes oil from its coverage. *See supra* note 88. *See* Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269 (1989); Faith Halter & Joel T. Thomas, *Recovery of Damages by States for Fish and Wildlife Losses Caused by Pollution*, 10 ECOLOGY L.Q. 5 (1982).

92. 42 U.S.C. §§ 6901-6987 (1988); *see* Zands v. Nelson, 779 F. Supp. 1254 (S.D. Cal. 1991) (once gasoline leaks it is a solid waste under RCRA).

93. 42 U.S.C. § 6972 (1988).

94. It may be that oil spill removal falls under the comprehensive scheme for pollution control in the CWA for pre-OPA spills. *See* 33 U.S.C.S. § 1321 (Law. Co-op. 1987 & Supp. 1991). *See generally* Legal Envtl. Assistance Found. v. Hodel, 586 F. Supp. 1163 (E.D. Tenn. 1984) (conflicts between RCRA and Atomic Energy Act).

95. *See infra* Part VI(C). The OPA provides that the OPA is not to modify the liabilities of any person under RCRA. 33 U.S.C.S. § 2718(a) (Law. Co-op. 1987 & Supp. 1991).

96. 33 U.S.C.S. §§ 1251-1387 (Law. Co-op. 1987 & Supp. 1991).

97. 33 U.S.C. § 1365 (1988).

98. *Id.* § 1365(a)(1). "Person" includes the United States or any other governmental instrumentality or agency. The CWA sets forth effluent standards and limitations at *id.* §§ 1311, 1316, 1317. The CWA allows a citizen to seek an action against any "person" for violating effluent standards. *Id.* § 1365(f). This section sets forth CWA's effluent standards very broadly. Similarly broad is the definition of person, which includes "an individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a state, or any interstate body." *Id.* § 1362(5). Suits against a government agency are only permitted to the extent allowed by the eleventh amendment to the United States Constitution. *Id.* § 1365(a)(1). *See generally* Steven Gaynor, Comment, *The Dilemma of the Downstream Plaintiff in an Interstate Water Pollution Case*, 37 BUFF. L. REV. 257 (1988).

99. 33 U.S.C. § 1365(a)(2) (1988).

100. *Id.* § 1365(b)(1)(B). If the state or EPA is prosecuting a CWA compliance action, citizens may still intervene as a matter of right to protect their interests. *Id.*

sessed a penalty.[101] Thus, private citizens may press CWA claims in only a few instances.

Before filing a civil action under the CWA, the private party must give notice of the alleged violation to either the state in which the violation occurs or the EPA, and to the alleged violator.[102] Reasonable attorney and expert witness fees may be awarded to prevailing or substantially prevailing parties.[103] The court also may require a bond or other security if the private party seeks a temporary restraining order or preliminary injunction.[104]

The CWA does not limit citizen suits to past violations.[105] Instead, suit may be brought in cases where there is a reasonable likelihood that a past polluter will continue to pollute in the future.[106] The primary purposes for enacting the citizen suit provision of the CWA were to spur government cleanup of polluted water and to supplement the government's enforcement actions using citizen suits.[107] Environmental groups have brought some of the citizen suits authorized by the CWA to enforce government-required water effluent standards and to clean up already polluted waters.[108] Because the CWA did not comprehensively address oil spills, in 1990, Congress adopted a new legislative scheme for the cleanup and the prevention of oil spills and for the punishment of oil spillers.

C. Oil Pollution Act of 1990

In 1990, Congress passed the OPA.[109] The greatest impetus for passage of the OPA was the 1989 *Exxon Valdez* oil spill in Prince William Sound, Alaska.[110] To date, the OPA is the most comprehensive act dealing with oil spill liability and compensation.[111] Under the OPA, a vessel or facility discharging oil (or even threatening to dis-

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101. *Id.* § 1319(g)(6)(iii).
102. *Id.* § 1365(b)(1)(A).
103. *Id.* § 1365(d). There is no provision for private recovery or economic damages in the CWA.
104. *Id.*
105. *See id.* § 1365(g).
106. *See* Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 55 (1987). Citizens permitted to bring suits under CWA are those having an interest "which is or may be adversely affected." 33 U.S.C. § 1365(g) (1988).
107. S. REP. No. 414, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 3668, 3746-47.
108. *See, e.g.*, Mann, *supra* note 78, at 183.
109. 33 U.S.C.S. §§ 2701-2761 (Law. Co-op. Supp. 1991).
110. S. REP. No. 94, 101st Cong., 2d Sess., *reprinted in* 1990 U.S.C.C.A.N. 722, 723. Congress suggested that oil spills were simply a cost of doing business because payment for oil spill cleanup and damages were not greater than efforts to prevent spills and develop appropriate cleanup techniques. *Id.* at 724.
111. *See* 3 AILEEN JENNER ET AL., 3 BENEDICT ON ADMIRALTY 1 (7th ed. 1991) (Oil Pollution Act of 1990 detailed commentary (Special Alert)); *see also* Antonio J. Rodriguez & Paul A.C. Jaffe, *The Oil Pollution Act of 1990*, 15 TUL. MAR. L.J. 1 (1990); Thomas J. Wagner, *The Oil Pollution Act of 1990: An Analysis*, 21 J. MAR. L. & COM. 569 (1990).

charge oil) onto navigable waters or adjoining shorelines is liable for damages.[112] "Discharge" means any emission of oil and includes both intentional and unintentional oil spills.[113]

Under the OPA, an oil spiller is liable for direct and indirect damages resulting from the spill and the costs of cleaning up the spill.[114] These costs and damages include oil removal costs, losses resulting from natural resource damages and destruction, and the costs of assessing oil spill damages.[115] Damages also include injuries to real or personal property and economic losses resulting from property damage caused by a spill.[116] The OPA also allows private parties to recover damages for lost revenues, profits, and earning capacity due to injury, destruction, or loss of real and personal property and natural resources caused by an oil spill.[117] At this point it is unclear whether the OPA assists or hinders parties bringing common law damage claims against an oil spiller.

The OPA limits the liability of parties responsible for oil spills to the greater of (1) $1,200 per gross ton, (2) $10 million for vessels greater than 3,000 gross tons, or (3) $2 million for vessels 3,000 tons or less.[118] These limitations do not apply if the oil spill was proximately caused by gross negligence, willful misconduct, or violation of federal laws.[119] In addition, these limitations do not apply if the party responsible for an oil spill fails or refuses to report a spill, or fails to provide reasonable cooperation and assistance concerning oil removal activities.[120]

The OPA sets forth several possible defenses to an oil spiller's liability.[121] Defenses to liability for spills include (1) acts of God or

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112. 33 U.S.C.S. § 2702(a) (Law. Co-op. Supp. 1991). The OPA defines "navigable waters" to mean the "waters of the United States, including the territorial sea . . . ." *Id.* § 2701(21). The OPA applies to any oil spill incident and claims arising out of an oil spill occurring on or after August 18, 1990. 43 U.S.C.S. § 1653(c)(14) (Law. Co-op. Supp. 1991).

113. 33 U.S.C.S § 2701(7) (Law. Co-op. Supp. 1991). *See* 56 Fed. Reg. 43,534-01 (1991) (advance notice of proposed rulemaking regarding oil spill response plans and oil discharge removal equipment requirements); 57 Fed. Reg. 1139-01 (announcing the establishment of the Oil Spill Response Plan Negotiated Rulemaking Committee (OSRPNRC)).

114. 33 U.S.C.S. § 2702(a) (Law. Co-op. Supp. 1991).

115. *Id.* § 2702(b)(1)-(2)(A), (B).

116. *Id.* § 2702(b)(2)(B). Any removal costs incurred by a private party must be consistent with the national contingency plan. The OPA does not define "subsistence", but subsistence users of natural resources may still be able to make claims for injury, loss, or destruction of natural resources damaged by an oil spill. *Id.* § 2702(b)(2)(C).

117. *Id.* § 2702(b)(2)(D), (E).

118. *Id.* § 2704(a)(1). Other vessels, deepwater ports, and offshore and onshore facilities all have other separate liability limitations ranging from $600 per gross ton or $500,000 for "other vessels" to $350 million for deepwater ports. *Id.* § 2704(a). Gross tonnage means a vessel's approximate volume; net tonnage is the volume of the vessel's cargo. 46 C.F.R. § 69.9 (1991).

119. 33 U.S.C.S. § 2704(c)(1) (Law. Co-op. Supp. 1991).

120. *Id.* § 2704(c)(2).

121. Defenses to liability are set forth at *id.* § 2703. The Act defines "responsible

war, (2) acts or omissions of a third party not associated with the spiller, and (3) gross negligence or willful misconduct of a damaged claimant.[122] Even if the spiller has a valid defense, it may not escape liability if it fails to report the spill or fails to provide cooperation and assistance in cleaning up the spill.[123]

An important provision of the OPA is the establishment of a fund to pay for oil removal costs, natural resource damage assessments, and claims for uncompensated removal costs or damages.[124] The oil spill compensation fund established by the OPA has several purposes. One purpose is to provide money for immediate cleanup activities.[125] Another purpose of the fund is to provide a source of compensation for claims not paid by spillers because they have invoked a limitation or defense; Congress sought to have the fund compensate oil spill victims, despite a spiller's legal liabilities.[126] Further, the OPA fund is to provide compensation in situations where an oil spiller is unknown or judgment proof.[127]

The OPA amended the CWA in several ways, but did not change the citizen suit provisions of the CWA.[128] There are no specific "citizen suit" provisions in the OPA. This is probably because the OPA establishes a mechanism to pay compensation to damaged private parties. The CWA, on the other hand, is primarily an enforcement statute. The fund established under the OPA supersedes the Fund established under the CWA to clean up oil spills.[129] The OPA increased the liability limits as they formerly existed under the CWA.[130] The monies in the OPA fund are available to pay a limit of $1 billion per oil spill incident for removal costs and damages.[131]

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party" to mean, in the case of vessels, "any person owning, operating, or demise chartering the vessel." *Id.* § 2701(32)(A). The Act also defines the terms "onshore facility," "offshore facility," "deep water ports," "pipelines," "abandoned facilities," "ports," "pipelines," and vessels." *Id.* § 2701(32).

122. *Id.* § 2703(a), (b).

123. *Id.* § 2703(c).

124. *Id.* § 2712(a). However, a claimant must still present claims for removal costs or damages to the responsible party first. *Id.* § 2713(a). The oil spill liability trust fund is described at 26 I.R.C. § 9509 (Law. Co-op. Supp. 1991). The fund receives money from taxes, oil spill damages, and penalties assessed under various federal acts. *Id.* § 9509(b). Congress used the Trans-Alaska Pipeline Authorization Act (TAPAA) as a starting point for the OPA, particularly TAPAA's mechanism for establishing a fund for reimbursing parties damaged by spills of oil shipped through the Trans-Alaska Pipeline. 43 U.S.C.S. §§ 1651-1656 (Law. Co-op. 1980 & Supp. 1991). *See infra* Part VIII(A).

125. 33 U.S.C.S. § 2712(a)(1), (d) (Law. Co-op. Supp. 1991).

126. *Id.* § 2712(a)(1), (4).

127. *See* S. REP. No. 94, 101st Cong., 2d Sess. 5 (referring to S. 686), *reprinted in*, 1990 U.S.C.C.A.N. 727.

128. *See supra* Part VI(B).

129. The CWA Fund was established at 33 U.S.C. § 1321(k) (1988). Section 2002 of the OPA repealed the CWA Contingency Fund. 33 U.S.C.S. § 2002.

130. *See* 33 U.S.C.S. § 1321(c)(5) (Law. Co-op Supp. 1991).

131. 33 U.S.C.S. § 2712 (Law. Co-op. Supp. 1991); 26 I.R.C. § 9509(c)(2) (Law. Co-op. 1991).

Congress only recently adopted the OPA. Therefore, courts have not had the opportunity to test or apply provisions of the OPA to an oil spill as of the date of this article.[132]

VII. LIMITATIONS ON PRIVATE PARTY LAWSUITS

A. *Limitation of Liability Act*

The Limitation of Liability Act of 1851 (LLA)[133] allows a shipowner to restrict liability from the act of a vessel to the value of the vessel. In part, the LLA provides that vessel owner liability is not to exceed the value of the owner's interest in the vessel or in the vessel's "freight then pending."[134] To take advantage of the LLA, a vessel owner must invoke the terms of the LLA, by filing an action in federal court and depositing funds with the court equal to the owner's interest in the vessel or the vessel's freight.[135] If the vessel owner did not know or have reason to know of the vessel's unseaworthiness or negligence in ship operations (if any), the LLA entitles the shipowner to limit liability to the value of his interest in the vessel or the freight.[136]

Whether the LLA applies to private parties suing for damages from an oil spill under state pollution laws is still not entirely clear.[137] Available case law suggests that the LLA would apply in cases where vessels spill oil which damages private property, with the exception of Trans-Alaska Pipeline System (TAPS) oil spills in Alaska.[138]

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132. The United States District Court in Alaska addressed the OPA in analyzing oil spills in Alaska waters. *See In re* Glacier Bay (*Glacier Bay II*), 746 F. Supp. 1379, 1385 (D. Alaska 1990) (discussed *infra* Part VIII(C)). However, the court could not apply the terms to the facts of that oil spill case because the OPA had not yet passed. In addition, the OPA prohibits application of its terms to events before August 18, 1990. *See* 33 U.S.C.S. § 2751(d) (Law. Co-op. Supp. 1991).

133. 46 U.S.C. app. §§ 181-195 (1988). A voluminous body of law describes the LLA and its applications in greater detail than is available here. An excellent starting point is GRANT GILMORE & CHARLES C. BLACK, JR., THE LAW OF ADMIRALTY (2d ed. 1975). *See generally* Fleming James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43 (1972).

134. 46 U.S.C. app. § 183(a) (1988).

135. *Id. See G. Gilmore & C. Black, supra* note 133, at 912-18; The Main v. Williams, 152 U.S. 122, 134 (1894); Complaint of Caribbean Sea Transport, Ltd. v. Russo, 753 F.2d 948, 949-50 (11th Cir. 1985) (discussions of the term "freight then pending" contained in 46 U.S.C. § 183(a)).

136. *Id.* § 183.

137. *See generally* David P. Currie, *State Pollution Statutes*, 48 U. CHI. L. REV. 27 (1981); *In re* Glacier Bay, 746 F. Supp. 1379 (D. Alaska 1990). *See also* Chelentis v. Luckenbach SS Co., 247 U.S. 372, 382 (1918); Southern Pac. Co. v. Jensen, 244 U.S. 204 (1917) (state recovery subject to general maritime law even though recovery sought in state court).

138. *In re* Glacier Bay (Glacier Bay II), 746 F. Supp. 1379 (D. Alaska 1990). *See* Askew v. American Waterways Operators Inc., 411 U.S. 325 (1973) (upholding State regulation of maritime oil spill). The effects of the LLA on liability of a shipowner for oil spills have been the subject of much discussion. *See, e.g.*, Alfred Avins, *Absolute Liability for Oil Spillage*, 36 BROOK. L. REV. 359 (1970); Allan I. Mendelsohn, *Maritime Liability for Pollution: Domestic and International Law*, 38 GEO. WASH. L. REV. 1 (1969); Joseph C. Sweeney, *Oil Pollution of the Ocean*, 37 FORDHAM L. REV. 155 (1968).

In *In re Harbor Towing Corp.*,[139] Harbor Towing filed an LLA petition after an oil spill in Baltimore Harbor. The State of Maryland, seeking reimbursement for cleanup costs, argued that the LLA provisions did not apply.[140] The federal district court, while recognizing that the LLA's limited liability provisions would "not encourage shipowners to proceed to engage in cleanup efforts after their own tortious acts," allowed Harbor Towing to limit its liability.[141]

After *Harbor Towing*, the United States Supreme Court in *Askew v. American Waterways Operators, Inc.*,[142] addressed whether federal pollution laws preempted the State of Florida from imposing its strict liability pollution laws on an oil spiller.[143] In *Askew*, several shipping companies sought to prevent Florida from applying a state oil spill prevention and pollution act. They argued that federal water quality law preempted the state law.[144] The Court held that there was no constitutional or statutory impediment to the State of Florida establishing any requirement or liability concerning the impact of oil spills on Florida's interest or concerns.[145] The Court went on to write: "Whether the amount of costs [Florida] could recover from a wrongdoer is limited to those specified in the Act and whether in turn this Act removes the pre-existing limitations of liability in the Limited Liability Act are questions we need not reach here."[146] Thus, the Court did not address whether the LLA applies to oil spill damages.

In *In re Oswego Barge Corp.*,[147] a case similar to *Harbor Towing*, Oswego Barge, which spilled oil in New York state waters, filed an LLA action in federal court.[148] The State of New York objected. The State based its objections, in part, on its oil spill strict liability statutes.[149] The State attempted to distinguish *Harbor Towing* and argued that two federal circuit court decisions on the LLA should have no applicability because both circuit decisions involved claims brought under federal law regarding damage or impairment of piers on navigable waterways.[150] In addition, New York argued that the limitation of liability statute was anachronistic and, until repealed by Congress, should be narrowly construed.[151]

The federal district court rejected New York's narrow construc-

139. 335 F. Supp. 1150 (D. Md. 1971).
140. *Id.* at 1152.
141. *Id.* at 1157-58. The court concluded that the issue must be addressed by Congress.
142. 411 U.S. 325 (1973).
143. *Id.* at 332.
144. *Id.* at 328.
145. *Id.* at 332.
146. *Id.*
147. 439 F. Supp. 312 (N.D.N.Y. 1977).
148. *Id.*
149. *Id.* at 312-13.
150. *Id.* at 316. *See* Hines, Inc. v. United States, 551 F.2d 717 (6th Cir. 1977); United States v. Ohio Valley Co., 510 F.2d 1184 (7th Cir. 1975).
151. *Oswego Barge*, 439 F. Supp. at 319.

tion and found the LLA still valid, but noted the growing concern over oil spills and their devastating effects on the environment.[152] In addition, the court did not interpret the LLA to deny Oswego Barge its protections.[153] The court held that the LLA applied to exempt the state's environmental claims against the barge company.[154]

B. Robins Dry Dock: *Limits on Economic Damage Claims Without a Direct Physical Impact*

In *Robins Dry Dock*, a vessel's charterer was required by a contract with the vessel owner to periodically turn over the vessel for repair. A dry dock company negligently damaged a vessel's propeller while the vessel was in dry dock for repairs.[155] The charterer brought an action for damages against the dry dock company, because, as a result of the propeller damage, the vessel was unavailable for charter for an additional two weeks.[156] The charterer paid no hiring fees during the maintenance period, but sought to recover its expected profits from the use of the vessel that it would earn during that time.

The United States Supreme Court held that the charterer lacked a cause of action and denied recovery.[157] The Court reasoned that the charterer was without a proprietary interest in the vessel, and, therefore, could not recover economic losses based on the dry dock's unintentional interference with charter contracts.[158] The *Robins Dry Dock* rule limited the plaintiff's recovery of foreseeable damages and precluded recovery for economic loss absent physical damage or injury to plaintiff's property.[159]

1. Historical Context and Background of *Robins Dry Dock*

The Justice Holmes authored-opinion in *Robins Dry Dock* was the first United States Supreme Court pronouncement of a bright-line

152. *Id.* at 320.
153. *Id.*
154. *Id.*
155. Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). The area of limitation of liability and interaction between *Robins Dry Dock* and the LLA is a complex and lengthy body of law. *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 13-7, at 472-73, and § 17-3, at 542-44 (1987) (economic losses and remote claims and compensatory damages for oil spills); James W. Shephard, Comment, *The Murky Waters of* Robins Dry Dock: *A Comparative Analysis of Economic Loss in Maritime Law*, 60 TUL. L. REV. 995 (1986) (general discussion, exceptions to, and historical development of the *Robins Dry Dock* rule). *See generally* Michael P. Sullivan, Annotation, Robins Dry Dock *Doctrine Limiting Recovery For Economic Losses Due To Unintentional Maritime Torts*, 88 A.L.R. FED. 295 (1988). For a thorough discussion of the *Robins Dry Dock* rule, *see* David R. Owen, *Recovery for Economic Loss Under U.S. Maritime Law: Sixty Years Under* Robins Dry Dock, 18 J. MAR. L. & COM. 157 (1987).
156. *Robins Dry Dock*, 275 U.S. at 307.
157. *Id.* at 309.
158. *Id.* at 308.
159. *Id.* at 309. *See* RESTATEMENT (SECOND) OF TORTS § 766(C) (1977) (generally adopting the *Robins Dry Dock* rule).

bar to recovery for economic damages.[160] At least one court cites the case as the basis of a *per se* rule against "recovery for economic loss caused by an unintentional maritime tort absent physical damage to property in which the victim has a proprietary interest."[161]

Justice Holmes concluded that the charterer lacked property rights in the vessel, and that the charterer's loss arose solely from its contract with the owner, not from any interest in the vessel.[162] Justice Holmes wrote that the dry dock owners knew nothing of the charter contract:

> [N]o authority need be cited to show that . . . a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong . . . . The law does not spread its protection so far.[163]

Though Justice Holmes cited no authority for this proposition, he alluded to three cases that concerned claims for indirect economic loss: *Elliot Steam Tug v. The Shipping Controller*,[164] *Byrd v. English*,[165] and *The Federal No. 2*.[166] *Elliot Steam Tug*, a case that allowed lost profits under a wartime indemnity statute, stated that economic loss might be recoverable under traditional tort rationales of foreseeability or proximate cause, but stated the common law rule this way:

> The Charterer in collision cases does not recover profits, not because the loss of profits during repairs is not the direct consequence of the wrong, but because the common law rightly or wrongly does not recognize him as able to sue for such an injury to his merely contractual rights.[167]

Justice Holmes' opinion in *Robins Dry Dock* does not directly address this question of "right or wrong" raised in *Elliott Steam Tug*'s dicta, though it seems to lurk in the background of his jurispru-

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160. *See* E. John Heiser, Note, *Recovery of Economic Losses*: Robins Dry Dock *Remains a Dominant Force* — Louisiana *ex rel.* Guste v. M/V Testbank, 10 MAR. LAW. 283 (1985).

161. Amoco Transp. Co. v. S/S Mason Lykes, 768 F.2d 659, 666 (5th Cir. 1985). *See* Shephard, *supra* note 155.

162. 275 U.S. at 308. Holmes wrote that if the charterers have a claim against third parties, "it must be worked out through their contract relations with the owners, not on the postulate that they have a right *in rem* against the ship." *Id.*

163. *Id.* at 309.

164. [1922] 1 K.B. 127 (C.A. 1921).

165. 43 S.E. 419, 421 (Ga. 1903) (holding that recovery for third-party economy loss would encourage collusion, extravagant contracts, and a portentous system of litigation).

166. 21 F.2d 313, 314 (2d Cir. 1927) ("damage suffered by one whose interest in the party or thing is contractual is too remote for recovery.").

167. [1922] 1 K.B. at 140.

dence.[168] Instead, Justice Holmes simply cites *Elliot Steam Tug* as a basis for his bright-line approach in barring recovery for economic damages. Interestingly, the *Robins Dry Dock* opinion and other early American cases using the bright-line approach paralleled similar developments in English legal theory.[169]

2. Factors Influencing Justice Holmes

The most apparent reason for Holmes' rigid rule is that, as Professors Prosser and Keeton opined, the courts stand "more or less in dread of a 'flood of litigation' involving problems which they are not prepared to deal with."[170] This concern may have been particularly acute at the time the Court decided *Robins Dry Dock*: when courts were experimenting with and expanding the notions of foreseeability to extend the limits of liability for physical injuries.[171] Justice Holmes perhaps did not consider foreseeability rationale suitable in the area of third-party economic damage, where repercussions of negligence might be far wider.[172]

Also, Justice Holmes advocated the private ordering of affairs through contract and did not favor expansive notions of liability.[173] At a basic level, Justice Holmes believed that "the loss from accident must lie where it falls,"[174] and that people could shift loss, or protect against it, through insurance or contract.[175] This view allowed Justice Holmes to insist, as he did in *Robins Dry Dock*, that recourse for third-party economic loss be resolved in advance by the parties who fear, or simply perceive, the risk.

In addition, Justice Holmes believed that the law should have predictive value so that persons could order their daily affairs with some certainty.[176] Perhaps the law's predictive value would be lost if recovery of economic damages was handled as a matter of foreseeability. Justice Holmes noticed the law's tendency to delineate arbitrarily

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168. *See infra* Part VII(B)(2).

169. 2 HOLMES-POLLOCK LETTERS 86-87 (Mark D. Howe ed., 1941).

170. KEETON, *supra* note 24, § 4, at 23.

171. 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 25.18A (2d ed. 1986). Physical consequences of negligence are usually limited, "but the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended." *Id.* at 623 (footnote omitted).

172. *See id.* and § 6.10, at 335 (footnote omitted) ("The multiplicity of actions and the unforeseeable extension of liability may well have influenced the court in denying the charterer's claim, as a matter of policy, just as the fear of an infinity of claims inhibits courts . . . in other cases involving purely economic loss.").

173. GRANT GILMORE, THE DEATH OF CONTRACT 15-17 (1974).

174. OLIVER W. HOLMES, JR., THE COMMON LAW 94 (Boston, Little, Brown, and Co. 1881).

175. *Id.* at 96; *see* OLIVER W. HOLMES, COLLECTED LEGAL PAPERS 182-83 (1920); FREDERIC R. KELLOGG, THE FORMATIVE ESSAYS OF JUSTICE HOLMES 126 (1984).

176. LIVA BAKER, THE JUSTICE FROM BEACON HILL 217 (1991); HOLMES, *supra* note 174, at 167, 169.

the bounds of recovery.[177] He mirrored this tendency in *Robins Dry Dock*.[178]

C. *Applications of* Robins Dry Dock

Several courts have held that the *Robins Dry Dock* rule does not prevent commercial fishermen from recovering for economic damages caused by an oil spill. For example, in *Pruitt v. Allied Chemical Corp.*,[179] the court held a chemical company liable to commercial fishermen because the chemical Kepone dumped into Chesapeake Bay by Allied Chemical rendered fish caught in the bay unmarketable. However, the fish buyers, who also lost profits because they could not sell pollution-tainted fish, could not recover from the polluter.[180] In *Pruitt*, commercial fishermen, seafood wholesalers, distributors, processors, retailers, bait shop owners, tackle suppliers, and restaurants all filed suit for economic damages; but only the fishermen recovered.[181] The court found that commercial fishermen were entitled to compensation for lost profits, noting that the entitlement arises from "a constructive property interest in the bay's harvestable species."[182] The court also found that fishermen could recover for economic damages "despite any direct physical damage to their own

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177. JUSTICE OLIVER WENDELL HOLMES 28 n.27 (Harry C. Shriver ed. 1936); HOLMES, *supra* note 174, at 68. Justice Holmes was probably influenced to some degree by similar concurrent developments in English jurisprudence. Through at least one letter from Frederick Pollack, Justice Holmes knew that the English courts were wrestling with the issue of open-ended liability for economic loss. HOLMES-POLLOCK LETTERS, *supra* note 169, at 86-87. Pollack also seemed opposed to alterations of any bright-line rule. *Id.*

178. As a historical note, Justice Holmes authored *Robins Dry Dock* when he was 86, just a few years before he resigned from the bench. He did not cite the case or the rule enunciated in *Robins Dry Dock* in any subsequent opinions, but he did express his preference for narrow liability in the earlier case of Southern Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533-34 (1918). The Court has cited *Robins Dry Dock* only a few times since it was written. None of the subsequent cases in which it is cited revisit the rationale of Justice Holmes' holding. In fact, the Court had the opportunity to revisit *Robins Dry Dock* in East River Steamship Corp. v. Trans Am. Delaval, Inc., 476 U.S. 858, 871 n.6 (1986), but chose not to do so.

179. 523 F. Supp. 975 (E.D. Va. 1981).

180. *Id.* at 981-82. *See* Venore Transp. Co. v. M/V Sterma, 583 F.2d 708 (4th Cir. 1978).

181. Indeed, Congress and the courts have always been protective and solicitous of fishermen in recovering damages. *See* 46 U.S.C. § 10601 (1988) (ensuring recovery of fishermen's share of catch). The courts have also indicated favor for fishermen recovering economic damages. *Trans Am. Delaval, Inc.*, 476 U.S. at 869 n.5; Emerson G.M. Diesel, Inc. v. Alaskan Enter., 732 F.2d 1468, 1472-74 (9th Cir. 1984) (economic loss recoverable in admiralty strict liability actions when action brought by commercial fishermen); Jones v. Bender Welding & Mach. Works, Inc., 581 F.2d 1331, 1337 (9th Cir. 1978) (fishing vessel owners and commercial fishermen may recover for lost fishing profits); Union Oil Co. v. Oppen, 501 F.2d 558, 570 (9th Cir. 1974); Carbone v. Ursich, 209 F.2d 178, 182 (9th Cir. 1953) (recognizing a "special situation" of fishermen in a "special rule" giving fishing vessel crew members recovery for lost profits resulting from another vessel damaging a fishing net).

182. 523 F. Supp. at 978.

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property."[183]

The *Pruitt* court found "itself with a perceived need to limit liability, without any articulable reason for excluding any particular set of plaintiffs."[184] The court struggled with deciding how to distinguish one set of damaged plaintiffs that could recover (for example, commercial fishermen) from another class of plaintiffs who could not (for example, seafood catchers, wholesalers, retailers, processors, distributors, restaurateurs, parties such as gear shops that sold to fishermen, employees of these businesses, etc.).[185] The court alluded to a desire to avoid double counting damages.[186] "Considerations both of equity and social utility suggest that just as defendant should not be able to escape liability for destruction of publicly owned marine life entirely, it should not be caused to pay repeatedly for the same damage."[187] Ultimately, the court allowed fishermen to recover, but disallowed damages sought by seafood purchasers and marketers because they were not sufficiently direct.[188]

Similarly, the court did not allow sportfishing interests to recover damages because it characterized those damages as small and difficult to establish.[189] The court did allow boat shops, tackle shops, bait shops, and marina owners to recover because damages to these parties were "foreseeable."[190] In part, the court found that those businesses that operate on the "water's edge" or on the water itself had a closer link to damages and, therefore, damage claims.[191] Those plaintiffs more removed from "direct" damages, such as onshore businesses that purchased and marketed fish from commercial fishermen, would not recover damages.[192] The court also upheld this conclusion under admiralty law citing to *Robins Dry Dock*.[193]

Another important case that analyzes the limitations imposed by *Robins Dry Dock* is *Louisiana ex rel. Guste v. M/V Testbank*.[194] The *M/V Testbank* collided with another barge in the Mississippi River spilling pentachlorophenol (PCP). As a result, the United States Coast Guard closed the Mississippi River outlet to navigation and suspended all fishing in a 400-square mile area. Shipping interests, marinas, boat rental operators, seafood buyers, restaurants, tackle shops,

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183. *Id.*
184. *Id.* at 980.
185. *Id.* at 979.
186. *Id.*
187. *Id.*
188. *Id.* at 980.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 982; *see also* Venore Transp. Co. v. M/V Struma, 583 F.2d 708 (4th Cir. 1978) which the *Pruitt* court relied upon in limiting recovery to commercial fishermen under *Robins Dry Dock*; *but see In re* Exxon Valdez, 767 F. Supp. 1509 (D. Alaska 1991) (questioning why recovery should be limited to commercial fishermen).
194. 752 F.2d 1019 (5th Cir. 1985).

bait shops, and recreational fishermen all filed suit against the owner of the *Testbank*.[195]

The *Testbank* plaintiffs argued that the rule of *Robins Dry Dock* should be limited to interference with contract and should apply only to losses suffered through an inability to perform contracts between those parties claiming injury and other parties.[196] Still, the court rejected the plaintiff's arguments and affirmed the *Robins Dry Dock* rule that plaintiffs who sustain no physical damage to property could not recover purely economic damages against those responsible for the spill.[197]

Thus, cases such as *Testbank* that deny economic loss recovery, absent physical damage, bolster the rule in *Robins Dry Dock*.[198] However, the rule of *Robins Dry Dock* is becoming increasingly questioned, and in some cases, eroded by courts. In particular, claimants who sue for damages for purely economic loss have seen some cases

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195. *Id.* at 1020-21.
196. *Id.* at 1023.
197. *Id.* at 1023-26.
198. Another case applying *Robins Dry Dock* to commercial fishermen's damage claims after an oil well blowout is Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974) (commercial fishermen recovery for Santa Barbara oil well blowout).

> Our holding that the defendants are under a duty to commercial fishermen to conduct their drilling and production in a reasonably prudent manner so as to avoid the negligent diminution of aquatic life is not foreclosed by the fact that the defendants' negligence could constitute a public nuisance under California law. . . . The right of commercial fishermen to recover for injuries to their businesses caused by pollution of public waters has been recognized on numerous occasions. . . .
>
> This injury must, of course, be established . . . [by showing] that the oil spill did in fact diminish aquatic life, and that this diminution reduced the profits the plaintiffs would have realized from their commercial fishing in the absence of the spill. This reduction of profits must be established with certainty and must not be remote, speculative or conjectural. . . .
>
> Finally, it must be understood that our holding in this case does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded by the oil spill of January 28, 1969. . . . Nothing said in this opinion is intended to suggest, for example, that every decline in the general commercial activity of every business in the Santa Barbara area following the occurrences of 1969 constitutes a legally cognizable injury for which the defendants may be responsible. The plaintiffs in the present action lawfully and directly make use of a resource of the sea, viz. its fish, in the ordinary course of their business. This type of use is entitled to protection from negligent conduct by the defendants in their drilling operations.

Id. at 570.

See also Kaiser Aluminum & Chem. Corp. v. Marshland Dredging Co., 455 F.2d 957 (5th. Cir. 1972) (gas production plant did not recover economic losses when large anchor severed gas line because interference with gas pipeline's contract rights unintentional); Dick Meyers Towing Serv., Inc. v. United States, 577 F.2d 1023 (5th Cir. 1978) *cert. denied*, 440 U.S. 908 (1979) (plaintiff's claim for damages arising out of damaged river locks on the theory of negligent interference with business expectancy denied); Louisville and Nashville R.R. v. M/V Bayou Lacombe, 597 F.2d 469 (5th Cir. 1979) (railroad company denied recovery for economic expectancy after bridge negligently struck by vessel); *see generally* Joseph J. Kalo, *Water Pollution and Commercial Fishermen: Applying General Maritime Law to Claims for Damages to Fisheries in Ocean and Coastal Waters*, 61 N.C. L. REV. 313 (1983).

reported in their favor.[199] In addition, passage of the OPA, the Trans-Alaska Pipeline Authorization Act,[200] and recent court decisions in the Alaska federal district court, show a further eroding of the *Robins Dry Dock* protections for defendants who spill oil.

VIII. ALASKA OIL SPILL CASES

In July 1987, the oil tanker *Glacier Bay* spilled about 150,000 gallons of oil from the Alaska Pipeline System (TAPS) into Cook Inlet near Kenai, Alaska.[201] The oil tanker *Exxon Valdez* went aground on Bligh Reef near Valdez, Alaska, in March 1989.[202] Litigation resulting from these spills has resulted in three reported court cases from the Alaska Federal District Court.[203] These cases involve applications of the LLA, the Trans-Alaska Pipeline Authorization Act (TAPAA), *Robins Dry Dock*, Alaska's strict liability statute, as well as claims by many types of plaintiffs seeking damages resulting from these spills. These two Alaska oil spills have also presented the Ninth Circuit Court of Appeals with opportunities to address the limitations placed on attempts to recover economic damages by private parties. Therefore, reviews of these cases are instructive.

A. *Trans-Alaska Pipeline Authorization Act*

Congress enacted the TAPAA in 1973.[204] Under TAPAA, the holder of the trans-Alaska oil pipeline system (TAPS) right-of-way is strictly liable for all damages caused to lands, structures, and natural resources affected by a spill of TAPS oil along the pipeline's right of way.[205] If any damages remained beyond the limits set by Congress, TAPAA directs claimants to seek remedies in court by providing that "damages in excess of $50 million shall be in accord with ordinary rules of negligence."[206]

If a vessel spills TAPS oil, both the owner and operator of the

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199. Kelly M. Hnatt, Note, *Purely Economic Loss: A Standard for Recovery*, 73 IOWA L. REV. 1181 (1988); Edward L. Raymond, Jr., Annotation, *Business Interruption, Without Physical Damage, as Actionable*, 65 A.L.R. 4TH 1126 (1988).

200. 43 U.S.C.S. §§ 1651-1655 (Law. Co-op. 1980 & Supp. 1991).

201. *In re* Glacier Bay, 944 F.2d 577, 579 (9th Cir. 1991).

202. *See supra* note 14 and accompanying text.

203. *In re* Glacier Bay, 944 F.2d 577 (9th Cir. 1991) *aff'g*, 741 F. Supp. 800 (D. Alaska 1990); *In re* Glacier Bay *(Glacier Bay II)*, 746 F. Supp. 1379 (D. Alaska 1990); *In re* Exxon Valdez, 767 F. Supp. 1509 (D. Alaska 1991). District Court Judge Holland wrote each of the district court opinions.

204. 43 U.S.C. §§ 1651-1655 (1988). *See* 43 C.F.R. § 29.3 (1991) (administration of the Fund). The OPA amended or repealed several provisions of TAPAA. *See* 43 U.S.C.S. § 1653 (Law. Co-op. 1980 & Supp. 1991) (liability for damages and amount to be deposited in liability fund).

205. 43 U.S.C.S. § 1653(a)(1) (Law. Co-op Supp. 1991). In these strict liability situations under TAPAA, and prior to passage of the OPA, liability for spills was limited to $50 million for any one incident. *Id.* § 1653(a)(2).

206. *Id.* § 1653(a)(2).

vessel are strictly liable, jointly and severally, for all damages and cleanup costs.[207] TAPAA's damage recovery scheme limits the amount that can be paid for all claims arising out of an oil spill to $100 million.[208] The vessel's owner and operator are jointly and severally liable for the first $14 million of claims. The TAPAA Liability Fund is liable for the balance of claims up to $100 million.[209] If total claims exceed $100 million, the claims are reduced proportionately.[210] Unpaid portions of any claims made against the TAPAA Fund could be asserted under other state or federal law.[211]

B. Glacier Bay I

In *In Re Glacier Bay* (*Glacier Bay I*),[212] the owner of the oil tanker *Glacier Bay* filed an action in district court to limit its liability under the LLA.[213] This motion was challenged on the grounds that the TAPAA repealed application of the LLA to transportation of TAPS oil.[214]

The Alaska Federal District Court held, and the Ninth Circuit Court of Appeals agreed, that the LLA[215] did not apply to claims made on spilled TAPS oil.[216] The Ninth Circuit found that Congress intended TAPAA "to become *the* controlling statute with regard to trans-Alaska oil."[217] Consequently, the Ninth Circuit decided Congress implicitly repealed the LLA with respect to TAPS oil, when it enacted TAPAA.[218] The court of appeals found that the LLA "is contrary to every aspect of TAPAA."[219] In particular, the court noted that applying the LLA to any aspect of TAPAA would frustrate TAPAA's goal of comprehensive remedial damage payments to parties harmed by an oil spill.[220] The Ninth Circuit concluded that Congress intended TAPAA and its strict liability and negligence provisions to operate without limitation.[221]

207. 43 U.S.C. § 1653(c)(1) (1988).
208. 43 U.S.C.S. § 1653(c)(3) (Law. Co-op. Supp. 1991).
209. *Id.*
210. *Id.*
211. *Id.*
212. 741 F. Supp. 800 (D. Alaska 1990), *aff'd*, 944 F.2d 577 (9th Cir. 1991).
213. *Id.* at 801.
214. *Id.*
215. 46 U.S.C. app. § 183 (1988).
216. 741 F. Supp. at 803-04.
217. *In re* Glacier Bay, 944 F.2d at 583 (emphasis in original).
218. *Id.* The court's finding that Congress implicitly repealed the Limitation of Liability Act when it passed TAPAA was primarily based on the reasoning found in Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976).
219. *In re* Glacier Bay, 944 F.2d at 583.
220. *Id.*
221. *Id.*

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C. Glacier Bay II

In a later case arising from the same oil spill, *In re Glacier Bay (Glacier Bay II)*,[222] the Alaska Federal District Court reiterated that TAPAA pre-empted the use of the LLA for spills of TAPS oil.[223] Having held in *Glacier Bay I* that the federal LLA did not apply to limit the liability of a vessel's owners for damages, the court faced private party damage claims in *Glacier Bay II*.[224] The two primary substantive issues the district court addressed in *Glacier Bay II* were: (1) whether fishermen's claims could be compensated under TAPAA and Alaska's oil spill strict liability statute and, (2) whether business losses of non-fishermen were compensable damages under TAPAA and Alaska's strict liability law.[225]

The court held that maritime law applied because the *Glacier Bay* oil spill was a maritime tort; it occurred on navigable waters and bore a significant relationship to traditional maritime activities.[226] Ultimately, the district court held that parties could recover "all provable damages."[227] Moreover, damages were recoverable without evidence of physical harm under either the State of Alaska's strict liability statute or TAPAA.[228] This result emerged because TAPAA provided, in part, that TAPAA's fund " 'shall be strictly liable without regard to fault in accordance with the provisions of this subsection for *all damages*, including clean up costs, sustained by *any person* or entity . . . .' "[229] The court interpreted this section of TAPAA to "mean what the plain language of that statute says: all damages sustained by any person as a result of an oil spill."[230] The court also turned to language in the OPA that addressed oil spill damages.[231] Section 8102(c) of the OPA amended TAPAA to indicate that claims against TAPAA's fund for damages shall include, but not be limited to

> (A) the net loss of taxes, revenues, fees, royalties, rents, or other revenues incurred by a State or a political subdivision of a State due to injury, destruction, or loss of real property, personal property, or natural resources, or diminished economic activity due to a discharge of oil; and

222. 746 F. Supp. 1379 (D. Alaska 1990).
223. *Id.* at 1382.
224. *Id.*
225. *Id. See* ALASKA STAT. § 46.03.822 (1991).
226. *Glacier Bay II*, 746 F. Supp. at 1383. *See* Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972); Robert M. Hughes, III & D. Arthur Kelsey, *Toxic and Environmental Torts Within Admiralty*, 62 TUL. L. REV. 405 (1988).
227. *Glacier Bay II*, 746 F. Supp. at 1386.
228. ALASKA STAT. § 46.03.822 (1991); 43 U.S.C.S. § 1653(c) (Law. Co-op. 1980 & Supp. 1991); *Glacier Bay II*, 746 F. Supp. at 1386-87.
229. *Glacier Bay II*, 746 F. Supp. at 1384 (quoting 43 U.S.C. § 1653(c)(1) (1988) (emphasis added by court).
230. *Id.* at 1385.
231. *Id.*

(B) the net cost of providing increased or additional public services during or after removal activities due to a discharge of oil, including protection from fire, safety, or health hazards, incurred by a State or political subdivision of a State.[232]

The court held that this amendment to TAPAA by the OPA clarified "that certain actual damages perceived by Congress to have been incurred as a result of the more recent *Exxon Valdez* TAPS oil spill were indeed recoverable damages, although clearly beyond the scope of the *Robins Dry Dock* rule."[233]

The district court's opinion in *Glacier Bay II* may be an in-road into damage claim limits established by the *Robins Dry Dock* rule.[234] However, the opinion may be of limited usefulness in non-TAPS oil spills outside Alaska because the *Glacier Bay II* court based its decision in part on TAPAA, which authorizes claims to be brought against an oil spiller, and in part on Alaska's strict liability oil spill statute.

D. Exxon Valdez

Recently, Alyeska Pipeline Service Company and others presented the Alaska Federal District Court in *In re Exxon Valdez*[235] with a motion for judgment on the pleadings against plaintiffs seeking economic damages because of the *Exxon Valdez* oil spill. Alyeska argued that the plaintiffs' claims for economic losses did not have a requisite physical impact or injury as required by both maritime law and *Robins Dry Dock*. The plaintiffs seeking damages were boat charterers, taxidermists, fishing lodges, sportfishermen, photographers, kayakers, fish processors, and fish tenders.[236]

The *Exxon Valdez* court first held that the *Exxon Valdez* oil spill was a maritime tort because it occurred on navigable waters and bore a significant relationship to maritime activity, and therefore, maritime law applied.[237] Having established admiralty jurisdiction, the court addressed the damage claims of shoreside businesses.[238] The court found that under the Admiralty Extension Act,[239] the *Exxon Valdez*

232. *Id.* at 1385 (quoting 43 U.S.C.S. § 1653(c)(13) (Law. Co-op. Supp. 1991)).
233. *Id.* at 1385. *See also* 43 C.F.R. § 29.1 (1989) (TAPAA's implementing regulations defining damages broadly).
234. See *supra* Part VII(B) for a discussion of Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).
235. 767 F. Supp. 1509 (D. Alaska 1991).
236. *Id.* at 1511 (collectively called "area businesses" and "use and enjoyment plaintiffs").
237. *Id.* at 1511-12. *See East River S.S. Corp.*, 476 U.S. at 863-64 (maritime nexus requirement); *Executive Jet Aviation*, 409 U.S. at 268 (relationship to traditional maritime activity). *See also* Hess v. United States, 361 U.S. 314, 318 n.7 (1960) (tort action on navigable waters is within exclusive reach of maritime law).
238. *Exxon Valdez*, 767 F. Supp. at 1512.
239. *Id.*; 46 U.S.C. app. § 740 (1988). "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damages or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage

oil spill proximately caused "the shore-based damage claims, thereby subjecting them to admiralty jurisdiction . . . ."[240] Because maritime law applied to the plaintiffs' damage claims, it did not matter to the court whether the plaintiffs claimed damages under state common law or state statutory strict liability.[241] The court then held that *Robins Dry Dock* and maritime law applied to all tort claims except those based on strict liability.[242]

In analyzing TAPAA and Alaska's strict liability statute, the court first indicated that the Alaska law was a valid attempt to "protect the safety of its citizens, their property, and the state's natural resources by regulating the release of hazardous substances."[243] The court then concluded that Alaska's strict liability statute was similar to TAPAA because TAPAA imposed strict liability on spillers of TAPS oil up to $100 million.[244] The court wrote:

> In the limited situation such as this case where the oil spill was of TAPS oil, the Alaska Act and TAPAA do not conflict to the extent of $100 million. For the first $100 million of damage resulting from a TAPS oil spill, the remedy would be uniform whether claims were brought under TAPAA or the Alaska Act. A conflict does not surface until a TAPS oil spill exceeds $100 million in damages.[245]

The court indicated that if plaintiffs claim damages in excess of TAPAA's $100 million liability limitation, *Robins Dry Dock* would apply to limit additional damages because the applicable law is general maritime law. The court further held that to the extent state law supplements federal maritime law, plaintiffs could recover up to $100 million in recoverable damages.[246] Thereafter, Alaska's strict liability statute could not be effective to avoid federal damage limitations law under *Robins Dry Dock*.[247] Moreover, TAPAA[248] could not be inter-

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or injury be done or consummated on land." *Id.*

240. *Exxon Valdez*, 767 F. Supp. at 1512.

241. *Id.* at 1513-14.

242. *Id.* at 1514.

243. *Id.* The state statute was valid because it did not conflict with federal law and was concurrent with federal maritime law. *Id.*

244. *Id.* at 1515; 43 U.S.C.S. § 1653(c) (Law. Co-op. 1980 & Supp. 1991). The $100 million ceiling in TAPAA, "as specific federal maritime legislation, displaces the general maritime law, including the rule of *Robins Dry Dock*, regarding strict liability." *Exxon Valdez*, 767 F. Supp. at 1515.

245. *Exxon Valdez*, 767 F. Supp. at 1515 (footnote omitted). The "Alaska Act" referred to in the court's decision is ALASKA STAT. § 46.03.822 (1991). The court wrote: "This was essentially the ruling in [*Glacier Bay II*]. The court did not elaborate on the basis for that ruling because the parties in [*Glacier Bay II*] represented to the court that damages did not exceed $100 million." 767 F. Supp. at 1515.

246. *Exxon Valdez*, 767 F. Supp. at 1515.

247. *Id.*

248. The court specifies 43 U.S.C. § 1653(c)(9) (1988), which states that this subsection "shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements." *Id.*

preted as relieving states from limits imposed by maritime law.[249] *Exxon Valdez* plaintiffs' efforts to invoke the state's strict liability statute on damages are still subject to TAPAA's $100 million limitation. To hold otherwise, the court believed that Congress would have had to specifically intend to allow state strict liability statutes to impose a higher limit, a limit higher than TAPAA specifically allows and higher than that which *Robins Dry Dock* would allow.[250] "*Robins Dry Dock* applies to limit the damages recoverable under the Alaska Act in excess of $100 million recoverable under TAPAA."[251]

The court continued that despite the disclaimer of the Ninth Circuit in *Union Oil Co. v. Oppen*[252] of "any intention to disavow *Robins Dry Dock* except for commercial fishermen, this court does not understand how, as a matter of principle, the rule in *Robins Dry Dock* can have application for all claimants who suffer economic loss as a result of a marine tort except commercial fishermen."[253] The court pointed out to the Ninth Circuit that its interpretation of *Robins Dry Dock* is open to some question that could "have implications of . . . monumental proportions."[254]

> The court assumes without knowing that there are thousands of commercial fishermen's claims involved in this litigation. Even if *Oppen* remains the law of the Ninth Circuit, this court and the Superior Court for the State of Alaska are confronted with a substantial number of economic loss claims. This court and, since it is bound to follow federal admiralty law as well, the Superior Court of Alaska urgently need to know whether and to what extent the rule of *Robins Dry Dock* will apply to the economic claims of those who are not commercial fishermen.[255]

The District Court urged the Ninth Circuit to "take this matter up immediately" because, the *Exxon Valdez* oil spill presented the District Court with a substantial number of economic loss claims.[256] Those parties who are not commercial fishermen but who have claims for economic loss would be affected by the Ninth Circuit's decision.

In *Glacier Bay II*, the court seems to have ruled that all provable damages by any person were recoverable and not limited by *Robins Dry Dock* because damages in the *Glacier Bay* oil spill did not exceed $100 million.[257] From this, one might conclude that pre-OPA plaintiffs suing in admiralty for TAPS oil spill damages could recover up to

249. *Exxon Valdez*, 767 F. Supp. at 1515.
250. *Id.* at 1515-16.
251. *Id.* at 1516.
252. 501 F.2d 558 (9th Cir. 1974) (*see supra* note 198).
253. *Exxon Valdez*, 767 F. Supp. at 1518.
254. *Id.*
255. *Id.*
256. *Id.* The Ninth Circuit did not take the matter up immediately.
257. *See Glacier Bay II*, 746 F. Supp. at 1386; *Exxon Valdez*, 767 F. Supp. at 1515 n.6.

$100 million in damages under either TAPAA, a state's statute making a spiller strictly liable for oil spill damages, or both. Applying the *Glacier Bay II* court's reasoning to post-OPA spills, recovery for any oil spill's damages might be limited to $500 million. Under the OPA, the "maximum amount which may be paid from the Oil Spill Liability Trust Fund with respect to . . . natural resource damage assessments and claims in connection with any single incident shall not exceed $500,000,000."[258] This amount is available even if the oil spilled is TAPS oil.[259]

One important conclusion of the *Glacier Bay II* decision is that under TAPAA, Congress intended to compensate all "victims" of TAPS oil spills under TAPAA, notwithstanding the rule of *Robins Dry Dock*.[260] The United States District Court for the District of California used analysis contrary to that applied in *Glacier Bay II* when it wrote that TAPAA incorporated the rule of *Robins Dry Dock*.[261] The California District Court denied recovery to a group of California plaintiffs who sought damages from Exxon defendants for increased gasoline prices following the *Exxon Valdez* oil spill.[262] The Ninth Circuit Court of Appeals affirmed the District Court's *Benefiel* decision but did not rule on the *Robins Dry Dock* issue.[263] Instead, in dicta, the Ninth Circuit indicated that the gas price issue was one of proximate cause, writing that the "spill itself did not directly cause any injury to the appellants . . . ."[264] The Court of Appeals believed that the proximate reason for increased gasoline prices derived from intervening events.[265] As such, causation for plaintiff's alleged damages could not be reasonably established and thus was a decision of proximate cause for the court to make, which dismissed plaintiff's complaint.[266]

When the Ninth Circuit renders its decision in *Exxon Valdez*, it will be faced with the Alaska District Court's decision in *Exxon Valdez* that TAPAA "displaces the general maritime law, including the rule of *Robins Dry Dock*"[267] and language from *Glacier Bay II* that "all provable damages sustained by any person as a result of a TAPS oil spill are compensable . . . ."[268] It is likely that the Ninth Circuit will disagree with the Alaska District Court. In its most recent decision involving TAPAA, the Ninth Circuit wrote that "Congress

258. 26 U.S.C. § 9509(c)(2)(A)(ii) (Law. Co-op. 1991).
259. *See* 43 U.S.C. § 1653(c)(14) (Law. Co-op. 1980 & Supp. 1991).
260. 746 F. Supp. at 1386.
261. Benefiel v. Exxon Corp., 1990 U.S. Dist. LEXIS 13251 (July 27, 1990).
262. *Id.* at 2.
263. 1992 U.S. App. LEXIS 5019 (Mar. 24, 1992).
264. *Id.* at 5.
265. *Id.* These intervening events included the Coast Guard's closing of Port Valdez, decisions by western oil refineries to raise prices instead of using oil reserves to make up for any crude oil shortages, and decisions by distributors, wholesalers, and retailers to pass on price increases. *Id.*
266. *Id.*
267. 767 F. Supp. at 1515.
268. 746 F. Supp. at 1386.

envisioned damages arising out of the *physical effects* of oil discharges," and that "remote and derivative damages . . . fall outside the zone of danger against which Congress intended to protect when it passed TAPAA."[269] Consequently, the Ninth Circuit is probably unlikely to allow parties to claim damages if they have suffered only economic losses from the *Exxon Valdez* oil spill without physical effects. At this point, it is unclear whether the Ninth Circuit will base its decision on proximate cause analysis or principles of maritime common law and *Robins Dry Dock.*

IX. CONCLUSION

Private parties have a wide array of legal theories to use to bring suit against oil spillers. The Oil Pollution Act of 1990 provides additional remedies to plaintiffs and a pool of money that private parties can attempt to use to seek compensation after an oil spill. Yet, given the large number of plaintiffs aggressively seeking damages after an oil spill, the complexity of the law regarding private party lawsuits, and the limited funds available to private parties under the Oil Pollution Act of 1990, the amount of payment on damages may be less than the claim and may be slow in coming.[270] Private parties seeking damages in court will face an expensive, time-consuming process, notwithstanding Congressional attempts at "prompt compensation."[271]

Private parties damaged by a spill should not, however, ignore an opportunity to present a claim for damages directly to the spiller before making claims against an oil spill recovery fund or before filing suit.[272] As demonstrated after the *Exxon Valdez* oil spill, if a party damaged by an oil spill presents documented claims to an oil spiller, the spiller may be very willing to settle the claim. Ultimately, this method prevents further hardship to the claimant and reduced costs to the spiller.[273]

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269. *Benefiel*, 1992 U.S. App. Lexis 5019, at 5 (emphasis added).

270. Ostensibly, the TAPAA Fund was set up with strict liability language to ensure "that trans-Alaska oil spill victims receive prompt compensation without resort to prolonged litigation." *In re* Glacier Bay, 944 F.2d 577, 582 (9th Cir. 1991).

271. *Id.*

272. For example, an oil spiller might be inclined to compensate parties harmed out of court for damages that a party could not recover in court. Parties such as taxidermists, businesses, and others that have no legal grounds (or "shaky" grounds at best) for obtaining damages from a court might be better off seeking a damage settlement with the spiller in this manner. *See, e.g.*, those parties set out in Part IV, *supra.* Through these settlements, the oil spiller avoids negative publicity, might gain positive publicity for attempting to rectify the situation with the damaged public, and the claimant receives payment.

273. This method also avoids negative publicity a spiller faces in the media. For example, after the *Exxon Valdez* spill, Exxon implemented an extensive claims process. By April 1990, one year after the spill, it had made more than 23,800 payments on more than 11,400 claims to more than 10,000 claimants. Affidavit of Richard T. Harvin, *In re* Exxon Valdez Oil Spill Litigation, No. 3AN-89-2533CI (Alaska Super. Ct. Apr. 19, 1990), at ¶ 2. The Exxon claims program had made payments of over $212 million on those claims. *Id.* Exxon set up claims offices in towns affected by the spill

At the time of this article, the Ninth Circuit had not rendered its opinion in the *Exxon Valdez* case.[274] Clearly, the concept that *Robins Dry Dock* limits damage claims to only those who have suffered physical impact from an oil spill and to commercial fishermen troubled Judge Holland.[275] In interpreting *Robins Dry Dock*, Judge Holland seemed to be searching for a way to convince the Ninth Circuit that it should clarify its ruling in *Oppen*, if not completely overrule *Oppen*. The dichotomy in the rule appears to trouble Judge Holland by allowing commercial fishermen to recover for economic damages while denying recovery to others who make similar claims for economic damages.[276]

Judge Holland recognized that the consequences of a decision expanding the ability of non-fishermen to recover economic damages was "monumental."[277] But Judge Holland also hints that if it were left to him, he would allow all types of private parties (onshore and offshore, fisherman and non-fishing businesses) to recover damages. The bases for his allowing recovery would probably be the Admiralty Extension Act,[278] TAPAA,[279] and Alaska's strict liability statute.[280]

The theory of *Robins Dry Dock* seems as sound today as it did when Justice Holmes first developed it in 1927. Parties facing economic damages can insure themselves against those potential damages. To hold an oil spiller responsible for damage claims by a myriad of parties suffering what they claim are economic damages, without any oil physically impacting them, would indeed open the courts up to monumental numbers of additional lawsuits. What, for example, would prevent parties watching scenes of an oil spill on television from suing for the psychic or emotional damages they suffer in seeing

(including Kodiak, Valdez, and Homer, Alaska) and in cities with individuals affected by the spill (e.g. Anchorage and Seattle). Exxon established meetings with affected constituencies (including fishermen's groups and municipalities) to learn of their concerns and attempt to respond to them. *Id.* at ¶¶ 5, 6.

An additional response effort that spillers can use after an oil spill is to hire those parties that may have been affected by the spill, to work on spill cleanup and response. This benefits potential claimants by giving them a job. For example, if fishermen are prevented from fishing because of closed areas due to a spill, the spiller could hire them to work on a cleanup. The spiller benefits by having access to skilled local labor. The spiller also benefits because if the person hired by the spiller sues the spiller for lost income from the spill, the claimant's wages should be deducted from any awards as mitigation setoff. Exxon paid more than $220 million to charter fishing vessels for oil spill cleanup work. *Id.* at ¶ 11. At least one court notes the tremendous efforts of Exxon in compensating claimants, attempting to clean up an oil spill, and paying civil and criminal fines in the billions of dollars. *In re* Oil Spill by the Amoco Cadiz, Nos. 90-2832 to -2841, 90-2857, 90-2946 to -2954, 1992 U.S. App. LEXIS 833 at *3-4 (7th Cir. Jan. 24, 1992).

274. 767 F. Supp. at 1509.
275. *Id.* at 1518.
276. *Id.*
277. *Id.*
278. *See supra* note 239.
279. *See supra* note 245.
280. *Exxon Valdez*, 767 F. Supp. at 1515.

wildlife harmed or waters sullied? The Alaska Federal District Court's deference to Congress's determination that limits of liability in oil spill situations should be legislatively decided is sound.[281] The kinds of political decisions necessary in determining how far liability for an oil spill should extend should be made by the body politic, and not the courts.

281. Other courts reached the same conclusion in different circumstances. *See In re* Harbor Towing, 335 F. Supp. 1150, 1158 (D. Md. 1971); *In re* Oswego Barge, 439 F. Supp. 312 (N.D.N.Y. 1977).