

Causation Issues Under the Oil Pollution Act

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Introduction

On April 20, 2010, the Deepwater Horizon, a mobile offshore drilling rig leased and operated by BP, exploded and caught fire, resulting in the death of eleven workers.² This disaster caused a gushing oil leak which flowed for three months,³ spewing almost five million barrels of crude oil into the Gulf of Mexico, making it the largest off-shore oil spill in history.⁴ Ten days after the explosion, the spill covered 3,850 square miles.⁵

This unprecedented spill caused and continues to cause tremendous damage, including the destruction of natural resources, property damage, and devastation to the Gulf Coast economy. Oil has washed up on beaches and wetlands from Marsh Island, Louisiana to Panama City Beach, Florida, with reports of oil debris stretching to Apalachicola, Florida and beyond.⁶ Thousands of visibly oiled animals, including sea turtles, dolphins, and birds, have been found dead along the coast.⁷ The federal government declared over 88,000 square miles of the Gulf unsafe for fishing, crippling the commercial fishing industry.⁸ With oil reaching many marshes that serve as nurseries for numerous marine life species, the environment and the fishing industry

¹ This paper would not be possible without the hard work of Luke Bentley, Grant Cofer, Stephanie Emens and Parker Miller.

² <http://www.cbsnews.com/stories/2010/04/30/national/main6447428.shtml> (additionally, 115 people were evacuated from the rig, 17 were injured, 3 critically injured).

³ The well was not declared "effectively dead" by Thad Allen (retired Coast Guard Admiral and federal point-man for the spill) until Sept. 19, 2010.

⁴ <http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/7924009/BP-leak-the-worlds-worst-accidental-oil-spill.html> (equivalent to 205 million gallons).

⁵ <http://www.theledger.com/article/20100501/NEWS/100509992/1410?p=2&tc=pg>.

⁶ <http://www.nytimes.com/interactive/2010/05/27/us/20100527-oil-landfall.html>.

⁷ <http://www.nytimes.com/interactive/2010/04/28/us/20100428-spill-map.html>.

⁸ <http://www.reuters.com/article/idUSTRE6AE3RT20101115>

may suffer for years.⁹ The BP Oil Spill also devastated Gulf tourism, an industry that generates \$34 billion in revenue annually and supports 400,000 jobs.¹⁰ The U.S. Travel Association estimated that this disaster will cause over \$23 billion in lost tourism revenue in the three years following the spill.¹¹

As part of the response, BP employed chemical dispersants to break down the oil. Scientists have found that one dispersant, COREXIT® 9500 (also known as EC9500A), is four times more toxic than crude oil.¹² BP has also used COREXIT® EC 9527, a chemical which caused health problems for Exxon Valdez cleanup workers, including disorders of the kidneys and liver.¹³ As of late July, 2010, BP had used more than 1.8 million gallons of COREXIT® 9500 in the Gulf.¹⁴

Eight months after the spill, the extent of the damage remains unknown. Tar balls of oil continue to wash up on shores throughout the Gulf Coast. Fishermen have reported catching oily seafood months after BP declared most of the oil had disappeared.¹⁵ Many scientists predict that it will take years to determine the ecological damages of the spill.¹⁶ The Alaskan coast still retains scars from the 1989 Exxon Valdez spill, which was only 5% of the volume of the Deepwater Horizon Spill.

As a result of the Exxon Valdez and other oil spills, Congress passed the Oil Pollution Act (OPA) in 1990. OPA mandates a strict liability scheme for the victims of oil pollution in

⁹ <http://www.bloomberg.com/news/2010-04-29/gulf-coast-fishing-tourism-imperiled-as-oil-spill-approaches-coastline.html>.

¹⁰ http://www.ustravel.org/sites/default/files/page/2009/11/Gulf_Oil_Spill_Analysis_Oxford_Economics_710.pdf.

¹¹ http://www.ustravel.org/sites/default/files/page/2009/11/Gulf_Oil_Spill_Analysis_Oxford_Economics_710.pdf.

¹² "A Toxic Fix to a Toxic Problem," *The Atlantic*, May 5, 2010. Available at

<http://www.theatlantic.com/technology/archive/2010/05/a-toxic-fix-to-a-toxic-problem/56203/>.

¹³ <http://www.nytimes.com/2010/05/13/business/energy-environment/13greenwire-less-toxic-dispersants-lose-out-in-bp-oil-spill-81183.html>.

¹⁴ http://www.msnbc.msn.com/id/38415786/ns/nightly_news-nbc_news_investigates/.

¹⁵ http://www.fox10tv.com/dpp/news/gulf_oil_spill/oil-covers-catch-hauled-in-by-shrimpers.

¹⁶ <http://abcnews.go.com/US/exclusive-submarine-dive-finds-oil-dead-sea-life/story?id=12305709> (researcher on Alvin submarine remarks that it could take a decade to know damages, she found an 80 square mile kill zone near the oil spill site).

waters of the United States and holds the responsible party liable for damages "that result from such an incident,"¹⁷ including damages to property, natural resources and lost profits.¹⁸ Because OPA is a strict liability statute, the primary issue typically centers on establishing causation between an oil spill and the injured party's damages.

This paper seeks to discuss and analyze the important causation issues for victims making claims under OPA. Section I will provide the background for the enactment of OPA and summarize the relevant clauses of the statute. Section II will address actual causation issues ("but for" causation) for claims involving damages to natural resources, personal injury, and lost profit. Section III will address proximate cause issues (scope of liability), analyzing the limits provided by the liability provisions of the OPA.

I. Oil Pollution Act

Outside of any statutory scheme, oil spill claims are based on federal admiralty and state tort common law. When a polluter's actions create large-scale damages, judges have often struggled with the proper scope of liability. In the wake of the Exxon Valdez Spill, Congress realized that courts might leave thousands of innocent victims uncompensated for their losses. Oil spill victims seeking recovery often had to surmount substantial obstacles, such as legal defenses, statutes of limitation, the corporate form, and burdens of proof that worked in favor of those responsible for the spill.¹⁹ In response, Congress enacted the OPA, which expands the scope of liability beyond those victims with personal injury, property damage, or a commercial fishing license.

¹⁷ 33 U.S.C. §2702(a).

¹⁸ 33 U.S.C. § 2702(b)(2)(B).

¹⁹ See *Rice v. Harken Exploration*, 89 F. Supp. 2d 820, 822 (N.D. Tx. 1999).

OPA states that the responsible party "is liable for ... the damages ... that result from such an incident."²⁰ The statute then goes on to list the following categories of damages in §2702(b)(2):

(A) Natural resources. Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.

(B) Real or personal property. Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.

(C) Subsistence use. Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.

(D) Revenues. Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.

(E) Profits and earning capacity. Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.

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

Each of these six categories of damages requires actual proof of causation, whereby the claimant (individual, business, or government entity) must link damages to the spill. Experience teaches that the vast majority of claimants in the Deepwater Horizon oil spill fall within category E – pure economic damages with no physical injury or property damages. Importantly, category E claims present unique proximate cause issues that must be addressed for claimants seeking losses

²⁰ 33 U.S.C. §2702(a).

attributable to a drop in tourism traffic, for example. Both actual causation and proximate cause issues are discussed in the next sections.

II. Actual Causation ("But for" Causation)

In order to establish a defendant's liability for economic loss under the OPA, claimants must establish they sustained lost profits and/or an impaired earning capacity due to property or natural resource damage resulting from an oil spill incident in navigable waters.²¹ The "due to" and "result from" clauses create an actual causation requirement. Whether the statute requires proximate cause is not as obvious, but that will be discussed thoroughly in the section to follow. For now we will deal with issues related to actual causation.

The economic impact from an unprecedented environmental disaster like the Deepwater Horizon oil spill can reach far beyond coastal communities and implicate multiple industry sectors. Even so, establishing a causal link between a claimant's damages and the oil discharge can be challenging. For example, determining whether a non-waterfront hotel owner's decline in business is a result of the spill requires an intense study in local economic trends and forensic accounting principles. Complicating matters further are local and national economic trends that existed before the spill. In the case of the Deepwater Horizon oil spill, Gulf Coast industries were previously feeling the stranglehold of the Great Recession.

Of OPA's six categories of potential damage claimants, this paper will focus on those claimants falling under 2702(b)(2)(E) (referred to herein as "Section E claimants") – or those claimants who suffer a loss of profits or earning capacity due to the destruction of property or natural resources. Section E claimants are not required to show ownership or control of the property or natural resources damaged, but they must demonstrate that their loss is (1) "due to"

²¹ 33 U.S.C. § 2702.

the destruction of the property or natural resources, and (2) that such destruction “resulted from” the discharge of oil. Examples of 2702(b)(2)(E) plaintiffs include commercial fishermen, restaurant owners, claimants in the tourism industry, and other business owners and employees that have seen a decline in sales or income since the oil spill. These claims will be analyzed in a two step analysis: first, the Section E claimant must show that natural resources were destroyed or injured by the discharge of oil. Second, the Section E claimant must show that the particular losses suffered by the claimant are due to that destruction of natural resources.

a. Step one – Establishing that the discharge of oil caused injury and/or destruction to natural resources

A claimant must establish that the resources he relies upon, whether he owns those resources or not, were damaged as a result of an oil spill in navigable waters. While establishing that oil from the Deepwater Horizon spill initially impacted the beaches of Alabama, Florida, Louisiana or Mississippi may not be difficult, the inquiry becomes more complicated with occasional tar balls or the perception created by the oil spill. Proving continued impact, extent of impact, or forecasting impact into the future will most assuredly require the assistance of experienced environmental experts.

To suggest that the Deepwater Horizon oil spill damaged natural resources along the Gulf Coast would be an understatement. The oil spill is arguably the largest environmental disaster in United States history. According to scientists, the spill’s impact on the Gulf Coast was devastating not only because of the sheer size of the spill but also because of its timing during the hatching and spawning season for coastal wildlife.²² Moreover, huge numbers of migratory

²² Fahrenthold & Eilperin, *Scientists watch for environmental effects of Gulf of Mexico oil spill*, The Washington Post, May 1, 2010 (available at <http://www.washingtonpost.com/wpdyn/content/article/2010/04/30/AR2010043001788.html?sid=ST2010043001050>).

birds converge on the marshes and barrier islands of the coastal states at this time of year. From an economic perspective, heavy oil washed up on the beaches of coastal communities at the height of the tourism season. Because of the Gulf Coast's heavy reliance on tourism and seafood, it is no surprise that the local markets have been devastated.

While differences in geography, reliance on tourism and population exist, the Alaskan Exxon Valdez spill in 1989 provides a basic indication of what the Gulf Coast could expect. From a devastating oil spill twenty-one years after the accident, Prince William Sound in Alaska is still recovering. Just this year, the Sound was re-opened to shrimp fishing after a nineteen-year closure. Moreover, the Pacific herring population that the region was known for before the spill completely collapsed and has never fully recovered. "After 1989, we quit fishing. We haven't fished for 15 years," says Philip Mundy, scientific director for the Exxon Valdez Oil Spill Trustee Council.²³ "The herring population is very, very low. I can't tell you exactly how it worked, but it is obvious the oil triggered something in the ecosystem."²⁴ Mundy was called in to assess the long-term consequences of the Deepwater Horizon oil spill in the Gulf of Mexico. After explaining the devastation of the herring population in Prince William Sound, Mundy surmised, "You may be looking at the same kind of situation here [in the Gulf] with tuna."

Recovery may take even longer in the Gulf due to the sheer size of the Deepwater Horizon spill. At an estimated 200 million spilled gallons of oil, the spill is more than 18 times the size of the Exxon Valdez spill and impacts five states instead of just one region of one state. Moreover, the difference between the rocky Alaskan shore and the spongy marshes of the Gulf could lead to a much longer recovery period. "The magnitude and the potential for ecological damage is probably more great than anything we've ever seen in the Gulf of Mexico," said Nancy

²³ Kennedy, Sara. *Expert from Exxon Valdez accident saddened by oil spill's effects*, June 2, 2010, McClatchy News (available at <http://www.mcclatchydc.com/2010/06/02/95245/expert-from-exxon-valdez-accident.html>).

²⁴ Id.

Rabalais, a scientist who heads the Louisiana Universities Marine Consortium, a research center in Cocodrie, La. "Once [the oil] hits the shoreline, it'll get into everything."²⁵ This spells trouble not only for the living organisms that make their home in the marshes, but also for the coastline itself. If the grasses that hold the marshes together die, then the marsh itself is more prone to erosion—a problem exacerbated by the Gulf's annual threats of tropical storms and hurricanes.

Our knowledge of the Gulf Coast environment plus what we have learned from the Exxon Valdez disaster combine to provide a picture of how the Deepwater Horizon oil spill has caused and will continue to cause the destruction of Gulf Coast natural resources. The next question is whether the individual 2702(b)(2)(E) claimants are able to show that this destruction of natural resources actually caused their losses.

b. Step two—establishing that the destruction of natural resources is the cause of the claimant's losses

Each category of claimants will face unique hurdles in their burden to establish causation. Out of all the potential 2702(b)(2)(E) claimants, commercial fisherman will probably have the least amount of difficulty demonstrating actual cause. A commercial fisherman making a claim for lost profits must show that his loss of business was due to the oil spill and not other factors like red tide or the depletion of fish stocks from recreational fishing. The livelihood of commercial fisherman wholly depends on the vitality and stability of the Gulf Coast ecosystem. Most fisherman work on commission, so their income is directly tied to the volume and quality of fish they are able to catch and/or sell. Anything that alters the Gulf environment threatens their earning capacity. Moreover, they make their business procuring and selling food intended

²⁵ Fahrenthold & Eilperin, *Scientists watch for environmental effects of Gulf of Mexico oil spill*, The Washington Post, May 1, 2010 (available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/30/AR2010043001788.html?sid=ST2010043001050>).

for human consumption. That food must not only be safe, but perceived as safe. Both crude oil and the dispersants BP used to break up the oil are toxic to humans.²⁶ Both crude oil and the toxic dispersants used in the oil spill remediation process are toxic to humans and marine life. Unfortunately, the current restriction against fishing certain areas of the Gulf is just one chapter of what will probably be a very long story for Gulf Coast fisherman.

Even if the oil disappears and the fish stocks remain plentiful, the reputation of Gulf Coast seafood has been severely tainted and may possibly never recover. An FDA declaration that the seafood is safe to eat may not be enough to overcome the damage that has been done. For seafood processors, distributors, wholesalers and restaurants, the grim reality is that a rational consumer will likely avoid purchasing Gulf seafood because of the plethora of options to choose from that do not involve the risk of ingesting oil and dispersant-tainted fish. Such “perception damages” are directly due to the destruction of natural resources by the discharge of oil and thus meet the requirement for “but for” causation.

Claimants in the tourism industry such as snorkeling guides, tour boat and charter fishing operators, photographers, and hotel owners will also suffer from these perception damages. The industry depends on the Gulf Coast’s status as a place that people want to come visit—a status earned because of the pristine natural resources that the Gulf had to offer: white beaches, clear water, and excellent seafood. The oil spill destroyed all three of these resources for the time being. Images of orange waves and tar-covered beaches will linger in the public’s collective memory and affect their vacation choices for years to come. As with the seafood, a rational public’s preferred vacation spots may be forever altered: even if the water is clear and the beaches are clean, other choices exist that are not associated with such gruesome imagery.

²⁶ Gulf Oil Spill: BP Trying to Hide Millions of Gallons of Toxic Oil? Available at: <http://www.protecttheocean.com/gulf-oil-spill-bp/>.

The other end of the 2702(b)(2)(E) claimant spectrum involves the miscellaneous businesses that happen to be located on the Gulf Coast but do not directly make use of Gulf Coast resources. Cosmetologists, banks, veterinarians, seamstresses, electricians, mechanics, etc. fall into this category. Like the commercial fishermen, these people have suffered a loss of profits because of the oil spill, even though their business does not directly utilize the natural resources of the Gulf.

The fact that a business does not directly make use of Gulf Coast resources does not mean that their destruction could not cause that business to suffer losses. Many of these claimants can show that their losses are “due to” the destruction of the Gulf’s natural resources by the discharge of oil. The biggest obstacle to proving this is the fact that many businesses were already suffering due to the poor economy. One can generally distinguish between losses caused by the oil spill and losses caused by the economy by looking at a business’s monthly profit and loss statements. Many businesses were finally beginning to rebound in early 2010, only to see all their hopes dashed by the oil spill in April. If they have the numbers to offer as proof, those businesses should be able to establish actual causation. Whether they can recover will depend on how the doctrine of proximate causation applies.

III. Proximate Causation (Scope of Liability)

Undoubtedly, the OPA has expanded the scope of liability beyond the common law, most notably in §2702(b)(2)(E), which allows a claimant to recover for economic loss despite lacking a propriety interest in property physically damaged by the spill. To determine the extent of liability under subsection E, this section analyzes the plain meaning of the statute, presumptions of statutory interpretation, the legislative history, and public policy considerations. Hundreds of

thousands of claimants that potentially fall into subsection E have submitted claims to the Gulf Coast Claims Facility (GCCF) or filed a lawsuit. Kenneth Feinberg, head of the GCCF, hired Professor John Goldberg of Harvard Law School to provide his opinion on the scope of economic liability under this section.²⁷ The following analysis includes responses to some of the conclusions in the "Goldberg Memo."

Plain Meaning of U.S.C. §2702(b)(2)(E)

As stated by the Supreme Court, "[D]o not resort to legislative history to cloud a statutory text that is clear."²⁸ The plain meaning of the text of the OPA is the starting place for interpretation of the statute. Subsection E allows recovery for lost profits "due to" damage to property or natural resources. Common words like this are typically interpreted as having their ordinary dictionary or "natural" meaning.²⁹ Although there are legal terms of art used to describe the scope of liability, such as "proximate cause," this section of the OPA uses the common term "due to" to describe the causal requirement. In the analysis of this clause, the statute should be read as a whole, as opposed to viewing the clause in isolation. Reading subsection E along with the preceding text in section 2702(a), the statute states that a claimant must show damage to or loss of property or natural resources "resulting from" an oil spill,³⁰ and economic loss "due to" that damage or loss of property.³¹ The plain meaning of these terms simply indicates a double causation requirement: the damage must be caused by the oil spill, and the economic loss must be caused by the damage.

The Goldberg Memo recognizes the plain meaning rule of statutory interpretation and then states that, "at least in the abstract, the requirement set by the "due to" clause is susceptible

²⁷ The release of the Goldberg Memo was obviously a calculated move by Feinberg, designed to induce potential claimants to forgo litigation in favor of settling their claim with the GCCF.

²⁸ *Ratzlaf v. United States*, 510 U.S. 135, 147.

²⁹ *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

³⁰ 33 U.S.C. 2702(a).

³¹ 33 U.S.C. 2702(b)(2)(E).

to different interpretations."³² The Goldberg Memo also identifies the double causation requirement, but comes to a conclusion that goes beyond the ordinary meaning of these common terms and mischaracterizes the interplay between §2702(a) and §2702(b)(2)(E). Goldberg concludes that subsection E only allows recovery by claimants who suffered economic loss caused by damage to property "that they have a right to put to commercial" use. Contrary to Goldberg's opinion, extracting the commercial use limitation out of the plain language of the statute does require some "interpretive gymnastics."³³ Goldberg himself implicitly admits that "results from" establishes an actual causation requirement, and there is no reason to think that "due to" should be interpreted any differently.³⁴

Presumptions of Statutory Interpretation

When interpreting statutes, there is a presumption that if Congress uses a term of art in statutory provision A and omits it from provision B then the omission from provision B is intentional.³⁵ Goldberg urges that Congress intended to include "both actual and proximate cause" requirements in the phrase "due to." He said that this was common practice in statutory interpretation. The problem with this interpretation is that Congress does use the term "proximate cause" in another section of the OPA; therefore, the omission of that term in this section is presumed to be intentional.

There is also a presumption that if Congress intends to depart from the established common law, it will be clear about the departure.³⁶ Despite the fact that the law was enacted in

³² Goldberg Memo page 18.

³³ See Goldberg Memo page 20.

³⁴ Goldberg demonstrates the fact that §2702(b)(2)(E) adds a second layer causation requirement by examining the reach of that section if the "due to" clause had been omitted, which would then read: "damages equal to the loss of profits or impairment of earning capacity are recoverable by any claimant." He states that such a provision would only require proof of responsibility for a discharge, economic loss, and actual causation. Therefore, Goldberg implicitly concludes that the "results from" clause of §2702(a) establishes an actual causation requirement.

³⁵ Goldberg Memo footnote 42.

³⁶ *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl Protection*, 474 U.S. 494, 501 (1986).

response to the shortcomings of common law in compensating oil spill victims, Goldberg argues that the intention of Congress was unclear. Goldberg notes that the “pure economic loss rule” has long standing within the federal admiralty courts, in addition to having been adopted by most state courts as well.³⁷ He also notes the exception to this rule for commercial fishermen, allowing them to recover for negligent harm to commercial fishing stocks despite the fact that the fishermen do not own those stocks. Addressing the interplay of this common law background with the enactment of the OPA, Goldberg argues that the extent to which the OPA departs from the common law should be governed by the presumption favoring narrow derogation, thus extending liability only so far as judicial decisions have pushed the boundaries of the economic loss rule. Under this rubric, OPA’s economic loss provisions would extend liability for economic loss to any person “whose business profitability depends on his or her ability to exercise a right physically to obtain or use property or resources that are damaged or lost because of an oil spill.”³⁸

Examining the OPA’s departure from the common law background, the presumption in favor of narrow derogation does not support Goldberg’s conclusion. Goldberg states that where Congress clearly indicates intent to depart from the common law such intention controls, subject to a presumption that any such departure will be construed narrowly. He acknowledges the fact that the OPA obviously departs from the pure economic loss rule, but then argues that such departure should be limited to the confines of those common law decisions that themselves derogate from the rule. Because the admiralty courts have recognized a commercial fishermen’s exception, and a handful of state courts have recognized a limited right to recover for those with

³⁷ The pure economic loss rule functions to allow recovery for economic loss only by those with a proprietary interest in property that has been damaged or injured by tortious conduct.

³⁸ Goldberg Memo.

commercial use rights in damaged property or natural resources, he would hold the OPA to these limitations.

The presumption in favor of narrow derogation does not support such reasoning. The OPA obviously departs from the pure economic loss rule. However, if the OPA must retain all aspects of the common law that it does not expressly depart from, the handful of state court decisions expanding liability beyond the bounds of the pure economic loss rule cannot be considered part of that common law. As Goldberg himself takes note of, “the vast majority of state courts have not adopted the rationales or even the results” of these cases.³⁹ The exception for commercial fishermen, however, is firmly entrenched in admiralty law despite a lack of any formal recognition by the Supreme Court, and could fairly be considered as part of the common law the OPA must retain. The problem that arises as a result of this analysis is that the OPA was obviously not intended to limit the recovery of economic loss to commercial fishermen only. Therefore, the common law cannot give guidance as to the scope of the OPA’s economic loss protection.

Legislative History

Although statutory interpretation begins with the plain text, analysis of the legislative history is common. “[P]roper construction frequently requires consideration of wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve.”⁴⁰ A review of the legislative history of the OPA suggests that Congress intended to enact a statute with a broad scope of liability.

The intent of Congress can often be clarified by comparing the final to earlier versions up for debate. Proposed versions of the OPA required the responsible party to pay for damages

³⁹ Id.

⁴⁰ *Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968).

"that arise out of or directly result from such an incident"⁴¹ or that are "proximately caused" by the spill.⁴² The fact that Congress considered and rejected these versions of the liability provisions suggests that they intended a more liberal approach to the causation requirement than proximate cause.

Goldberg claims that the legislative history supports the contention that §2702(b)(2)(E) was intended to protect actual users of property or resources damaged as the result of an oil spill. He bases this contention on the fact that various comments in the House and Senate reports mention fishermen and beachfront property owners as parties that would be entitled to recovery under that section. But Goldberg only extracted comments from the legislative history that supported his conclusion. Many Congressmen described a much broader scope of liability. For example Rep. Schneider remarked that the proposed OPA would compensate fishermen, fish dealers, seafood processors, bait and tackle shops, beach concessionaires, and so forth.⁴³

Public Policy

Goldberg states that there are plausible reasons for wanting to limit recovery in the manner he advocates. First, he argues that we should prioritize recovery for those who have suffered personal injury or property damage over those who have merely suffered economic loss. Furthermore, by limiting the class of economic loss claimants to their proposed boundaries, compensation will flow primarily to those communities most immediately and tangibly affected by a spill. By compensating those "first-line" users of damaged property and resources, economic recovery will flow from the immediate to the more remote victims along the same lines as the initial economic loss.

⁴¹ H.R. 1465 (March 16, 1989).

⁴² H.R. 3027.

⁴³ H.R. 1466, 101st Cong. (June 22, 1990).

This trickle down approach to just compensation only works if the proper first line claimants are paid. Fishermen and beachfront property owners are not the only "front line" victims of the spill. By paying fishermen, some bait shop, fishing supply stores, and other businesses that service fishermen might be compensated, but at least two valid categories of claimants are deprived of compensation: 1) customers of fishermen and 2) non-fishing first line victims.

First, it does not matter how much money you pay the fishermen, they still did not catch fish. Because they did not catch fish, local seafood processors, wholesalers, retailers, and restaurants suffered great losses. Goldberg's trickle down compensation scheme focuses on the money that fishermen were unable to spend due to the spill, but it should also focus on the products that they were unable provide. The value of a fish is spread between this entire chain of businesses, with each taking their share of the value as the product changes hands. BP would be unjustly enriched if they only compensated the fishermen for lost profits, that is only a portion of the value of that lost fish. BP should pay the entire value of the fish, multiplied by the average number of fish caught before the spill.

Second, other first line businesses deserve compensation along with fishermen and beachside hotels. For instance, SCUBA instructors and recreation rentals directly depend on the clean Gulf waters for business success. These businesses are not as easily labeled as hotel and fishermen, but they still contribute to the Gulf economy and must be compensated in order for any trickle down compensation scheme to be effective. Proximate causation issues often only address how far down the chain should liability extend. Courts and the GCCF must also make sure to establish the proper first line claimants.

Conclusion

Under OPA's strict liability scheme, actual causation and scope of liability (proximate cause) issues will be extremely important. Undoubtedly, the OPA has expanded the scope of liability beyond the common law. Under 2702(b)(2)(E), claimants that do not own or lease property damaged by the spill may still have a claim for their economic losses. The plain meaning of the statute indicates a double causation requirement: the damage must be caused by the oil spill, and the economic loss must be caused by the damage. Analysis of the presumptions of statutory interpretation and the legislative history points to a liberal interpretation of the scope of liability for economic loss claimants.