

*IN RE: OIL SPILL BY THE OIL RIG “DEEPWATER  
HORIZON” ON THE GULF OF MEXICO, ON  
APRIL 20, 2010, ORDER, AUG. 26, 2011*

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INTRODUCTION

The explosion at the Macondo oil well on April 20, 2010 and subsequent oil spill around the *Deepwater Horizon* rig in the Gulf of Mexico caused the deaths of eleven oil rig workers, the discharge of over four million barrels of oil, and billions of dollars in economic losses.<sup>1</sup> Not surprisingly, the disaster has spawned hundreds of lawsuits by thousands of claimants,<sup>2</sup> including over 100,000 claims for economic loss and property damage.<sup>3</sup> The economic loss claimants include real estate agents, seafood processors, charter fishing businesses, hotel owners, gas stations, and others.<sup>4</sup> Many of these plaintiffs traditionally would not have a remedy under federal maritime common law because of the “pure economic loss rule,” which bars economic loss claims not arising from physical damage to a proprietary interest – with one narrow exception for fishermen.

Nonetheless, the Oil Pollution Act of 1990 (“OPA”)<sup>5</sup> provides a statutory cause of action for at least some of these claimants. Following the lead of most courts and scholars, on August 26, 2011, a federal district court order addressing a motion to dismiss economic loss claims related to the spill held that OPA permits recovery for economic damages “‘due to the injury, destruction, or loss of real property, personal property, or natural resources,’” regardless of whether the claimant has an ownership interest in the property or resource.<sup>6</sup> That is, OPA does not follow the pure economic loss rule. However, the Order of August 26, 2011 did not decide what specific causation standard governs OPA economic loss claims. Given that OPA does not require the connection to be a proprietary interest, the issue boils down to what kind of connection plaintiffs must demonstrate between their economic loss and the property or resources identified by the statute.

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<sup>1</sup> See NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING vi (2011), available at <http://www.gpoaccess.gov/deepwater/index.html>.

<sup>2</sup> See, e.g., In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010 (*Order of Oct. 12, 2011*), 2011 WL 4829905, at \*1–2 (E.D. La. Oct. 12, 2011) (order dismissing a particular “bundle” of claims).

<sup>3</sup> In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010 (*Order of Aug. 26, 2011*), 808 F. Supp. 2d 943, 947 (E.D. La. 2011) (order addressing motions to dismiss claims for “non-governmental economic loss and property damages”).

<sup>4</sup> *Id.* at 948.

<sup>5</sup> 33 U.S.C. §§ 2701–2762 (2006).

<sup>6</sup> See *Order of Aug. 26, 2011*, 808 F. Supp. 2d at 959 (quoting 33 U.S.C § 2702(b)).

Due to the magnitude of the spill and the scope of the *Deepwater Horizon* litigation, the outcome of this causation battle will not only shape future interpretations of OPA and similar statutes but also could lead to a reevaluation of the pure economic loss rule's use in tort law. This Comment proceeds in four parts. Part I describes how the pure economic loss rule excludes many potential economic loss claimants under common law. Part II explains how the *Deepwater Horizon* litigation is currently organized. Part III analyzes the district court's order addressing economic loss claims and explains how plaintiffs whose claims would otherwise be barred by the pure economic loss rule must pin their hopes of recovery on OPA's economic loss provision. Part IV examines this statutory provision in detail, analyzes relevant case law, and evaluates two competing interpretations of the provisions.

This Comment then suggests an alternative interpretation that best captures Congress's intent to provide broad recovery for economic losses from oil spills: for a claim to proceed under OPA's provision for economic loss, the spill must have deprived the plaintiff of the benefit of a specific real property, personal property, or natural resource that was reasonably necessary for the production or sale of her goods or services. This interpretation would most fairly compensate all plaintiffs who relied on property and natural resources affected by the oil spill. Finally, Part V briefly touches on the recent proposed BP settlement terms that have gained preliminary approval in federal district court. While the settlement is more of a blunt instrument than the precise fact-finding of litigation, it incorporates a fairly generous causation standard that recognizes that the relationship Gulf businesses and workers have to damaged property and resources is rooted in commercial necessity.

## I. PURE ECONOMIC LOSS UNDER MARITIME LAW

Tort law's "pure economic loss rule" originates in *Robins Dry Dock & Repair Co. v. Flint*.<sup>7</sup> In *Robins Dry Dock*, the plaintiff, a steamship charterer, sued for expected profits lost due to a two-week delay in a vessel's availability caused by the dry dock.<sup>8</sup> The plaintiff did not have a proprietary interest in the vessel, but the delay interfered with his contract with the vessel's owners.<sup>9</sup> Writing for the Court, Justice Oliver Wendell Holmes held that the charterer could not recover his lost profits because the tort did not affect his "person or property."<sup>10</sup> *Robins Dry Dock* spawned the now-widely adopted bright-line rule that only allows claims for economic loss

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<sup>7</sup> 275 U.S. 303, 308–09 (1927).

<sup>8</sup> *Id.* at 307.

<sup>9</sup> *Id.* at 308.

<sup>10</sup> *See id.* at 308–09; *id.* at 309 (“[A] tort to the person or property of one man does not make the tort-feasor 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.” (citation omitted)).

arising from an unintentional maritime tort when the claimant demonstrates personal injury or physical harm to a proprietary interest (“*Robins* rule”).<sup>11</sup> When such loss is unaccompanied by physical injury to person or property, it is referred to as pure economic loss.<sup>12</sup> The sole commonly recognized exception to the pure economic loss rule in maritime law is for loss suffered by commercial fishermen arising from damage to natural resources.<sup>13</sup>

Despite its longstanding survival,<sup>14</sup> the pure economic loss rule has been criticized as theoretically deficient and unprincipled.<sup>15</sup> Nonetheless, despite one intriguing deviation, the Fifth Circuit continues to apply the *Robins* rule on pure economic loss claims straightforwardly.<sup>16</sup>

## II. BACKGROUND ON THE *DEEPWATER HORIZON* LITIGATION

Most of the claims arising from the disaster have been consolidated into two Multidistrict Litigation (“MDL”) proceedings.<sup>17</sup> One MDL, *In re: Oil Spill by the Oil Rig “Deepwater Horizon” on the Gulf of Mexico, on April 20, 2010*, includes hundreds of claims for environmental, economic, and per-

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<sup>11</sup> See, e.g., Fleming James Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 43 (1972) (“[A] plaintiff may not recover for his economic loss resulting from bodily harm to another or from physical damage to property in which he has no proprietary interest.”).

<sup>12</sup> See *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 870 (1986) (stating that when “by definition no person or other property is damaged, the resulting loss is purely economic”).

<sup>13</sup> See, e.g., *Union Oil Co. v. Oppen*, 501 F.2d 558, 570 (9th Cir. 1974) (recognizing an oil company’s duty to commercial fishermen to avoid negligently disrupting aquatic life).

<sup>14</sup> See, e.g., Robert J. Rhee, *A Production Theory of Pure Economic Loss*, 104 Nw. U. L. REV. 49, 49, 50 (2010) (“Despite the historical dynamism of Anglo-American tort law, the rule remains pure and has been unadulterated by the evolutionary forces of the common law.”).

<sup>15</sup> See *id.* at 51.

<sup>16</sup> In *Louisiana ex rel. Guste v. M/V Testbank*, the Fifth Circuit, en banc, adopted the *Robins* rule as a pragmatic limitation on the common law doctrine that foreseeable and proximate injuries are generally compensable. 752 F.2d 1019, 1032, 1035 (5th Cir. 1985). However, in *Sekco Energy Inc. v. M/V Margaret Chouest*, 820 F. Supp. 1008 (E.D. La. 1993), the U.S. District Court for the Eastern District of Louisiana failed to apply the rule on a claim asserting economic loss arising from interference with a company’s right to use an oil drilling platform it owned when the company did not sustain physical damage to the platform or other property. *Id.* at 1011–12 (distinguishing plaintiffs in *Robins* and *Testbank* as “one or more steps removed from the principal cause of action”). Finally, in *Reserve Mooring Inc. v. American Commercial Barge Line, LLC*, the Fifth Circuit disavowed *Sekco*’s reasoning, and upheld the bright-line rule. 251 F.3d 1069, 1071 (5th Cir. 2001).

<sup>17</sup> An MDL is a “coordinated or consolidated” pretrial proceeding for when “civil actions involving one or more common questions of fact are pending in different districts.” 28 U.S.C. § 1407 (2006). The purpose of an MDL is “to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary.” *Overview of Panel*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., <http://www.jpml.uscourts.gov/panel-info/overview-panel> (last visited June 14, 2012) (on file with the Harvard Law School Library).

sonal harms arising from the spill.<sup>18</sup> This MDL is assigned to Judge Barbier in the U.S. District Court for the Eastern District of Louisiana.<sup>19</sup>

This Comment concerns *In re: Oil Spill* and, specifically, claims for pure economic loss. As structured through a pre-trial order, *In re: Oil Spill* includes several “bundles” of claims falling under different headings, including personal injury and death claims, individual and business loss claims, public damage claims, and injunctive and regulatory claims.<sup>20</sup> The plaintiffs in each bundle were asked to submit a “master complaint” to centralize the proceedings.<sup>21</sup> One complaint alleged “Non-Governmental Economic Loss and Property Damages.”<sup>22</sup> The plaintiffs in this bundle fall into different categories such as commercial fishermen, recreational businesses, plant and dock workers, and real property owners.<sup>23</sup> Collectively, they assert claims under general maritime law, OPA, and different state laws.<sup>24</sup> The defendants include a number of companies associated with the *Deepwater Horizon* rig and Macondo well, including BP, Transocean, Halliburton, and Anadarko.<sup>25</sup> The core of the plaintiffs’ complaint is that the defendants’ misfeasance contributed to the blowout at the Macondo well that caused explosions, fire, and, ultimately, the massive oil spill that directly caused most of the alleged economic loss.<sup>26</sup>

*In re: Oil Spill* is not the only venue in which victims may pursue damages for economic loss. As an alternative to litigation, BP established the Gulf Coast Claims Facility (“GCCF”). The GCCF allows parties to submit claims to the administrator of a twenty billion dollar fund. The GCCF offers “final,” “interim,” and “quick” payments for past documented damages.<sup>27</sup> Both the final and quick payment options require claimants to waive the right to pursue future legal claims against BP or other responsible parties for damages arising from the spill.<sup>28</sup>

<sup>18</sup> See *Order of Oct. 12, 2011*, 2011 WL 4829905, at \*1 (E.D. La. Oct. 12, 2011).

<sup>19</sup> *Id.* at \*1. The second MDL, *In re: BP P.L.C. Sec. Litig.*, 734 F. Supp. 2d (J.P.M.L. 2010), concerns alleged violations of the Securities Exchange Act, 15 U.S.C. §§ 78A–78P (2006). These claims “share allegations that BP and its executives misled the investing public concerning the company’s safety measures and commitment to conducting safe operations.” *In re: BP P.L.C. Sec. Litig.*, 734 F. Supp. 2d at 1378. This MDL is assigned to Judge Ellison in the U.S. District Court for the Southern District of Texas. *Id.* at 1379.

<sup>20</sup> Pretrial Order No. 11, *In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, MDL No. 2179 (E.D. La. Oct. 19, 2010), available at <http://www.laed.uscourts.gov/OilSpill/10192011Agenda.pdf>.

<sup>21</sup> See *id.* at 3.

<sup>22</sup> *Order of Aug. 26, 2011*, 808 F. Supp. 2d 943, 947 (E.D. La. 2011).

<sup>23</sup> *Id.* at 948.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> First Amended Master Compl. at 11–12, *In re: Oil Spill by the Oil Rig “Deepwater Horizon” on the Gulf of Mexico*, on April 20, 2010, MDL No. 2179 (E.D. La. Feb. 9, 2011), available at <http://lieffcabraser.com/media/pnc/0/media.1150.pdf>.

<sup>27</sup> See GULF COAST CLAIMS FACILITY, FINAL RULES GOVERNING PAYMENT, ELIGIBILITY AND SUBSTANTIATION CRITERIA, AND FINAL PAYMENT METHODOLOGY (2011) (on file with the Harvard Law School Library).

<sup>28</sup> See *id.*

### III. *IN RE: OIL SPILL* AUGUST 26 ORDER

On August 26, 2011, Judge Barbier issued an order addressing motions to dismiss claims for “non-governmental economic loss and property damages.”<sup>29</sup> The order granted the motions in part and denied them in part.<sup>30</sup> While the order responded to numerous alleged defects with various claims, this Comment will summarize only the order’s analysis as relevant to the causation standard for claims of pure economic loss.

#### A. *State Law Claims*

Judge Barbier dismissed all state law claims in the bundle.<sup>31</sup> The order first denied the applicability of a provision of the Outer Continental Shelf Lands Act<sup>32</sup> that would have allowed state law to supplement federal law.<sup>33</sup> The order then concluded that state law was preempted because the conduct giving rise to the claims did not occur in state waters.<sup>34</sup> Moreover, state law could not supplement federal maritime law and OPA in non-territorial waters because there is no “gap” in the federal liability scheme.<sup>35</sup> Finally, the order held that OPA’s saving provisions did not preserve the claims.<sup>36</sup> Therefore, the order dismissed all “state common-law claims for nuisance, trespass, and fraudulent concealment,” as well as claims under a Florida statute<sup>37</sup> allowing recovery for damages caused by pollution.<sup>38</sup> As a result, plaintiffs seeking to recover pure economic losses will not have the opportunity to show that various state laws would be less restrictive than either maritime law or OPA.<sup>39</sup>

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<sup>29</sup> *Order of Aug. 26, 2011*, 808 F. Supp. 2d 943, 947 (E.D. La. 2011).

<sup>30</sup> *Id.* at 969.

<sup>31</sup> *Id.* at 958.

<sup>32</sup> 43 U.S.C. §§ 1331–1356 (2006).

<sup>33</sup> *Order of Aug. 26, 2011*, 808 F. Supp. 2d at 952–53 (denying the applicability of 43 U.S.C. § 1333(a)(2)(A)).

<sup>34</sup> *Id.* at 952–55.

<sup>35</sup> *Id.* at 954–55 (citing *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970)).

<sup>36</sup> *Id.* at 954–57 (denying the applicability of 33 U.S.C. § 2718(a), (c) (2006)).

<sup>37</sup> Florida Pollutant Discharge Prevention and Control Act (“FPDPC”), Fla. Stat. §§ 376.011–376.165, 376.19–376.21 (2011).

<sup>38</sup> *Order of Aug. 26, 2011*, 808 F. Supp. 2d at 958; *see also* *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1221, 1221–22 (Fla. 2010) (holding that commercial fishermen with no proprietary interest can recover under the FPDPC and noting that “the language of the statute allows any person to recover for damages suffered as a result of pollution”).

<sup>39</sup> There has been debate about the actual favorability of state laws. *Compare* Shelly F. Spansel, *Robins Dry Dock Versus State Laws Governing Liability for Pure Economic Loss: How the Maritime Circuit Should Resolve the Preemption Conflict*, 51 *LOY. L. REV.* 165, 173 (2005) (arguing that because of Louisiana law’s “case-by-case,” rather than bright-line, approach to pure economic loss, “if *Robins* does not preempt state law, a Louisiana litigant could potentially recover for pure economic loss”), *with* Benjamin J. Steinberg & Dwayne Antonio Robinson, *Making BP’s Blood Curd-Le: Duty, Economic Loss, and the Potential Cardozian Nightmare After Curd v. Mosaic Fertilizer*, 63 *FLA. L. REV.* 1245, 1268 (2011) (claiming that “due to the stringent application of the analysis as well as additional common law restrictions,

### B. Maritime Law Claims

Judge Barbier upheld most maritime law claims against the defense of statutory displacement by OPA, but dismissed maritime law claims that ran afoul of the pure economic loss rule.<sup>40</sup> In doing so, the order refused to depart from *Robins Dry Dock* to provide an avenue of recovery other than OPA for pure economic loss claimants, although it upheld the exception for commercial fishermen.<sup>41</sup>

Turning to OPA, the order reasoned that one apparent purpose of the statute, which was enacted in the wake of the infamous 1989 *Exxon Valdez* oil spill in Prince William Sound, Alaska,<sup>42</sup> was to broaden the class of claimants who could recover economic losses from an oil spill.<sup>43</sup> Therefore, the order clearly disavowed the applicability of the pure economic loss rule to OPA, which allows recovery for economic loss from an oil spill “regardless of whether the claimant sustained physical damage to a proprietary interest.”<sup>44</sup> Another purpose of OPA was to create a scheme whereby a “Responsible Party” is strictly liable for cleanup and damages.<sup>45</sup> The scheme is intended to “encourage settlement and reduce the need for litigation.”<sup>46</sup>

The order then analyzed whether OPA displaces federal maritime common law.<sup>47</sup> With regard to claims that would have been viable before OPA, the order applied the Supreme Court’s three-part test for displacement<sup>48</sup> to find that these claims were saved.<sup>49</sup> However, Judge Barbier dismissed all maritime law claims for pure economic loss, with the exception of claims by

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Louisiana state law still would provide little solace to private BP plaintiffs, including commercial fishermen”).

<sup>40</sup> *Order of Aug. 26, 2011*, 808 F. Supp. 2d at 968–69.

<sup>41</sup> *Id.* at 958–59.

<sup>42</sup> *Id.* at 959.

<sup>43</sup> *Id.*

<sup>44</sup> *See id.*

<sup>45</sup> *Id.* (citing 33 U.S.C. §§ 2709, 2710, 2713 (2006)). The Responsible Party “pays the claims and is then allowed to seek contribution from other allegedly liable parties.” *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 959–62.

<sup>48</sup> *Order of Aug. 26, 2011*, 808 F. Supp. 2d at 960 (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 (2008)) (“First, is there a clear indication that Congress intended to occupy the entire field? Second, does the statute speak directly to the question addressed by the common law? Third, will application of common law have a frustrating effect on the statutory remedial scheme?”).

<sup>49</sup> *Order of Aug. 26, 2011*, 808 F. Supp. 2d at 961–62. Applying the *Baker* test, the order found, in analyzing OPA’s savings provisions, that Congress did not intend to “occupy the entire field.” *Id.* at 961. Moreover, maritime law addresses a “gap” in the statute: the liability of non-Responsible Parties for damages. *Id.* Finally, maritime claims against non-Responsible Parties did not frustrate OPA’s remedial scheme, and maritime claims against the Responsible Party interfered with OPA only with respect to procedure. *Id.* at 962. Judge Barbier held that OPA displaced maritime claims against the Responsible Party, “but only with regard to procedure.” *Id.* at 969. That is, a gap-filling maritime law remedy may be available, but maritime claims against a Responsible Party must meet OPA’s specific “presentment requirements.” *See* 33 U.S.C. § 2713 (2006).

commercial fishermen,<sup>50</sup> because the bulk of pure economic loss maritime claims would not have been viable regardless of whether OPA had been enacted.<sup>51</sup> Interpreting maritime common law, the court declined to deviate from the Fifth Circuit's adoption of the *Robins* rule.<sup>52</sup> Thus, pure economic loss claimants are left to pin their hopes exclusively on OPA.

### C. OPA Causation

Judge Barbier briefly addressed OPA's causation standard, allowing OPA claims submitted by Vessel of Opportunity ("VoO") and Moratorium plaintiffs to proceed.<sup>53</sup> In seeking to dismiss these claims, the defendants attempted to tie OPA's open-ended causation language to a heightened, common law standard of "proximate cause."<sup>54</sup> The order noted that few courts have examined OPA's causation requirements, but found that OPA did not "expressly require" a showing of "proximate cause."<sup>55</sup> The order hinted that "OPA causation may lie somewhere between" two common law standards for causation: "traditional 'proximate cause' and simple 'but for' causation."<sup>56</sup> Ultimately, the order found that a holding on OPA's causation requirements was not required at this stage, and that the plaintiffs had "stated a plausible claim for relief."<sup>57</sup>

In sum, pure economic loss claims under OPA survived the defendants' motion to dismiss. The trial for so-called "*Robins Dry Dock Claimants*" is scheduled to begin on July 16, 2012, though it is possible that Judge Barbier could resolve the causation issue through motion practice before the trial.<sup>58</sup>

## IV. ANALYSIS OF OPA'S CAUSATION REQUIREMENT FOR ECONOMIC LOSS

This Comment argues that, when the court with jurisdiction over economic loss claims eventually decides what specific causation standard

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<sup>50</sup> *Order of Aug. 26, 2011*, 808 F. Supp. 2d at 968-69.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 966.

<sup>54</sup> See *infra* Part IV.B. The VoO plaintiffs alleged damages arising from participation in a program under which BP chartered vessels to assist in the response to the spill. First Amended Master Compl., *supra* note 26, at 139-40. The Moratorium plaintiffs alleged damages arising from the government's post-spill decision to impose a temporary moratorium on deepwater drilling. *Id.* at 29-30. The defendants responded to both sets of claims by arguing that the spill was not the legal cause of the damages in question: injuries to the VoO plaintiffs "occurred as a result of their participation in the VoO program, not as a result of the spill," while the Moratorium claims should be barred because the Moratorium was an "intervening or superseding cause of damage." *Order of Aug. 26, 2011*, 808 F. Supp. 2d at 965.

<sup>55</sup> *Id.* at 966 (citing *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2642-43 (2011), to suggest that judges should not mechanically import common law causation standards into statutes that do not include language that would explicitly trigger their use).

<sup>56</sup> *Id.* at 966; see also *infra* Part IV.B.

<sup>57</sup> *Order of Aug. 26, 2011*, 808 F. Supp. 2d at 966.

<sup>58</sup> See Pretrial Order No. 11, *supra* note 20, at 19.

should govern, it should apply the following interpretation of OPA's economic loss provision: plaintiffs may recover only if the oil spill has deprived them of the benefit of a specific real or personal property or natural resource that is reasonably necessary for the plaintiff's commercial activity. This part of the Comment will examine the statutory language, legislative history, and applicable case law, as well as two recent readings of the economic loss provision. Finally, it will explain why both readings are flawed and suggest that the interpretation given above is both more faithful to the statute and fairer to all parties involved in the litigation.

### A. *The Statutory Language*

OPA's damages provisions, found in section 2702, contain its causation requirements.<sup>59</sup> An initial prefatory section states that a "Responsible Party" is liable for specified damages that "result from" an "incident" of oil discharge, or a "substantial threat" of discharge, into navigable waters, adjacent shoreline, or "the exclusive economic zone."<sup>60</sup> The phrase "result from" creates a first, generalized causal requirement between a spill and losses claimed under the statute. The classes of damages covered are then listed in 33 U.S.C. § 2702(b)(2) and include "natural resources," "real or personal property," "subsistence use," "revenues," "profits and earning capacity," and "public services." Pure economic loss claims fall under section 2702(b)(2)(E), "Profits and earning capacity" (hereinafter "economic loss provision"):

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*.<sup>61</sup>

The phrase "due to" imposes a more specific casual requirement, by tying the loss directly to property or resource damage. However, it is undefined in the statute. Also, a crucial expression in this subsection is "recoverable by any claimant," which appears to expand recovery beyond plaintiffs with a proprietary interest, i.e., the pure economic loss rule.

The ordinary language meanings of "result from" and "due to" do not provide much guidance, except to rule out an absurdly broad causation stan-

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<sup>59</sup> 33 U.S.C. § 2702 (2006).

<sup>60</sup> 33 U.S.C. § 2702(a). Defenses to and limitations on liability are covered in 33 U.S.C. §§ 2703–2704 (2006).

<sup>61</sup> 33 U.S.C. § 2702(b)(2)(E) (emphasis added). OPA defines "natural resources" as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government." *Id.* § 2701(20). This Comment will refer to the "real property, personal property, or natural resources" specified in section 2702(b)(2)(E) as "property and resources."



dard. In everyday speech, the two expressions have nearly the same semantic meaning. Beyond the basic point that one should interpret the causation standard from OPA's economic loss provision in a way that excludes very remote, indirect causes, the ordinary language meaning of the two phrases leaves open a vast terrain within which the causation standard could fall.

The phrase "due to" occurs only one other time in the damages provisions, under the subheading of damages for 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.<sup>62</sup>

Applying the canon of construction that phrases should be given the same meaning throughout the statute<sup>63</sup> might entail using the same causation standard for both pure economic loss and lost government revenue. On the other hand, it is appropriate in this case to read "due to" in the context of the type of injury for which Congress sought to provide recovery.<sup>64</sup> Assuming "due to" cannot be read in isolation as enacting some "stock" formulation of causation, such as traditional common law proximate cause,<sup>65</sup> courts should not interpret the phrase without considering the class of injury suffered. Therefore, the question is not, "What does the phrase 'due to' mean?" but rather, "What does it mean for pure economic loss (or, in the context of the preceding subsection, government revenues) to occur 'due to' property or resource damage?" The statute does not make this connection explicit, and therefore courts must have recourse to other sources, including the purpose of the statute, its legislative history, related case law, and public policy.

Turning to statutory purpose and legislative history, the Senate Report states that OPA's damages provisions "are intended to provide compensation for *a wide range of injuries* and are not so narrowly focused as to prevent victims of an oil spill from receiving reasonable compensation."<sup>66</sup> This language implies that courts should interpret the provisions broadly, and thus should not rely on exclusionary requirements like the traditional pure economic loss rule. Moreover, the phrase "reasonable compensation" suggests that Congress did not have a bright-line causation standard in mind when it drafted OPA's damages provisions. An alternative interpretation would be that "reasonable" refers only to the amount of compensation, and not also to

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<sup>62</sup> 33 U.S.C. § 2702(b)(2)(D) (2006) (emphasis added).

<sup>63</sup> *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

<sup>64</sup> *See Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1933) (explaining that presumption of consistent usage of phrases "readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.").

<sup>65</sup> And, as will be explained *infra*, common law causation formulations would not be appropriate here.

<sup>66</sup> S. REP. NO. 101-94, at 12 (1989) (emphasis added).

the circumstances under which compensation should be granted. However, the reference to “reasonable compensation” occurs in the context of a contrast between the intended recovery for “a wide range of injuries” and a more “narrowly focused” approach, so it is appropriate to view the statement as advancing an interpretation that permits any recovery that is “reasonable” in light of the provisions and denies any recovery that is not.<sup>67</sup> Therefore, courts should feel comfortable devising flexible standards to undertake a case-by-case approach rather than seeking bright-line rules like the traditional pure economic loss rule from *Robins Dry Dock*. The Senate Report goes on to say:

For example, economic damages include both loss of use and loss of subsistence use of natural resources. Under this provision, fishermen, for example, would not only receive the equivalent of unemployment compensation, but would also receive compensation to prevent loss of a boat. Lost wages are of limited value if the means of earning wages, such as a boat, go uncompensated.<sup>68</sup>

The quote describes types of compensation that should be considered reasonable (here, “wages” and “the means of earning wages”) and not merely amounts, lending support to an interpretation of “reasonable compensation” that allows courts to exercise discretion to exclude unreasonable claims. Furthermore, by reasoning that “[l]ost wages are of limited value if the means of earning wages . . . go uncompensated,” the Report does not apply any hard-and-fast rule but rather employs common sense, policy, and fairness: considerations that would fall under a more flexible analysis.<sup>69</sup> Courts should follow this lead by avoiding strict rules and employing common sense standards.

Also, the House Conference Report glosses the clause “recoverable by any claimant” in OPA’s economic loss provision as: “The claimant need not be the owner of the damaged property or resources to recover for lost profits or income. For example, a fisherman may recover lost income due to damaged fisheries resources, even though the fisherman does not own those resources.”<sup>70</sup> Although the example provided is the traditional fisherman’s exception from the common law, the phrase “for example” demonstrates that the statute is not meant to codify the existing common law approach to pure economic loss, in which the fisherman’s exception was not merely one “example” but the only generally recognized exception. Therefore, as Judge Barbier suggested,<sup>71</sup> OPA provides broader recovery than the common law. This interpretation is also the best plain-language reading of section 2702(b)(2)(E), particularly given the contrast with section 2702(b)(2)(B), which makes “[d]amages for injury to, or economic losses resulting from

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<sup>67</sup> See *id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> H.R. REP. NO. 101-653, at 103 (1990).

<sup>71</sup> See Order of Aug. 26, 2011, 808 F. Supp. 2d 943, 959 (E.D. La. 2011).

destruction of, real or personal property . . . recoverable by a claimant who owns or leases that property.”<sup>72</sup> The exclusion of the “owns or leases” requirement in subsection E compared with subsection B demonstrates Congress’s intent to move beyond the pure economic loss rule.<sup>73</sup>

Finally, in an analysis of the version of the bill first passed by the House of Representatives, one of the bill’s sponsors stated that “an employee at a coastal motel may have standing to make a claim for damages even though the employee owns no property which has been injured as a result of an oil spill.”<sup>74</sup> Assuming that a motel is unlikely to be directly damaged by an oil spill, the employee’s claim would not even be parasitic on damages to a proprietary interest held by his employer. Also, the statement’s qualification — “*may have standing*” — invites courts to craft a standard to determine under what conditions the employee could press a claim.

In sum, the text and legislative history indicate that Congress intended for OPA’s economic loss provision to extend recovery beyond the traditional pure economic loss rule to a potentially wide range of claimants who do not own or lease damaged property or resources. Indeed, it seems likely that Congress did not intend any kind of firm rule but rather a more fact-based approach allowing courts to determine where compensation would be clearly unreasonable. Neither the statute nor the legislative history, however, provides any reliable evidence for what precise causal standard courts should use, and, relatedly, what relationship between physical damage and economic loss plaintiffs must show.<sup>75</sup>

### B. *Common Law Causation Tests*

Judge Barbier’s order suggests that OPA causation lies between “traditional proximate cause and simple but-for causation:” what would these two

<sup>72</sup> 33 U.S.C. § 2702(b)(2)(B), (E) (2006).

<sup>73</sup> See, e.g., *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (“[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (citing *Kusello v. United States*, 464 U.S. 16, 23 (1983))).

<sup>74</sup> 135 CONG. REC. 26,851 (Nov. 1, 1989) (statement of Rep. Jones). Though the statement comes from only one representative, the view of the sponsor of a bill carries more weight.

<sup>75</sup> Attempts to find clues of congressional intent on causation from more remote or otherwise unreliable pieces of legislative history will not be recounted where they appear strained and more obscuring than helpful. See, e.g., Andrew B. Davis, *Pure Economic Loss Claims Under the Oil Pollution Act: Combining Policy and Congressional Intent*, 45 COLUM. J. L. LAW & SOC. PROBS. 1, 24 (citing a statement by the House Committee on Public Works that the act creates incentives to avoid economic and ecological damages as evidence that “Congress intended to provide broad recovery”); John C.P. Goldberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Spill*, 30 MISS. C. L. REV. 335, 368 (2011) (citing individual lawmakers who provided examples of hypothetical claimants, such as beachfront property owners and fishermen, who should recover); David W. Robertson, *The Oil Pollution Act’s Provisions on Damages for Economic Loss*, 30 MISS. C. L. REV. 157, 174 n.58 (2011) (accusing Professor Goldberg of taking an “overly narrow view of the legislative history” and relying on a wide range of comments by individual lawmakers proposing hypothetical deserving claimants).

common law standards look like as applied to section 2702(b)(2)(E)? Applying the broadest traditional factual causation test, courts would ask if the claimant's injuries would have occurred in the absence of (but for) the oil discharge that led to property or resource damage.<sup>76</sup> This is not the only formulation of the factual cause test that could be applied to section 2702(b)(2)(E),<sup>77</sup> but it is the formulation that would compensate the widest range of injuries. However, centering the factual cause inquiry around the oil discharge rather than the physical damage described in section 2702(b)(2)(E) would essentially read the latter requirement out of the statute. An alternative formulation of but-for cause posits a more specific counterfactual: would the injury have occurred in the absence of the fact that an oil spill caused property damage?<sup>78</sup> This ties the injury more specifically to property loss. It is not clear whether Judge Barbier meant to suggest that OPA rules out both formulations, or merely the broader one.

The second test employed in a common law causation analysis in tort law is proximate cause. These two tests are not either/or: they are generally applied in tandem,<sup>79</sup> with factual cause setting an initial bar and proximate cause setting the higher bar that the injury fall within the "scope of liability" fairly to be ascribed to the tortious actor.<sup>80</sup> The textbook proximate cause formulation asks if the injury is a "harm within the risk" that "made the actor's conduct tortious."<sup>81</sup> Courts typically look at several factors to decide whether proximate cause is satisfied, including whether the injury was foreseeable, whether the chain of causation leading to the injury was direct or remote, whether intervening forces contributed to the injury, and whether public policy supports causation.<sup>82</sup> In a statutory context, a court applying proximate cause principles could frame the question as whether the injury falls within "the zone of dangers against which Congress intended to protect when it passed" OPA,<sup>83</sup> and then proceed to answer this question using prin-

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<sup>76</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 (2010) ("[A]n act is a factual cause of an outcome if, in the absence of the act, the outcome would not have occurred.").

<sup>77</sup> See *infra* Part IV.D.3.

<sup>78</sup> This formulation of factual cause is explored in Part V.D.3.

<sup>79</sup> RESTATEMENT (SECOND) OF TORTS § 9 (1965) (referring to the whole causation inquiry as "legal cause").

<sup>80</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 6 (2010) (recognizing the widespread use of the term "proximate cause" but suggesting that the term "scope of liability" would be better).

<sup>81</sup> *Id.* § 29 (2010); see also Warren Seavey, *Mr. Justice Cardozo and the Law of Torts*, 39 COLUM. L. REV. 20, 34 (1939) ("[T]he reasons for creating liability should limit it").

<sup>82</sup> See, e.g., *Petition of Kinsman Transit Co.*, 338 F.2d 708, 723–26 (2d Cir. 1964) (foreseeability); RESTATEMENT (SECOND) OF TORTS § 433 (1965) (guiding courts to ask "whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible"); see also *Ashley Cnty. v. Pfizer, Inc.*, 552 F.3d 659, 671 (8th Cir. 2009) ("Proximate cause is bottomed on public policy as a limitation on how far society is willing to extend liability for a defendant's actions.").

<sup>83</sup> *Benefiel v. Exxon Corp.*, 959 F.2d 805, 807 (9th Cir. 1992) (applying proximate cause principles to the causation standard in the Trans-Alaska Pipeline Authorization Act ("TAPAA"), 43 U.S.C. §§ 1651–1656 (2006)).

ciples like foreseeability, remoteness, and intervening cause.<sup>84</sup> The straightforward application of a traditional proximate cause analysis to OPA would result in a heightened causation standard.

Because OPA does not specify that courts should use common law causation standards<sup>85</sup> and because Judge Barbier's order suggested that "OPA causation may lie somewhere between" the two common law standards,<sup>86</sup> it is unlikely that *In re: Oil Spill* will evaluate pure economic loss claims using either of the causation standards that a court applying maritime law would use.

### C. Case Law Interpreting Section 2702(b)(2)(E) and Related Provisions

#### 1. Fifth Circuit

In *Sekco Energy, Inc. v. M/V Margaret Chouest*, the U.S. District Court for the Eastern District of Louisiana ruled that a plaintiff had a valid cause of action under section 2702(b)(2)(E) against a defendant who allegedly caused an oil discharge.<sup>87</sup> The plaintiff owned and operated an oil drilling platform on the Gulf.<sup>88</sup> The court held that the plaintiff could maintain a cause of action for lost production revenues caused by the spill without alleging physical "injury to [his own] personal or real property."<sup>89</sup> The court reasoned that the plaintiff's lost earnings from the platform constituted a "loss of property" within the meaning of OPA's damages provision even if it did not constitute an "injury" to property, because injury is physical but loss is not.<sup>90</sup> Therefore, the OPA economic loss claim upheld in *Sekco* was for the loss of the plaintiff's own property and not for damage to another's property.<sup>91</sup> However, this reading produces a strange result: if lost earnings constitute a loss of property under OPA, then collecting under the economic loss provision would not require showing any physical injury at all.<sup>92</sup> Thus, Professor John C.P. Goldberg argues that *Sekco*'s holding was based on the loss of use of the physical platform, drawing on other parts of the opinion and eliding the court's direct equation of earnings with property.<sup>93</sup> However, the part of the opinion dealing with OPA does not mention loss of use, but

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<sup>84</sup> See *id.* (applying principles drawn from the RESTATEMENT (SECOND) OF TORTS).

<sup>85</sup> See 33 U.S.C. § 2702 (2006).

<sup>86</sup> Order of Aug. 26, 2011, 808 F. Supp. 2d 943, 966 (E.D. La. 2011).

<sup>87</sup> 820 F. Supp. 1008, 1014–15 (E.D. La. 1993).

<sup>88</sup> *Id.* at 1010.

<sup>89</sup> *Id.* at 1015.

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

<sup>91</sup> See *id.*

<sup>92</sup> See Cameron H. Totten, *Recovery for Economic Loss Under Robins Dry Dock and the Oil Pollution Act of 1990: Sekco Energy, Inc. v. M/V Margaret Chouest*, 18 TUL. MAR. L.J. 167, 176 (1993) ("Sekco sustained no damage to any of its proprietary interests except for the right to drill for oil under their platform. The right to drill, however, is not *physical* property.").

<sup>93</sup> Goldberg, *supra* note 75, at 368–69.

rather, loss of revenues more broadly.<sup>94</sup> *Sekco* could be read as stating that the economic loss arises out of impairment of the company's exclusive right to use the property for drilling, but the case does not require or even expressly suggest this reading. At a minimum the basis for *Sekco*'s holding on OPA's economic loss provision is poorly articulated.

In *In re Taira Lynn Marine Ltd. No. 5, LLC*, the Fifth Circuit stated that "§ 2702(b)(2)(E) allows a plaintiff to recover for economic losses resulting from damage to another's property."<sup>95</sup> *TairaLynn* concerned a maritime allision that caused the release of "a gaseous mixture," and the government ordered a mandatory evacuation in the area of the release.<sup>96</sup> The court did not decide whether OPA applied to the incident but held that, even if OPA did apply, parties claiming economic loss under section 2702(b)(2)(E) failed to raise an issue of fact as to whether the release of the gas in fact caused any property damage.<sup>97</sup> The claimants had alleged lost revenues from the evacuation, however, implying, *contra Sekco*, that future revenues are not "property" under OPA.<sup>98</sup>

The district court in *In re Settoon Towing, LLC* held that a company could proceed with a claim under section 2702(b)(2)(E) for economic harms suffered when an oil spill blocked access to its undamaged production platform.<sup>99</sup> The spill resulted from a barge striking an oil well owned by another company, resulting in property damage.<sup>100</sup> Unlike in *Taira Lynn*, which concerned a gaseous discharge in open air,<sup>101</sup> the incident in *Settoon Towing* indisputably led to the discharge of oil into "navigable waters or the adjacent shoreline," as required by OPA's damages provisions.<sup>102</sup> Therefore, *In re Settoon Towing* is more relevant to the question of the scope of section 2702(b)(2)(E).

Finally, the district court in *Dunham-Price Group, LLC v. Citgo Petroleum Corp.* held that the owner of an undamaged concrete facility could pursue a claim under section 2702(b)(2)(E) arising from the facility's temporary closure as a result of an oil spill.<sup>103</sup> The spill caused "the closure of approximately 22 miles of the Calcasieu River, including portions of the Intracoastal Waterway" and damaged personal property along the river, though none belonging to the plaintiff.<sup>104</sup> The court found that the river was a natural resource under OPA.<sup>105</sup> The court held that a trier of fact could

<sup>94</sup> See *Sekco*, 820 F. Supp. at 1015.

<sup>95</sup> 444 F.3d 371, 382 (5th Cir. 2006).

<sup>96</sup> *Id.* at 376.

<sup>97</sup> *Id.* at 383. The allision caused property damage, but the allision and the discharge were two distinct incidents. *Id.*

<sup>98</sup> *Id.* at 379.

<sup>99</sup> No. 07-1263, 2009 WL 4730969, at \*2, \*4 (E.D. La. Dec. 4, 2009).

<sup>100</sup> See *id.* at \*1.

<sup>101</sup> Robertson, *supra* note 75, at 191 (arguing that *TairaLynn* is not "particularly instructive" on the issue because it is "fairly clearly not an OPA case").

<sup>102</sup> *Settoon Towing*, 2009 WL 4730969 at \*1, \*4; 33 U.S.C. § 2702(a) (2006).

<sup>103</sup> No. 2:07 CV 1019, 2010 WL 1285446, at \*2-3 (W.D. La. Mar. 31, 2010).

<sup>104</sup> *Id.* at \*1, \*3.

<sup>105</sup> *Id.* at \*3.

decide whether the plaintiff's economic loss was caused by this property and resource damage.<sup>106</sup>

Fifth Circuit precedent clearly demonstrates that individuals may pursue claims under section 2702(b)(2)(E) for economic damages caused by physical damage to another's property or resource. However, the precise relationship required between the loss and the physical damage remains an open issue.

## 2. *Other Jurisdictions*

### a. *Analysis of OPA*

Case law from other jurisdictions provides little help in directly resolving the requirement under section 2702(b)(2)(E). Compared to Fifth Circuit case law, the early decision by the U.S. District Court for Eastern District of Michigan in *Petition of Cleveland Tankers, Inc.* was more restrictive to economic loss claimants, holding that section 2702(b)(2)(E) requires a showing of damage to the plaintiff's own property or resources.<sup>107</sup> However, *Cleveland* did not explain its reasoning with substantial analysis, and its holding is unpersuasive in light of Congress's expressed intent to provide damages to "any claimant."<sup>108</sup> By contrast, the First Circuit in *Ballard Shipping Co. v. Beach Shellfish* analyzed the structure and legislative history of OPA's economic loss provision to reach the opposite conclusion: "Congress means to allow recovery of economic losses from injury to natural resources even though the claimant's own property was not damaged."<sup>109</sup> The analysis in *Ballard* was dicta,<sup>110</sup> but it was adopted by the Fifth Circuit in *Taira Lynn*.<sup>111</sup>

Finally, the Fourth Circuit in *Gatlin Oil Co. v. United States* did not directly consider section 2702(b)(2)(E)'s requirement tying the injury to property or resource damage but rather section 2702(a)'s provision that the injury must "result from such incident" as the statute specifies.<sup>112</sup> The court accepted the Coast Guard's interpretation of "incident" to mean "the discharge or substantial threat of discharge into navigable waters or adjacent shorelines."<sup>113</sup> The losses at issue in *Gatlin* arose from a fire caused by the ignition of vapors from an oil discharge, and not the discharge directly.<sup>114</sup> In a parenthetical, Judge Barbier read *Gatlin* as "holding that a plaintiff could not recover for fire damage because the evidence did not show that the fire caused the discharge of oil into navigable waters."<sup>115</sup> By contrast, if the fire

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<sup>106</sup> *Id.*

<sup>107</sup> *Petition of Cleveland Tankers, Inc.*, 791 F. Supp. 669, 679 (E.D. Mich. 1992).

<sup>108</sup> *See id.*; 33 U.S.C. § 2702(b)(2)(E) (2006).

<sup>109</sup> 32 F.3d 623, 631 (1st Cir. 1994).

<sup>110</sup> *See id.*

<sup>111</sup> *In re Taira Lynn Marine Ltd. No. 5, LLC*, 444 F.3d 371, 382 (5th Cir. 2006).

<sup>112</sup> 169 F.3d 207, 210 (4th Cir. 1999).

<sup>113</sup> *Id.* at 211–12.

<sup>114</sup> *Id.*

<sup>115</sup> *Order of Aug. 26, 2011*, 808 F. Supp. 2d 943, 965 (E.D. La. 2011).

had caused or threatened to cause the oil discharge, the fire would have fallen under the court's definition of "incident." However, Judge Barbier's parenthetical is incomplete. To deny the plaintiff's claim, the court must also have concluded the converse: that the fire damages did not "result from" the oil discharge.<sup>116</sup> Even granting that the fire was started by "vapors" from the discharge and not the discharge itself, evidence showed that "[t]he fire consumed a large part of the discharged fuel."<sup>117</sup> The court's application of its own interpretation is suspect: if it could be shown that damages resulted from the fuel feeding the fire, then at least some of the damages clearly "resulted from" the discharge. The majority in *Gatlin* did not analyze this argument, and so *Gatlin* is a questionable precedent for illuminating the extent of compensable damages resulting from an oil discharge.<sup>118</sup>

*b. Analysis of Other Statutes*

Courts in other jurisdictions have sometimes found that pollution statutes similar to OPA may be read to incorporate implicitly common law causation standards.<sup>119</sup> Other courts have suggested that statutes cannot implicitly abrogate all common law causation standards, but can implicitly abrogate some common law features.<sup>120</sup>

In a passage of dicta quoted by Judge Barbier, the Supreme Court recently warned against the wholesale import of common law standards into statutes:

Congress, it is true, has written the words "proximate cause" into a number of statutes. But when the legislative text uses less legalistic language, *e.g.*, "caused by," "occasioned by," "in consequence of," or, as in [the statute at issue in the case], "resulting in whole or in part from," and the legislative purpose is to loosen constraints on recovery, there is little reason for courts to hark back to stock, judge-made proximate-cause formulations.<sup>121</sup>

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<sup>116</sup> See *Gatlin*, 169 F.3d at 211 (holding that damages specified in section 2702(b) are those that result from a discharge of oil or from a substantial threat of a discharge of oil into navigable waters or the adjacent shoreline).

<sup>117</sup> *Id.* at 209.

<sup>118</sup> However, the dissent in *Gatlin* did consider this argument and concluded that the plaintiff should be "entitled to its damages" under the majority's interpretation. See *id.* at 214–15 (Niemeyer, J., dissenting).

<sup>119</sup> See *Ohio v. U.S. Dep't of Interior*, 880 F.2d 432, 472 (D.C. Cir. 1989) (finding that the Comprehensive Environmental Response, Compensation, and Liability Act does not foreclose a proximate cause requirement, even where the statute does not explicitly provide for such a requirement).

<sup>120</sup> See *In re Glacier Bay*, 746 F. Supp. 1379, 1384–86 (D. Alaska 1990) (finding TAPAA implicitly abrogated the strict physical damage requirement from maritime law but not deciding whether the statute retained other implicit, causation-based limitations on liability); *Benefiel v. Exxon Corp.*, 959 F.2d 805, 807–08 (9th Cir. 1992) (deciding based on the same provision of TAPAA at issue in *Glacier Bay* "that Congress in enacting TAPAA did not intend to abrogate all principles of proximate cause").

<sup>121</sup> *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2642–43 (2011).



This passage guides lower courts not to rely on “stock” formulations when the “legislative purpose” points in another direction. However, the Court did not imply that judges should avoid imposing limitations suggested by the most reasonable plain reading of the text. Rather, the Court merely stated that deviations from proximate-cause formulations can occur absent explicit authorization from the text.<sup>122</sup>

#### D. *Two Recent Approaches to OPA Causation*

##### 1. *The Issue*

The sheer size and scope of the *Deepwater Horizon* litigation means that courts would benefit from a more precise interpretation of section 2702(b)(2)(E). The causation inquiry may be “highly factual,” as Judge Barbier suggests,<sup>123</sup> but some level of doctrinal consistency is required to ensure fairness across many different types of claims. Transplanting ready-made proximate cause formulations from the common law represents one extreme that should be avoided. Another extreme would be to interpret the statute too generously. Section 2702(b)(2)(E) provides that “any claimant” can recover for economic loss due to property or resource damage, but this language should not be interpreted to mean that every claimant can recover.

First, as *Benefiel v. Exxon Corp.* recognized, courts should not abandon all principles of proximate cause.<sup>124</sup> Consider an example that could arise in the *Deepwater Horizon* litigation: a Minnesota seafood restaurant serves a variety of seafood, none of it originating from the Gulf of Mexico. In the wake of continued news coverage about the spill and its effects of gulf seafood products, some of the restaurant’s customers decide to stay away. The restaurant charts a sudden drop in earnings, beginning almost immediately after the spill and persisting for a number of weeks. Under the most generous common law factual cause test, the restaurant can probably show that “but for” the oil discharge, it would not have suffered lost earnings. In this sense, the “loss of profits . . . results from” the spill, in OPA’s language.<sup>125</sup> However, a court should have the flexibility to consider whether customers’ unreasonable beliefs about the safety of the restaurant’s seafood, or the restaurant’s failure to pursue corrective advertising, may be intervening causes

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<sup>122</sup> Cf. *In re Glacier Bay*, 746 F. Supp. at 1384 (D. Alaska 1990) (citing *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) (“Statutes which invade the general maritime law are read with a presumption favoring the retention of long-established and familiar principles *except when a statutory purpose to the contrary is evident.*”) (emphasis added)).

<sup>123</sup> Order of Aug. 26, 2011, 808 F. Supp. 2d 943, 966 (E.D. La. 2011).

<sup>124</sup> *Midlantic Nat’l Bank v. N.J. Dep’t of Env’tl. Protection*, 474 U.S. 494, 501 (1986) (quoting *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266–67 (1979)). “The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.” *Id.* The idea that the injury must be part of the harm within the risk that made the actor’s conduct tortious is a foundational part of the judicially created causation analysis in tort law.

<sup>125</sup> 33 U.S.C. § 2702(b) (2006).

that should shield a Responsible Party from liability. By contrast, reading section 2702(b)(2)(E) to require only that a loss would not have occurred in the absence of an oil spill causing property damage would foreclose this analysis.

Second, the plain language of section 2702(b)(2)(E) most reasonably requires some kind of specific relationship between property damage and economic loss. Claims based solely on injury to the reputation of the general Gulf Coast region or the impairment of the economic climate of the Gulf or the nation as a whole should be excluded. Imagine that the Minnesota restaurant described above did in fact serve Gulf seafood, which was perfectly safe, but customers nonetheless stayed away because oil spill news coverage had made seafood temporarily unpopular, unrelated to safety concerns. Leaving aside any problems with intervening cause, the Minnesota restaurant has merely suffered reputational loss — its earnings decreased because of a generalized impairment to the reputation of Gulf Coast seafood.<sup>126</sup> If the restaurant's claim was supported by nothing more than proof that fewer customers wanted to eat seafood after the spill, then its claim is not due to any particular property or resource damage. Losses based solely on an impaired economic climate are equally problematic. An example of such loss would be an inland business — say, a clothing store — that suffers lower earnings amid a general downturn in the economy of states bordering the Gulf Coast. The store cannot demonstrate any specific connection between its loss and physical damage, and so its claim should be excluded. Allowing recovery for losses based on a spill's generalized impact to the economy could lead to absurd outcomes, such as holding a Responsible Party liable for losses incurred by traders in oil futures. Put simply, section 2702(b)(2)(E) should not be interpreted to say that injuries need not have any connection to damaged property and resources, so long as such physical damage occurred somewhere. The next section explains how two recent interpretations of section 2702(b)(2)(E) attempt to tie economic loss directly to property or resource damage.

## 2. *Professor Goldberg's Test*

In response to the *Deepwater Horizon* spill, two of the country's leading tort scholars have devised new approaches to the question of what causation standard section 2702(b)(2)(E) requires. First, in the wake of BP's decision to set up the GCCF, Kenneth Feinberg retained Harvard Law School Professor John C.P. Goldberg to prepare a report on economic liability under the

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<sup>126</sup> The result of the traditional factual cause test in this paragraph would be no different if the restaurant served unsafe Gulf seafood. However, in the latter case, if the restaurant were unable to serve food from which its sales largely derived — if it specialized in serving fish found only in the Gulf, for example — then the fairness question would be substantially different, because the injury would be tied to a specific resource on which the restaurant relied and not to a generalized harm to the “reputation” of Gulf Coast seafood.

oil spill.<sup>127</sup> Professor Goldberg asserts that Mr. Feinberg expected a straightforward accounting of “the prospects facing different categories of economic loss claimants.”<sup>128</sup> However, from a strategic standpoint, a stricter standard for recovery under OPA would lead more individuals to choose the safer route of a guaranteed final payout from the facility, a result that would presumably be welcomed by BP.

Professor Goldberg’s basic thesis is that OPA imports proximate cause-like limitations on recovery for pure economic losses.<sup>129</sup> Specifically, OPA grants recovery under section 2702(b)(2)(E) to claimants who have “a right physically to obtain or use property or resources that are damaged or lost because of an oil spill” (the “use-right” requirement).<sup>130</sup> As a matter of statutory interpretation, Professor Goldberg relies on the presence of an apparent “two-layer causation requirement” in OPA.<sup>131</sup> OPA states that a Responsible Party is liable for damages “result[ing] from” an oil discharge<sup>132</sup> and “due to injury, destruction, or loss of real property, personal property, or natural resources.”<sup>133</sup> He argues that “result from” provides an initial factual (“but-for”) causation requirement, while “due to” imposes an additional, second-layer causation requirement: a physical use-right requirement.<sup>134</sup> Why use-rights? Professor Goldberg supports his interpretation with a complex mix of legislative history,<sup>135</sup> prior case law,<sup>136</sup> and policy considerations.<sup>137</sup> It is unnecessary to recount his entire argument here, be-

<sup>127</sup> John C.P. Goldberg, *OPA and Economic Loss: A Reply to Professor Robertson*, 30 MISS. C. L. REV. 203, 204 (2011). Some commentators initially thought that Professor Goldberg’s analysis would be the template used to determine payouts from the GCCF, see David F. Partlett & Russell L. Weaver, *BP Oil Spill: Compensation, Agency Costs, and Restitution*, 68 WASH. & LEE L. REV. 1341, 1353 (2011), but the facility’s protocol for paying claims appears to be broader than Professor Goldberg suggests the law requires, see *Protocol for Interim and Final Claims*, GULF COAST CLAIMS FACILITY (Feb. 8, 2011), [http://www.gulfcoastclaimsfacility.com/proto\\_4](http://www.gulfcoastclaimsfacility.com/proto_4) (on file with the Harvard Law School Library).

<sup>128</sup> Goldberg, *supra* note 127, at 204.

<sup>129</sup> See, e.g., Goldberg, *supra* note 75, at 354.

<sup>130</sup> *Id.* at 366.

<sup>131</sup> See Goldberg, *supra* note 127, at 206.

<sup>132</sup> 33 U.S.C. § 2702(a) (2006).

<sup>133</sup> See *id.* § 2702(b)(2)(D), (E).

<sup>134</sup> See Goldberg, *supra* note 75, at 354.

<sup>135</sup> For example, Professor Goldberg claims that the 1990 Senate Report for OPA suggests recovery for at least some economic injuries was predicated on the loss of commercial use of resources. Commercial fishermen are an obvious example. Professor Goldberg argues that the Senate Report’s reasoning logically extends to property as well. See *id.* at 367–68 (quoting S. REP. NO. 101-94, at 12 (1990)). However, this legislative history does not state that claims should be limited to those who have use-rights. Professor Goldberg also notes that a previous version of OPA advanced by the House of Representatives explicitly tied recovery for lost earnings to the utilization of property or resources. Goldberg, *supra* note 127, at 212, 213 (citing H.R. 3027, 101st Cong. § 102(a)(2)(B)(v) (1st Sess. 1989)). The fact that the utilization provision did not make it into the 1990 legislation as readily suggests that Congress considered it unacceptable as it does that Congress had use-rights in mind all along; the two explanations fairly cancel each other out.

<sup>136</sup> Goldberg, *supra* note 75, at 368–69.

<sup>137</sup> For example, avoiding “arbitrary distinctions” between claimants, providing greater compensation to communities most directly affected by the spill, and avoiding unmeritorious claims. See *id.* at 369–72.

cause Professor Goldberg cannot show that Congress explicitly intended section 2702(b)(2)(E) to include a physical use-right requirement, nor that the plain meaning of the provision requires this reading. His argument merely shows that his interpretation would be compatible with the statute, its legislative history, and case law. It is the policy rationale — especially the need to limit recovery to “flow primarily to certain members of the communities most immediately and tangibly affected by a spill”<sup>138</sup> — that must do the work to push Professor Goldberg’s interpretation from being compatible to being the best interpretation. This Comment will argue that there is a more intuitive reading of the economic damage provision that is also fairer from a policy perspective.

### 3. *Professor Robertson’s Test*

After Professor Goldberg released his report, University of Texas Professor David W. Robertson published a highly critical response in the *Mississippi College Law Review*, which drew a subsequent response and reply from both professors. Professor Robertson describes the “dual-layer” statutory argument as “highly dubious”<sup>139</sup> and “*fabulously false*.”<sup>140</sup> He proceeds to attack the use-right requirement from many angles.<sup>141</sup> His basic theme is that Professor Goldberg has advanced an overly limited construction of OPA’s causation requirements in order to craft an argument with “exclusionary power.”<sup>142</sup> It should be noted that Professor Robertson’s argument reflects his work as a consultant for the Plaintiffs’ Steering Committee in the MDL litigation.<sup>143</sup>

Robertson supplies a competing interpretation of the OPA’s causation requirements. He argues that OPA merely imposes heightened “but-for” causation on parties suing for pure economic loss.<sup>144</sup> Therefore, the relevant counterfactual is not simply, ‘but for this oil spill, would the loss have occurred?’ but rather, ‘but for the fact that this oil spill *caused damages to property and natural resources*, would the loss have occurred?’<sup>145</sup> (the “heightened factual cause requirement”). The second question clearly sets a higher bar than the first because it requires that the economic injury be causally connected to physical damage caused by the spill and not merely that physical damage occurred somewhere. The distinction is subtle, but Professor Robertson maintains that the second question imposes meaningful limitations on recovery in contrast with the first.<sup>146</sup> And indeed it does. For example, the plaintiffs in *Benefiel* were gasoline consumers who sought to

<sup>138</sup> *Id.* at 370.

<sup>139</sup> Robertson, *supra* note 75, at 176.

<sup>140</sup> *Id.* at 200.

<sup>141</sup> *See generally id.* at 175–202.

<sup>142</sup> *See, e.g., id.* at 175.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 168–69.

<sup>145</sup> *See id.* at 169.

<sup>146</sup> *See id.* at 165 (describing his as a “middle-of-the-road interpretation”).

recover for the increased price of gasoline in the wake of the *Exxon Valdez* oil spill.<sup>147</sup> The alleged injury to the gasoline consumers in *Benefiel* — losses caused by increased prices — would not meet the requirement. The *Benefiel* losses would not have occurred in the absence of the *Exxon Valdez* oil spill but they probably would have occurred even in the absence of physical damage from the spill. Nonetheless, Professor Robertson's interpretation would not require that claims for lost profits and earnings need any *specific* connection with damaged property or resources.

On policy grounds, Professor Robertson regards the heightened factual cause test as clearly fairer to plaintiffs than Professor Goldberg's use-right requirement. For example, he cites the example of the "ship's chandler," which was first mentioned by Professor Goldberg in his report.<sup>148</sup> A chandler repairs and services boats, like the fishing boats that work on the Gulf Coast. Unlike fishermen, the chandler does not have a specific right to use natural resources damaged in the spill, and therefore, under a strict use-right requirement, the chandler may not be able to recover lost earnings if fewer fishermen employ his services in the wake of damage to fisheries.<sup>149</sup> However, the chandler's loss undoubtedly would not have occurred if the spill had not physically harmed the fisheries, so his case is strong under the heightened factual cause requirement.<sup>150</sup>

In litigation as large as *In re: Oil Spill*, there are undoubtedly a great number of claims that would meet Professor Robertson's test but not Professor Goldberg's. Therefore, it makes a great deal of difference which test is adopted. However, although both professors make powerful arguments, neither has come up with the best interpretation of section 2702(b)(2)(E).

#### 4. *Problems with Use-Right and Heightened Factual Cause Requirements*

First, because the use-right limitation proposed by Professor Goldberg is not obviously required by the statutory language or explicitly suggested by legislative history and case law, it must be defended in large part on policy grounds. On these grounds, the limitation goes too far. Professor Goldberg seems to acknowledge as much when he says that certain complainants — particularly those who "reside in the immediate vicinity of a spill" and whose "commercial activities are very closely bound up with local economies that revolve around the use of resources and property that have been damaged" — could have a strong equity and policy argument for recovery under section 2702(b)(2)(E).<sup>151</sup> The ship's chandler is one such claimant.<sup>152</sup> Goldberg says that these types of claimants could meet the standard for re-

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<sup>147</sup> *Benefiel v. Exxon Corp.*, 959 F.2d 805, 806 (9th Cir. 1992).

<sup>148</sup> Robertson, *supra* note 75, at 170.

<sup>149</sup> *See id.* at 175.

<sup>150</sup> *See id.*

<sup>151</sup> Goldberg, *supra* note 75, at 375–76.

<sup>152</sup> Goldberg, *supra* note 127, at 212 n.40.

covery under a generous interpretation of OPA.<sup>153</sup> But there is no principled reason to be charitable in statutory interpretation if the statute were in fact to require excluding claimants like the Chandler. On the other hand, if the statute does not clearly mandate excluding some worthy claimants, the intuition that justice favors allowing a jury to weigh their claims suggests that the use-right requirement is too rigid and categorical.<sup>154</sup>

Moreover, Professor Goldberg reads too much into the OPA's supposed "dual layers" of causation: "result from" and "due to." It may be wise to import some notion of proximate cause into the statute for reasons of policy and precedent.<sup>155</sup> But any heightened causation standard beyond factual cause does not arise from the peculiar combination of "layers," but rather because the most reasonable reading of section 2702(b)(2)(E) by itself is that Congress intended successful claimants to have a more direct connection with damaged property or resources. Finally, as suggested above, the legislative history and case law cited by Professor Goldberg support the contention that Congress intended there to be a nexus between the economic loss and the damaged property, but not a "use-right" test in particular.

Professor Robertson's heightened factual cause requirement seems even more problematic. First, his reading stands at odds with the most reasonable plain language interpretation of "due to," which should allow for a nuanced distinction between more and less direct forms of causation.<sup>156</sup> Specifically, a factual cause requirement in any form would forbid courts from exercising their discretion to exclude claims with only a distant connection to property or resources. Also, while a clear Congressional intent to depart from the pure economic loss rule is evident, the intent to depart from the traditional practice of holding plaintiffs responsible for the harm within the risk created by their activity is not evident.<sup>157</sup>

Furthermore, Professor Robertson's factual cause test would be such a mess to apply in practice that it is hard to imagine a reasonable Congress foisting it upon courts. The test involves more than simply asking if the economic loss would have occurred if the spill did not cause physical damage (i.e., the spill was small and limited in scope). Rather, the test distinguishes between the two aspects of the same spill, the physical damage aspect and the non-physical reputational aspect, and asks whether the eco-

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<sup>153</sup> Goldberg, *supra* note 75, at 376.

<sup>154</sup> See also Robert Force, Martin Davies, & Joshua S. Force, *Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties, and State Remedies in Oil Spill Cases*, 85 TUL. L. REV. 889, 938 (2011) ("[T]he [Goldberg] report's analysis is too narrow because it does not appear to permit recovery by many parties directly involved in providing or servicing primary maritime activities even though those parties rely upon natural resources in conducting their businesses.").

<sup>155</sup> See, e.g., *Benefiel v. Exxon Corp.*, 959 F.2d 805, 807 (9th Cir. 1992).

<sup>156</sup> As discussed above, while it is logically accurate to use "due to" to mean "had as a necessary condition," ordinary speakers usually layer more subtle distinctions involving directness on top of this bare logical foundation. See *supra* Part IV.A.

<sup>157</sup> See *Midlantic Nat'l Bank v. N.J. Dep't of Env'tl. Protection*, 474 U.S. 494, 501 (1986) (stating the general rule that Congress does not depart from "the interpretation of a judicially created concept" without a show of intent).

nomic loss would have occurred if only the former were present but not the latter.<sup>158</sup> Thus, in the context of the *Deepwater Horizon* litigation, Professor Robertson argues that the appropriate question is whether the economic loss would have occurred if the spill had somehow been equally “ugly” and “massive” but had not caused any damage to property or natural resources.<sup>159</sup> This is a profoundly unhelpful inquiry because the distinction he seeks to draw is much more difficult than he makes it out to be. For example, a large part of what made the spill seem so “ugly” was the public images of property and resource damage, as well as chilling footage from BP’s underwater camera documenting the release of huge amounts of oil,<sup>160</sup> which was disconcerting precisely because of the concrete damages expected to result from this discharge. If the spill had been of a kind that would not cause physical damage, it would have been neither “ugly” nor “massive.” It would be bewildering and impractical to ask judges and juries to counterfactually imagine a huge spill that releases millions of gallons of oil and yet somehow results in no damage.<sup>161</sup> The speculation involved in such an inquiry would also likely lead to inconsistent or arbitrary outcomes.

Nonetheless, Professor Robertson believes his test will at least limit claims arising from the purely “reputational” effects of the spill.<sup>162</sup> These are claims with no connection to concrete physical damages but rather based purely on a public reaction to the magnitude of the spill in the abstract. While it is true that some claims based on reputational effects would be excluded, Professor Robertson evidently believes that more would be excluded than would in fact be the case. For instance, he provides the example of a gas station in Idaho suffering losses from a boycott organized in the wake of the spill.<sup>163</sup> He argues that the boycotters would probably not “care” whether the spill “had actually damaged anything,” an implausible and confusing claim (and one that should give cause for offense to hypothetical boycotters everywhere!).<sup>164</sup> But one could tweak the hypothetical slightly to achieve a different result: say that an oil spill has led to highly publicized and well-documented deaths of a colony of marine birds in the

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<sup>158</sup> See Robertson, *supra* note 75, at 173.

<sup>159</sup> *Id.*

<sup>160</sup> See, e.g., Robert Mackey, *Underwater Video Shows Oil Gushing From Damaged Pipe Into Gulf*, THE LEDE, N.Y. TIMES, May 12, 2010, <http://thelede.blogs.nytimes.com/2010/05/12/underwater-video-shows-oil-gushing-from-damaged-pipe-into-gulf/>.

<sup>161</sup> For example, to (try to) make a counterfactual involving a Florida theme park work, Professor Robertson must go to great imaginative lengths, positing a situation in which the spill not only caused no physical damage to tourist beaches, but caused no physical damage generally because it “occurred in a Gulf of Mexico long since so befouled by frequent oil and chemical spills as to have become essentially a dead zone for all purposes save mineral exploration.” See David W. Robertson, *OPA and Economic Loss: A Response to Professor Goldberg*, 30 MISS. C. L. REV. 217, 222 (2011). Thus, he not only re-imagines the spill but also the entire Gulf of Mexico! Even then, his explanation of why the theme park’s claim should be excluded under his test is convoluted and unconvincing.

<sup>162</sup> See Robertson, *supra* note 75, at 173.

<sup>163</sup> Robertson, *supra* note 161, at 219–20.

<sup>164</sup> *Id.* at 220.

gulf. A boycott of a gas station in Idaho is organized by a local birding group, which carries signs depicting birds covered in oil and declaring, "Stop killing Gulf Coast wildlife!" Now the gas station's claim should easily pass the factual cause test because the boycott most likely would not have occurred without damage to natural resources, even though from a practical and policy perspective no meaningful distinction can be drawn between this boycott and Professor Robertson's imagined boycott. Moreover, an imagined seafood restaurant in Minnesota that serves no Gulf products should also meet the factual cause requirement if it could be shown that the misinformed customers were reacting to news of damage to Gulf Coast fisheries, even if the restaurant did not sell any products from those fisheries. However, the restaurant's loss has, at best, a very weak nexus with specific resource damage caused by the spill, and so its claim should fairly be excluded. In sum, Professor Robertson's interpretation would be such a dramatic departure from any principles of proximate cause, and would produce such a strange and unworkable test for a fact-finder to apply, that it seems unreasonable to suppose Congress would intend this result absent a clear announcement of a factual cause standard.

*E. Another Approach: A Commercial Needs Requirement*

Based on the analysis above, it is reasonable to assume that for liability to arise Congress required a specific nexus between the economic loss incurred and the damaged property or resource. The authors of a recent article assessing OPA have suggested that a claimant should have to demonstrate that its "business enterprise was so directly intertwined with the damaged property or resource that the claimant sustained immediate and predictable economic consequences."<sup>165</sup> The reasoning behind this reading of the statute is that by protecting lost profits and earning capacity, Congress intended to broadly protect individuals who rely in a fairly direct way on property or resources for their livelihood.

The best, most precise interpretation of the nexus required by Congress is that the plaintiff must be deprived of the benefit of a specific real property, personal property, or natural resource that is reasonably necessary for the production or sale of the plaintiff's good or service (a "commercial needs" requirement). An interpretation along these lines would not provide as definitive an answer as either Professor Goldberg or Professor Robertson provides. But it would produce a less rigid, more pragmatic framework for analyzing the complicated fairness and policy issues involved in a massive oil spill, while preserving a court's ability to draw a line to exclude obviously attenuated claims. Moreover, under the "nexus" interpretation, courts would not have to rely on other, more arbitrary methods of excluding unmer-

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<sup>165</sup> Susan Molero Vance & Paul N. Vance, *OPA 90 in 2010: A Maritime Perspective*, 24 TUL. ENVTL. L.J. 113, 133 (2010).



itorious claims that have been suggested, such as drawing “lines based upon geographic proximity.”<sup>166</sup>

First, the damaged property or resource should be identifiable and specific. Claimants may not assert claims based on generalized damage to such entities as the “Gulf Coast shoreline” or the “Gulf of Mexico fisheries.” A plaintiff must identify the specific damaged property or resource that led to economic loss; for example, a tourist beach, a particular fishery, or a transportation waterway. The specificity requirement imposes a *de facto* test of geographic proximity on many claimants, because as one gets farther from the physical effects of the spill, it is more difficult to identify specific physical damage causing loss. Therefore, a store in Shreveport, Louisiana (a far inland city) that sells beach items could not submit a claim for economic loss based on damage to Gulf Coast beaches because the store would not be able to identify a particular beach or area of beaches on which its business depended. A claimant would have to cite a particular area, such as the beaches on the Gulf Shores in Alabama, and show why that area is reasonably necessary to one’s commercial activity. However, the specificity requirement does not use a geographic test directly, so courts would have the flexibility to admit claims from more geographically remote claimants who could show a connection to particular physical damage.

Second, the specific property or resource need not be directly damaged; the plaintiff need only have been deprived of some economic benefit from it. The statute states that the “loss of” property or resource, apart from its “injury” or “destruction,” is sufficient to sustain a claim. To give independent meaning to the term “loss,” it should be interpreted as “inaccessibility,” in the sense that some segment of the public has been deprived of or separated from the property or resource. This reading squares with a broad plain language interpretation of the word “loss”<sup>167</sup> and also with Congress’s desire to compensate injuries that affect the means of earning a living.<sup>168</sup> To make claims dependent on physical injury to property or resources would contradict the statute and lead to strange results. For example, imagine a small oil spill occurring just offshore, leading the government to place barriers in front of a waterway that barges use for transport to prevent oil from flowing up the waterway during unfavorable weather or currents. If the spill causes no physical damage to any property or resources, the barge owners should

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<sup>166</sup> See Force, *supra* note 154, at 942; see also Press Release, Gulf Coast Claims Facility, Feinberg Announces Clarification Regarding Geographic Proximity (Oct. 4, 2010) (on file with the Harvard Law School Library) (announcing the GCCF’s official position that “a geographic test to determine eligibility regarding economic harm due to the oil spill is unwarranted”).

<sup>167</sup> See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1338 (1981) (defining “loss” as “deprivation” and “the harm or privation resulting from losing or being separated from something or someone”). For example, when one refers to the loss of a fine piece of art that has been stolen, it does not mean that the painting has been damaged or destroyed, and when one refers to the loss of a family member, it does not mean a loss of ownership or a use-right but rather a more general absence or separation.

<sup>168</sup> See *supra* Part IV.A.

still be able to make a claim based on their loss of access to the waterway, but this claim would only be allowed if “loss” includes “inaccessibility.”<sup>169</sup>

Third, claimants should be allowed to submit claims based on impairment of either production or sale. Thus, damage to the beaches of Gulf Shores, Alabama would not hinder the ability of a local souvenir store to produce its goods, but it could substantially affect sales due to decreased tourism. To return to language found in OPA’s legislative history, both “lost wages” and the “means of earning wages” should be protected.<sup>170</sup>

Fourth, to be “reasonably necessary” requires more than showing that one’s business would have been better off had the spill not caused physical damage. The property or resource must be in some sense integral to (or “directly intertwined with”) the impaired commercial activity. In most cases this will mean that the commercial activity is directly oriented around the property or resource.

The commercial needs interpretation agrees with the statutory language and legislative history. First, as explained above, the legislative history suggests that courts should interpret the requirement that loss was “due to” physical injury using a flexible standard: the spill damaged property or resources that the claimant needed for his or her commercial activity. The text of the statute does not suggest that a strict test like use-rights should be employed. Further, a strict test would leave courts unable to deal with unforeseen, but meritorious, claims; given the number and complexity of claims, courts should refrain from tying their hands with a strict test.

Second, the most plausible reading of the provision requires a connection between economic loss and specific property. For example, subsection B of the damages provision provides recovery for damages “resulting from destruction of . . . real or personal property, which shall be recoverable by a claimant who owns or leases that property.”<sup>171</sup> Subsection B clearly requires that loss arise from damage to a specific property; otherwise, an ownership or leasehold interest could not be shown. Subsection E provides broader recovery than subsection B because it allows “any claimant” to recover and because it permits recovery for damages from the loss of natural resources.<sup>172</sup> However, the specificity requirement of “real property” and “personal property”<sup>173</sup> should be maintained in subsection E under the presumption that statutory language should be interpreted consistently unless there is evidence of contrary intent.<sup>174</sup> Further, the specificity requirement should carry over to “natural resources,” which occurs in a list immediately after “real prop-

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<sup>169</sup> The party responsible for the spill might still have an argument that the government was a superseding or intervening cause — particularly if the decision to place barriers was unreasonable — but this argument would be separate from the argument that the statute does not cover damages from loss of access to an undamaged natural resource.

<sup>170</sup> See *supra* Part IV.A.

<sup>171</sup> 33 U.S.C. § 2702(b)(2)(B) (2006).

<sup>172</sup> *Id.* § 2702(b)(2)(E).

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

<sup>174</sup> See, e.g., *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994).

erty” and “personal property,”<sup>175</sup> because it would be incongruous to apply this requirement to only two of the three items in the list.<sup>176</sup> Additionally, subsection D includes the same “due to” causation clause as subsection E.<sup>177</sup> This subsection allows state or federal governments to recover for “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.”<sup>178</sup> Presumably a government entity could not collect under this statute without identifying specific property or resources creating revenue. Thus, if subsection D refers to specific property or resources, subsection E, which includes an identical causation clause, should as well.

Third, in accord with the legislative history, the commercial needs requirement does not mandate that the claimant have a proprietary interest.<sup>179</sup> It also provides broad recovery for a wide range of injuries and without allowing unreasonable compensation.<sup>180</sup> It does not foreclose any type of injury but merely excludes unreasonable, excessively remote claims, particularly from plaintiffs who would argue that generalized physical damage hurt their business without asserting that a specific property or resource was necessary to their business. Finally, the commercial needs requirement comports with the Court’s exhortation to avoid “stock, judge-made proximate-cause formulations.”<sup>181</sup> The requirement would avoid such a formulaic proximate cause analysis because it looks into the claimant’s specific relationship to physical loss or damages, and not merely into factors like remoteness and foreseeability.

From a fairness perspective, the requirement ensures that claimants with investment-backed expectations in properties or resources may recover, while those without such reliance may not. If a property or resource is truly integral to a claimant’s good or service, then the commercial activity in question should be intentionally oriented around that property or resource.<sup>182</sup>

In the context of the *Deepwater Horizon* spill, a commercial needs requirement would make many cases easier without neatly resolving all complications. For example, a hotel that relies on customers’ ability to enjoy a

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<sup>175</sup> 33 U.S.C. § 2702(b)(2)(E).

<sup>176</sup> *Ratzlaf*, 510 U.S. at 143.

<sup>177</sup> 33 U.S.C. § 2702(b)(2)(D).

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

<sup>179</sup> See *supra* notes 70–75 and accompanying text.

<sup>180</sup> See S. REP. NO. 101-94, at 9 (1989).

<sup>181</sup> *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2643 (2011).

<sup>182</sup> For example, a nearby beach would not be integral to a grocery store in an inland residential area, because one would assume that most of the store’s customers are permanent residents. The owner probably invested in the store to cater to permanent residents, and so her investment-backed expectations should not be upset by temporary closure of the beach, even if the closure leads to a short-term decline in business. By contrast, the owner of a restaurant along a beachside road popular with tourists has likely chosen that location (and perhaps paid a premium) because of its connection with the beach. Therefore, the restaurant could be able to pursue a claim for lost profits from any decrease in tourism. On the other hand, if a spill were so awful that it led to long-term natural resource damage — to the extent that the store’s regular customers started moving away — the store would then have a good claim to make. The flexibility of the commercial needs test is its great strength.

popular nearby beach to which it does not have a specific use-right would clearly meet the standard.<sup>183</sup> So too would a dockside restaurant whose “regular customers . . . are connected with maritime commerce” on the Gulf and “a real estate agent whose listings are made up primarily of beachfront properties in an area of the Gulf that has been contaminated by the spill.”<sup>184</sup> And, of course, a ship’s chandler would fit the bill.<sup>185</sup> In all of these cases, specific property or resources are integrated into the commercial activity to such an extent as to be reasonably necessary for production or sale.

On the other hand, an inland seafood restaurant that suffers losses due to the impaired reputation of either Gulf seafood or seafood generally would not recover.<sup>186</sup> It would be hard to think of many cases where an inland restaurant would be able to show that specific Gulf products were necessary to its business. Even if the restaurant served some Gulf products that were temporarily inaccessible, the availability of alternative seafood sources — both from the Gulf and other areas — would weigh heavily against a finding of necessity. Second, to return to an earlier example,<sup>187</sup> a gas station in Idaho that suffers a costly boycott in response to protests against damage to natural resources would be unable to recover, even if the damaged natural resource was specific, like a particular endangered bird species. The gas station could not satisfy the necessity requirement because there is no integrated relationship between its business and a lost or damaged resource.<sup>188</sup>

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<sup>183</sup> See Goldberg, *supra* note 75, at 366. Professor Goldberg claims that the hotel would have a use right because the oil spill would interfere with the owner’s right to use it as a hotel. *Id.* However, the use-right test requires that the claimant have a “right physically to obtain or use property or resources that are damaged because of an oil spill.” *Id.* In the example, the hotel itself sustains no damage; no economic loss arises from the hotel’s own particular right to obtain or use the nearby beach (it is the customers who use the beach, and the beach is open to the public); and the injury does not interfere with the hotel’s right to use its property as a hotel but, perhaps, only as a profitable hotel. However, the use-right test cannot merely require interference with the right to use one’s property profitably or with customers’ ability to use publicly accessible property. Otherwise it would allow claims that Professor Goldberg states are “clearly” not eligible under his test. *Id.* at 375. Such claims would include an “inland amusement park owner” who loses business when fewer customers “combine a trip to [the amusement] park with a beach vacation.” *Id.* at 347. What specific use-right to the public beach does the local hotel have that the inland amusement park lacks? Under the use-right test the result for both businesses should be the same. However, under the commercial needs requirement, no particular beach is reasonably necessary to the amusement park’s business, while the local beach is necessary for a hotel oriented around beach tourists.

<sup>184</sup> *Id.* at 347. Under Professor Goldberg’s reading, inclusion of these claimants would require a “generous” rather than strict interpretation of OPA. *Id.* at 374, 376. Under a commercial needs requirement, no generosity would be required — a simpler result.

<sup>185</sup> See *supra* Part IV.D.3.

<sup>186</sup> This assumes that the restaurant did not depend on particular products that became unavailable or prohibitively expensive because of the spill — for example, a Louisiana roadside shack that specialized in fresh regional seafood could have a case if it lost access to its supplies.

<sup>187</sup> See *supra* note 163 and accompanying text.

<sup>188</sup> Notice that under the commercial needs requirement the gas station is excluded much more simply than if one were to use Professor Robertson’s complex counterfactual, asking whether the boycott would have occurred if an equally massive spill had caused no property damage.

Third, a “land-locked” Florida theme park that sees its profits decline because of a temporary drop in tourism to the Gulf region<sup>189</sup> would likewise fall outside OPA’s scope. The theme park would be unable to cite specific physical damage that led to its losses. Even if the theme park could identify, for example, a particular damaged beach that many tourists typically visit in a combined beach/theme park vacation, the availability of the beach is not integral to the theme park’s business, and it is unlikely that the theme park could demonstrate any substantial investment-backed interest in the beach’s accessibility. These examples should all be easy cases for exclusion.

An example of a case that would remain difficult would be the owner of a restaurant in a Gulf Coast town that attracts many tourists. The restaurant is in the center of town, away from the beach, which has been temporarily closed because of the spill. The restaurant caters mostly to locals but also to visitors, and the owner charts a decline in revenues in the weeks following the spill. On the one hand, the availability of tourists may be necessary for the some of the owner’s sales. On the other hand, tourism can decline for many reasons, and it may not be reasonable for the owner to depend on tourism to such an extent that the restaurant could not weather a temporary downturn in visitors. Moreover, assuming the town benefits from economic activity created by oil production in the Gulf, there would be reciprocity of interests between the restaurant and the oil industry that frequently resounds to the benefit of the owner. This case would — and should — be a closer call:<sup>190</sup> as Judge Barbier put it in the order, causation under OPA is “necessarily a highly factual analysis.”<sup>191</sup>

A commercial needs requirement also dovetails with a more sophisticated and theoretically rigorous explanation of the pure economic loss rule in the common law generally, one grounded in factors of production rather than strict ownership.<sup>192</sup> In a recent article, Professor Robert J. Rhee argues that tort law should “protect assets indispensably integrated into the production function, irrespective of property rights or the entrepreneur’s ownership of the assets.”<sup>193</sup> However, according to Rhee, “[w]ithout the loss of a factor of production, the law does not insure profit expectation.”<sup>194</sup> Rhee distinguishes his “production theory of pure economic loss” from the conventional theory by noting that communal property and natural resources

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<sup>189</sup> See Goldberg, *supra* note 75, at 347 (proposing the amusement park example).

<sup>190</sup> Based on the bare facts given, I would be inclined to exclude this restaurant owner’s claim both based on the reciprocity argument and because the damaged beach seems to fall just outside of being considered “integrated” into the owner’s business.

<sup>191</sup> Order of Aug. 26, 2011, 808 F. Supp. 2d 943, 966 (E.D. La. 2011).

<sup>192</sup> Factors of production are inputs — such as land, labor, or capital — that make possible the production of a good or service. See Rhee, *supra* note 14, at 53. In the context of maritime common law, Rhee notes that a production theory easily accounts for the fishermen’s exception, but would also expand the exception to other areas. See *id.* at 69–70. He explains that “a factor of production need not be property, but may be a part of a broader class of economic assets such as the Internet or *natural resources that are integrated into the production function.*” *Id.* at 73 (emphasis added).

<sup>193</sup> *Id.* at 53.

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

may be indispensable to production even though an individual may not be able to claim a proprietary interest in them.<sup>195</sup>

Rhee's theory, particularly his suggestion that the factor of production must be "integrated" to the production function, provides a useful, common law counterpart to the commercial needs requirement described here.<sup>196</sup> Nonetheless, the commercial needs requirement provides broader recovery than his production theory because it protects property or resources necessary for commercial activities including sale, and not merely production. Thus, while Professor Rhee states that a hotel with a "crucial interest" in the "pristine state of natural attractions" could not recover under the common law in his theory,<sup>197</sup> the commercial needs requirement in OPA could allow a hotel that depends on a nearby Gulf Coast tourist beach to recover. As described above, OPA's language, legislative history,<sup>198</sup> and recognition of the special dangers of oil spills (as evidenced by its enactment in the wake of the *Exxon Valdez* spill) require broader recovery than the pure economic loss rule provides, even in the form of a more generous production theory. What is more, the broad statutory language, coupled with expressed Congressional intent to provide recovery for a wide range of injuries, suggests that the test for integration under the commercial needs requirement should be more lenient than Professor Rhee's test that holds that a factor of production must be "indispensable" to the plaintiff's business. An indispensability requirement would, somewhat paradoxically, be both too much like a bright-line rule and too difficult to apply. Is a tourist beach indispensable to a nearby hotel? Or would the uninterrupted accessibility of a beach be indispensable to a real estate agent whose listings are made up primarily of beachfront property? It depends on how strictly one defines indispensable, which is why it is preferable to give courts more flexibility from the outset by simply requiring that the damaged property or resource be "reasonably necessary." Courts may then clarify this standard through the evolution of case law. Nonetheless, the adoption of a commercial needs requirement by courts interpreting OPA could be an important step toward recognizing certain non-proprietary interests (besides the fishermen's exception) under the common law pure economic loss rule.

One could argue that a standard giving courts fairly wide latitude to admit claims based on their view of what is reasonably necessary could create the kinds of problems that initially gave rise to the pure economic loss rule.<sup>199</sup> However, this concern would be misplaced. First, the commercial needs requirement would not lead to indeterminate liability. The require-

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<sup>195</sup> *Id.* at 72-73.

<sup>196</sup> *Id.* at 73.

<sup>197</sup> *Id.*

<sup>198</sup> See 135 CONG. REC. 26,851, *supra* note 74 (citing statement by one of the bill's sponsors that employees of motels depending on tourism should be able to recover, contrary to the result that one would get under Professor Rhee's theory).

<sup>199</sup> For a flavor of the justifications for the pure economic loss rule, see Rhee, *supra* note 14, at 60-63.

ment that plaintiffs demonstrate loss arising from the loss of specific property, as well as demonstrating the necessity of that property for their commercial activity, provides enough form and structure for section 2702(b)(2)(E) to give both potential plaintiffs and defendants a good idea of where courts will draw the line.<sup>200</sup> As demonstrated by the examples given above, the test should be much more predictable than using common law concepts like foreseeability as a limiting principle on liability.<sup>201</sup> On a second and related point, the commercial needs requirement should not over-deter production in the oil industry. The requirement would only protect property and resources integrated with existing commercial activity, and therefore the requirement would not deter oil production more than is required to protect existing economic value. The over-deterrence argument is also disarmed substantially by the cap on the amount of money that can be paid for damages under OPA.<sup>202</sup> However, the cap raises another question about the commercial use requirement: whether it expands liability to such an extent that some more deserving claimants, such as local workers, could be crowded out of compensation under OPA's damages cap by (perceived) less deserving claimants, like hotels.<sup>203</sup> However, the relevant question for courts should be whether a particular claimant is deserving of damages — full stop. Any potential unfairness due to a complex interaction among different types of claims should be left to Congress to resolve, perhaps by raising the caps on liability, as has been suggested by some legal scholars.<sup>204</sup> In sum, a commercial needs requirement would be a faithful interpretation of OPA's economic loss provisions, fulfilling Congress's intent to provide reasonable compensation for a wide range of injuries. It is also a fair and pragmatic standard that gives courts some — but not too much — flexibility to exclude undeserving claims. Courts can impose structure and predictability, while protecting meritorious claims, by adopting the analysis suggested above.

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<sup>200</sup> 33 U.S.C. § 2702(b)(2)(E) (2006).

<sup>201</sup> Rhee, *supra* note 14, at 63.

<sup>202</sup> See Oil Spill Liability Trust Fund, 26 U.S.C. § 9509(c)(2) (2006) (setting a \$1 billion cap on damages for a single incident under OPA that can be paid by an Oil Spill Liability Trust Fund, which covers claims that exceed what a responsible party is required to cover). The operation of the fund in conjunction with OPA is complex and beyond the scope of this Comment. However, it is worth noting that if the fund cannot cover all claims presented under OPA, the claimant may sue under state law. See 33 U.S.C. § 2713(c) (2006); see also Goldberg, *supra* note 75, at 344 n.32.

<sup>203</sup> See Davis, *supra* note 75, at 34 (raising competition between claims as a potential issue with OPA's recovery scheme).

<sup>204</sup> See Richard A. Epstein, *BP Doesn't Deserve a Liability Cap*, WALL ST. J., June 16, 2010, <http://online.wsj.com/article/SB10001424052748704312104575298902528808996.html>.

## V. SETTLEMENT PROPOSAL

In the spring of 2012, BP announced that it had reached a tentative settlement agreement with the plaintiff's steering committee.<sup>205</sup> Judge Barbier gave preliminary approval to the settlement terms for economic claims on May 2.<sup>206</sup> As one might expect, the terms are enormously complex.<sup>207</sup> The settlement agreement addresses individual and business economic loss claims.<sup>208</sup> The general approach that the settlement takes is to provide a different set of causation requirements based on proximity to the oil spill, the type of business in which the claimant was engaged, and the present status of the business.<sup>209</sup>

The settlement places claimants into four zones – A, B, C, and D – based on distance from areas affected by the spill.<sup>210</sup> In Zone A, which includes areas most directly affected, businesses need not demonstrate any evidence of causation unless they fall within a list of exceptions, such as start-up businesses, failed businesses, and entities and individuals not included within the class of economic loss claimants.<sup>211</sup> For these claimants, it is presumed that the spill caused their losses.<sup>212</sup> Tourism businesses need not show causation within Zones A and B.<sup>213</sup> Certain businesses related to the seafood and fishing industries need not show causation if they are located within zones A, B, or C.<sup>214</sup>

For other businesses within zones B and C, causation may be shown by: demonstrating particular revenue patterns, showing proof of spill-related cancellations using contemporaneous records, or by demonstrating proximity to a separate claimant that has established causation.<sup>215</sup> The causation standards for zone D are similar but higher.<sup>216</sup> Finally, the settlement excludes economic loss claims by businesses and employees in certain industries, including gaming, real estate development, financial institutions, and

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<sup>205</sup> John Schwartz, *Accord Reached Settling Lawsuit Over BP Oil Spill*, N.Y. TIMES, Mar. 2, 2012, <http://www.nytimes.com/2012/03/03/us/accord-reached-settling-lawsuit-over-bp-oil-spill.html>.

<sup>206</sup> See Preliminary Approval Order, In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D. La. May 2, 2012), available at [http://www.laed.uscourts.gov/OilSpill/Orders/05022012Order\(EconomicSettlement\).pdf](http://www.laed.uscourts.gov/OilSpill/Orders/05022012Order(EconomicSettlement).pdf).

<sup>207</sup> See generally Notice of Filing, In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D. La. May 2, 2012), available at [http://www.laed.uscourts.gov/OilSpill/Orders/05032012\(AmendedEconomicSettlement\).pdf](http://www.laed.uscourts.gov/OilSpill/Orders/05032012(AmendedEconomicSettlement).pdf).

<sup>208</sup> See *id.* at 3–8.

<sup>209</sup> See *id.* at Exhibits 4B, 8A.

<sup>210</sup> See *id.* at Exhibit 1A ("Economic Loss Zones").

<sup>211</sup> See *id.* at Exhibit 4B.

<sup>212</sup> See *id.*

<sup>213</sup> See *id.*

<sup>214</sup> See *id.*

<sup>215</sup> See *id.*

<sup>216</sup> See *id.*



the oil and gas industry.<sup>217</sup> All told, BP estimates that the settlement will cost \$7.8 billion, though the amount of compensation is not capped.<sup>218</sup>

In general, the BP settlement takes a rough and ready approach to economic loss claims that will likely catch most of the meritorious claims (and perhaps more than a few unmeritorious ones, as well). For example, the inclusion of a wide range of tourism and seafood businesses and lenient causation standards for zones A and B demonstrate that BP did not want to litigate a more restrictive interpretation of OPA's economic loss provisions along the lines of a use-rights test.<sup>219</sup> To the contrary, the settlement has been described as even more generous than the Gulf Coast Claims Facility.<sup>220</sup> The settlement recognizes that damaged property and resources were important to a wide range of businesses in the Gulf region, similar to the commercial needs requirement proposed in this Comment.

Of course, many claims will still proceed to trial, either because the claimants will reject the settlement or because they were excluded.<sup>221</sup> Therefore, the issue of what constitutes compensable economic loss under OPA remains very much alive, as do the spill's broader implications for the pure economic loss doctrine.

#### CONCLUSION

This Comment discusses the ongoing litigation arising from the oil spill around the *Deepwater Horizon* rig. In particular, it analyzed the causation standard for claims for pure economic loss against the background of maritime common law and OPA's economic loss provision, which most courts have found to eschew the common law pure economic loss rule. Following the lead of this existing case law, the August 26, 2011 *In re: Oil Spill* order held that, under maritime common law, pure economic loss claimants in the *Deepwater Horizon* litigation (excepting fishermen) have no available remedy. However, the order found that OPA expanded the scope of compensable claims beyond the pure economic loss rule. The question is how far, and specifically, what kind of causal relationship must be shown between economic injury and physical damage or loss. Case law suggests that the courts should not blindly import a full-fledged proximate cause analysis into the economic loss provision, but neither should they abdicate their traditional role in formulating fair and reasonable limitations on liability.

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<sup>217</sup> See *id.* at 8–11.

<sup>218</sup> John Schwartz, *BP Settlement, Milestone for Some Victims, a Setback for Others*, N.Y. TIMES, Mar. 19, 2012, <http://www.nytimes.com/2012/03/20/us/bp-settlement-leaves-some-spill-victims-unhappy.html>.

<sup>219</sup> See Notice of Filing, *supra* note 207, at Exhibits 2, 4B.

<sup>220</sup> See, e.g., Jonathan Stempel, *BP Proposes Gulf Spill Accord Terms, Trial Delay*, REUTERS, Apr. 18, 2012, <http://www.reuters.com/article/2012/04/18/us-bp-oilspill-idUSBRE83H0U120120418>.

<sup>221</sup> See Schwartz, *supra* note 205.

This Comment then evaluates competing interpretations of the causation standard contained in OPA's economic loss provision. The use-right requirement would prohibit recovery for economic loss unless the claimant has "a right physically to obtain or use property or resources that are damaged or lost because of an oil spill."<sup>222</sup> This requirement provides a (relatively) simple and categorical test, but it is overly inflexible and inconsistent with the best plain language reading of the statutory provision. A factual cause requirement — in the heightened form proposed by Professor Robertson — would make recovery for economic loss dependent on showing that the injury would still have occurred in an imagined world where the spill caused no physical damage. Professor Robertson's reading departs both from the everyday usage of causation language and from the presumption that Congress would have given a clearer indication had it intended to completely overrule the traditional discretion judges have to define the "harm within the risk" contemplated by the statute. Moreover, it is not reasonable to suppose that Congress intended to create a strange counterfactual that asks fact-finders to speculate whether the economic damages would have occurred under completely different and unrealistic circumstances, i.e., an equally massive spill that somehow causes no physical loss or damage. His test would be exceptionally hard to apply, and would produce strange and, in some cases, unfair results.

Finally, this Comment suggests that a fair and workable alternative to these positions supported by OPA's language would require that economic loss claimants show that the spill deprived them of the benefit of real property, personal property, or a natural resource that was reasonably necessary for claimant's commercial activity, including production or sale. Looking beyond the context of the oil spill, if a commercial needs requirement were to succeed in producing equitable outcomes in a litigation as diverse as the *Deepwater Horizon* MDL, it should lead courts to consider abandoning the strict requirement that pure economic loss claimants (except commercial fishermen) show a proprietary interest. In at least some cases not currently recognized by the common law, courts should protect reasonable investment-backed interests in property or resources needed for commercial activity, regardless of who owns them.

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<sup>222</sup> Goldberg, *supra* note 75, at 366.