

Journal of Civil Rights and Economic Development

Volume 26
Issue 4 *Volume 26, Summer 2013, Issue 4*

Article 3

June 2013

Economic Damages Under the Oil Pollution Act of 1990: The Case for the Exclusion of a Proximate Cause Requirement

Emily C. Adler

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

Recommended Citation

Emily C. Adler (2013) "Economic Damages Under the Oil Pollution Act of 1990: The Case for the Exclusion of a Proximate Cause Requirement," *Journal of Civil Rights and Economic Development*. Vol. 26 : Iss. 4 , Article 3.

Available at: <https://scholarship.law.stjohns.edu/jcred/vol26/iss4/3>

This Notes and Comments is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

ECONOMIC DAMAGES UNDER THE OIL POLLUTION ACT OF 1990: THE CASE FOR THE EXCLUSION OF A PROXIMATE CAUSE REQUIREMENT*

EMILY C. ADLER**

INTRODUCTION

The beach in St. Petersburg, Florida is pristine.¹ The pure white sand glistens in the sun as clear blue waves crash upon the shore. The cool ocean air fills the guest rooms of countless beachfront resorts, the white linen curtains dance in the summer breeze. Days like this are what drive the vibrant tourism industry in West Florida.² There is only one problem. The beaches and hotels are empty.

Keith Overton, owner of the TradeWinds Resort in St. Petersburg, Florida reported a decline in profits of more than \$1 million dollars this year as compared with his average earnings over the last three years.³ The cancellations and reservations-that-never-came were not because of any dereliction in the upkeep at TradeWinds or because of a downed economy. Rather, the losses came because tourists the world over think that St. Petersburg (and beaches throughout the Gulf Coast) are covered in oil as a result of the catastrophic Deepwater Horizon oil spill.⁴ “Black-crude

* This note won First Place in the 2012 St. John’s University School of Law Perspectives on Justice Best Student Note Writing Competition.

** J.D., *cum laude*, June 2012, St. John’s University School of Law; B.A., *summa cum laude*, Political Science, Queens College, May 2009.

¹ Facts adapted from David Segal, *Should BP’s Money Go Where the Oil Didn’t?*, N.Y. TIMES, Oct. 23, 2010, at BU1 (evaluating the issue of proximity claims in the wake of Deepwater Horizon); see *Gulf Oil Spill*, STPETE.ORG (Sept. 17, 2010), http://www.stpete.org/news/gulf_oil_spill.asp (indicating that the beaches in St. Petersburg are experiencing no impacts from the gulf oil spill).

² See Segal, *supra* note 1, at BU1 (discussing the impact of the oil spill on Florida’s \$60 billion-a-year tourist trade); see also Tim Padgett, *Florida Hopes for Best but Brace for Oil Spill*, TIME.COM (May 20, 2010), available at <http://www.time.com/time/health/article/0,8599,1990589,00.html> (commenting on Florida’s struggle to persuade tourists to visit in the wake of the epic oil spill).

³ Segal, *supra* note 1, at BU1; Steve Huettel, *BP Oil Spill Fund Now Open to Tampa Bay Area Claims*, TAMPABAY.COM (Oct. 4, 2010), <http://www.tampabay.com/news/business/tourism/bp-oil-spill-fund-now-open-to-tampa-bay-area-claims/1125866>.

⁴ Mr. Overton related a conversation an employee had with his mother in Bosnia who asked

hysteria” has set in, and Mr. Overton wants British Petroleum (BP) to compensate him for the money he would have earned but for the spill.⁵

Brian Barr, a member of the plaintiffs’ executive committee in the BP case, claims that “the entire tourism industry in this state has been impacted by people’s fear that the oil was going to hit Florida, whether those fears were reasonable or not.”⁶ The reality of the situation is that industries all over the country have been impacted by the spill. From a manufacturer in Tennessee stuck with 10,000 “I Love Pensacola” T-shirts to a restaurateur in New York whose diminution of supply of Gulf-fresh fish has resulted in diminished profits, the entire country is feeling the loss.⁷ The legal question thus becomes whether the thousands of people proximately affected by Deepwater Horizon have a valid claim against BP for lost profits.⁸

Kenneth Feinberg, the claims administrator appointed by BP and President Barack Obama, has publically stated that he would not consider payment of “proximity claims” (i.e. claims based on indirect harm)⁹ such as those mentioned above.¹⁰ This decision stems from Feinberg’s interpretation of the Oil Pollution Act of 1990 (OPA) provision on

whether her son was going to lose his job because the beach was covered in oil. Segal, *supra* note 1, at BU1. See Greg Allen, *A Year after Gulf Oil Spill, Florida Sees a Comeback*, NPR.ORG (Apr. 18, 2011), <http://www.npr.org/2011/04/18/135326540/a-year-after-deepwater-florida-sees-a-comeback>.

⁵ Segal, *supra* note 1, at BU1. Rob Shaw, *Nearly Year After BP Spill, Florida Residents Wait for Disaster Claims*, TAMPA BAY ONLINE (Apr. 15, 2011), <http://www2.tbo.com/news/oil-spill/2011/apr/15/1/nearly-year-after-bp-spill-florida-residents-wait-ar-197018/>.

⁶ On October 8, 2010, U.S. District Court Judge Carl Barbier of the Eastern District of Louisiana appointed 15 lawyers to the Plaintiff’s Steering Committee of the BP oil spill multidistrict litigation. Four of these lawyers were appointed to a Plaintiff’s Executive Committee. The purpose of the committees is to efficiently and effectively manage discovery and pretrial matters in the litigation process. LexisNexis Litigation Resource Community Staff, *Judge Appoints BP Oil Plaintiffs’ Steering, Executive Committees*, LEXISNEXIS (Oct. 14, 2010, 3:17 PM), <http://www.lexisnexis.com/community/litigationresourcecenter/blogs/litigationblog/archive/2010/10/14/federal-court-appoints-bp-oil-plaintiffs-steering-committee.aspx>; see David Segal, *Should BP’s Money Go Where the Oil Didn’t?*, N.Y. TIMES, Oct. 23, 2010, at BU1.

⁷ Segal, *supra* note 1, at BU1 (evaluating the breadth of potential proximity claims in the aftermath of Deepwater Horizon); *BP Oil Spill: Prosecutors Reportedly Preparing Criminal Charges*, HUFFINGTONPOST.COM (Dec. 29, 2011), http://www.huffingtonpost.com/2011/12/29/bp-oil-spill_n_1174542.html (discussing that businesses around the country have been forced to contend with the spill’s aftermath).

⁸ This note was written in 2011. Since then BP entered a \$7.8 billion dollar partial settlement agreement with the Deepwater Horizon plaintiffs. While this development brings relief to many of the claimants affected by the disaster, the legal question of whether the Oil Pollution Act of 1990 includes a requirement of a showing of proximate cause remains unresolved. This issue is the primary focus of this note. CNN Wire Staff, *BP, Plaintiffs Reach Billion Dollar Deal in Gulf Oil Spill*, CNN.COM (Mar. 3, 2012), <http://www.cnn.com/2012/03/02/business/bp-oil-spill-trial-agreement/>.

⁹ The term “proximity claim” refers to arguments of *indirect harm*. Segal, *supra* note 1, at BU1.

¹⁰ *Id.* (“Until early October, Kenneth Feinberg, the longtime mediator and the lawyer in charge of administering the spill fund, said publicly that he wouldn’t consider such claims, in part because he thought they would open a door that thousands of businesses across the country would try to walk through.”). See *supra* text accompanying notes 1-7.

economic loss to include a proximate cause requirement.¹¹ This note will challenge this interpretation of OPA as well as the decision not to pay such claims. More specifically, this note will argue that the proximate cause requirement has been conspicuously omitted from OPA and to require claimants to prove proximate cause is to establish a standard of recovery stricter than the statute envisioned. Furthermore, the objective of this note is to provide interpretive value to OPA that exceeds the scope of the current Deepwater Horizon controversy. Part II will provide a statutory analysis of OPA, looking at plain meaning and legislative history, as well as a comparison of interpretations of federal statutes dealing with oil spills and the release of hazardous materials. Included in this part will be a critique of John C.P. Goldberg's memo to Feinberg arguing for the inclusion of a proximate cause standard. While no court has rendered a decision finding for or against the inclusion of proximate cause, Part III of this note will analyze judicial interpretations of OPA which nonetheless lend significant support for this note's interpretation of OPA. Finally, Part IV will discuss policy considerations implicated by the exclusion of a proximate cause standard and suggest implementation of the Radial Causation Doctrine, an original theory aimed at the improvement and refinement of OPA.

I. BACKGROUND

On April 20, 2010, the Deepwater Horizon oil rig exploded in the Gulf of Mexico.¹² The rig, which was considered one of the largest and most sophisticated rigs in the world, exploded as a result of a blowout in the Macondo exploration site, approximately 50 miles southeast of Venice, Louisiana.¹³ Oil spilled into the gulf for 86 days, until it was successfully capped on July 15, 2010.¹⁴ It is estimated that 4.9 million barrels, or 205.8

¹¹ The Gulf Coast Claims Fund EAP Protocol states, "[t]he GCCF will only pay for harm or damage proximately caused by the spill. The GCCF's causation determinations of OPA claims will be guided by OPA and federal law interpreting OPA and the proximate cause doctrine." *Protocol for Emergency Advance Payments*, GULF COAST CLAIMS FACILITY (Aug. 23, 2010), available at http://www.gulfcoastclaimsfacility.com/proto_1.php, Para. II.F (emphasis added).

¹² Denise M. Pilie, *Satisfying Deepwater Horizon Oil Spill Claims: Will Ken Feinberg's Process Work?*, 58 LA. B. J. 176, 177 (2010) (commenting on the legal concerns and criticisms of the BP claims process and noting the criticisms facing Feinberg's administration tasks); see Stephen Gidiere, Mike Freeman & Mary Samuels, *The Coming Wave of Gulf Coast Oil Spill Litigation*, 71 ALA. LAW. 374, 374 (2010) (noting the interaction of OPA and state law in upcoming Deepwater Horizon litigation).

¹³ Campbell Robertson, *Search Continues After Oil Rig Blast*, N.Y. TIMES, Apr. 21, 2010, at A13 (reporting on the 11 missing rig workers who were ultimately counted as casualties of the explosion). CNN Wire Staff, *At Least 11 Missing After Blast on Oil Rig in Gulf*, CNN.COM (Apr. 21, 2010), http://articles.cnn.com/2010-04-21/us/oil.rig.explosion_1_rig-coast-guard-rear-adm-drilling?_s=PM:US.

¹⁴ Campbell Robertson & Clifford Krauss, *Gulf Spill Is The Largest of Its Kind, Scientists Say*,

million gallons, of oil have been discharged into the Gulf.¹⁵ Pursuant to OPA, BP was named the responsible party.¹⁶ That designation imposed strict liability on BP for removal costs and damages.¹⁷ In June 2010, BP established a “comprehensive claims process” with a \$20 billion fund for the payment of damages to those affected by the disaster.¹⁸ BP and President Obama jointly appointed Kenneth Feinberg, perhaps the most experienced mass claims administrator in the United States, to oversee the administration of the fund.¹⁹

Feinberg has mandated that claimants show that the spill was a proximate cause of their economic loss in order to recover from BP.²⁰ The validity of this decision depends entirely on whether OPA requires claimants who suffered a loss in profits or impaired earning capacity to prove a level of causation beyond actual cause, namely proximate cause. The doctrine of Proximate Cause, which will be further developed below, is less a bright-line rule and more a policy consideration aimed at limiting potentially endless liability.²¹ The inclusion of a proximate cause

N.Y. TIMES, Aug. 2, 2010, at A14 (finding that the 4.9 million barrels discharged in the Deepwater Horizon oil spill outstrips the estimated 3.3 million barrels spilled into the Bay of Campeche by the Mexican rig Ixtoc I in 1979, previously believed to be the world’s largest accidental release of oil). Cutler Cleveland, *Deepwater Horizon Oil Spill*, THE ENCYCLOPEDIA OF EARTH, available at http://www.eoearth.org/article/Deepwater_Horizon_oil_spill (last updated Feb. 8, 2012).

¹⁵ *Id.* at A14; Piliie, *supra* note 12, at 177 (introducing the oil spill in the context of the claims process).

¹⁶ The U.S. Coast Guard has named BP the responsible party pursuant to OPA, 33 U.S.C. §2701. BP has accepted that designation and has agreed to bear the liability associated with such designation. Letter from James Dupree, President, BP Exploration and Prod. Inc. to Thomas Morrison, Chief, Claims Div., U.S. Coast Guard (May 3, 2010) available at <http://www.uscg.mil/foia/docs/DWH/2094.pdf>; Terrell Arline, *The Deepwater Horizon Claims Process for Local Government*, 3 FLA. ASS’N COUNTIES, <http://fl-counties.com/Docs/Legal/Oil%20Legal%20Task%20Force/memo%20on%20claims%20process%20by%20ta%2011.1.10.pdf> (last visited Apr. 11, 2012).

¹⁷ See Gidiere et al., *supra* note 12, at 375-76 (finding that under OPA, responsible parties are strictly liable for damages caused by an oil spill and the cleanup of it). See also Arline, *supra* note 16, at 2 (stating that OPA makes a responsible party strictly liable for direct recovery and remediation costs plus certain damages incurred by local governments as a result of an oil spill).

¹⁸ Piliie, *supra* note 12, at 177 (introducing the oil spill in the context of the claims process). *BP Establishes \$20 Billion Claims Fund for Deepwater Horizon Spill and Outlines Dividend Decisions*, BP.COM (June 16, 2010), <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062966>.

¹⁹ Feinberg is also the trust administrator for the September 11 Victims Compensation Fund. He also served as mediator of a class-action lawsuit filed by 250,000 veterans suffering from the effects of “Agent Orange.” Piliie, *supra* note 12, at 177; *Kenneth Feinberg*, NYTIMES.COM, http://topics.nytimes.com/topics/reference/timestopics/people/f/kenneth_r_feinberg/index.html (last updated Mar. 5, 2012).

²⁰ “The GCCF will only pay for harm or damage proximately caused by the spill. The GCCF’s causation determinations of OPA claims will be guided by OPA and federal law interpreting OPA and the proximate cause doctrine.” *Supra* note 11 (emphasis added); see text accompanying notes 9-11; see also ALLIANCE FOR JUSTICE, ONE YEAR AFTER THE GULF OIL SPILL: IS JUSTICE BEING SERVED? 9 (2011).

²¹ See *infra* note 49.

requirement in OPA would justify Feinberg's mandate that claimants establish that the responsible party's conduct was a not only a "substantial factor" in bringing about the harm but also that the loss was a foreseeable consequence of the spill.²² Such a burden would prove difficult for proximity claimants to satisfy, and would require a greater showing of cause than is required under OPA.

II. A STATUTORY ANALYSIS OF OPA AND THE ARGUMENT FOR THE INTENTIONAL EXCLUSION OF A PROXIMATE CAUSE REQUIREMENT

This part of the note focuses on the statutory construction of OPA and uses John C.P. Goldberg's memo to Feinberg to provide structure to the analysis.²³ Goldberg, a Harvard Law professor, was commissioned by Feinberg to write a memo about liability for economic loss in connection with the Deepwater Horizon oil spill.²⁴ Part A will refute Goldberg's conclusion that OPA includes an implied proximate cause requirement.²⁵ This section will provide a context for the statutory analysis of OPA and delve into the plain meaning of the statute. Part B will rework Goldberg's comparison of OPA to the interpretations of CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act)²⁶, commonly known as the "Superfund", and TAPAA (Trans-Alaska Pipeline Authorization Act).²⁷ The objective of this section will be to distinguish OPA from these other statutes and their respective interpretations which import a proximate cause requirement. Part C will look at the relevant legislative history from both the House and Senate to support the claim that OPA does not include a proximate cause requirement.

²² *Id.*

²³ Memorandum from John C.P. Goldberg to Kenneth Feinberg (Nov. 22, 2010), available at <http://timeecocentric.files.wordpress.com/2010/11/goldberg-memorandum-of-law-2010.pdf>.

²⁴ The purpose of the commissioned memo was not to serve as a blueprint but rather as leverage. Segal, *supra* note 1, at BU1. After all, the Gulf Coast Claims Facility had already made public its decision to interpret OPA as including a proximate cause requirement. See *supra* note 11. Ultimately, the memo's purpose was to allow Feinberg to say to those claimants whose proximity claims are weak, "[y]ou'll get nothing in court, but I'll give you 20-30 cents on the dollar." Segal, *supra* note 1, at BU1.

²⁵ See Memorandum from John C.P. Goldberg to Kenneth Feinberg, *supra* note 23 at 20 (finding that §2702 includes an implied proximate causation requirement because of the use of both "due to" and "result from" language, as well as a judicial tendency to read in both a proximate cause and an actual cause requirement where a statute includes stand-alone "result from" language); see also *infra* text accompanying notes 32-57.

²⁶ Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607 (1980).

²⁷ Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653 (1973).

A. OPA: Context and Plain Meaning

OPA²⁸ was enacted on the heels of the *Exxon Valdez* oil spill in 1989.²⁹ In the wake of what was the largest oil spill in U.S. history,³⁰ Congress sought to prevent future spills and mitigate their resulting damage by requiring oil companies to institute spill prevention plans as well as clean up technology and equipment.³¹ In the event of a spill, OPA allows for recovery of damages in six situations.³² This note, in order to address proximity claimants' actions for lost profits, will focus on the Section 2702(b)(2)(E) damage provision for lost profits and earning capacity.³³ In a

²⁸ 33 U.S.C. §§ 2701–62.

²⁹ *Gatlin Oil Co. v. U.S.*, 169 F. 3d 207, 209 (1999) (holding that the removal costs and damages provided in section 2702(b) are those that result from a discharge in oil or from a substantial threat of a discharge of oil into navigable waters or adjacent shorelines). See Gidiere et al., *supra* note 12, at 375 (providing a context for the adoption of OPA).

³⁰ On March 24, 1989, the tanker Exxon Valdez, en route from Valdez, Alaska to Los Angeles, California, struck a Bligh Reef in Prince William Sound, Alaska. NOAA/HAZARDOUS MATERIALS RESPONSE AND ASSESSMENT DIVISION, OIL SPILL CASE HISTORIES 1967-1991: SUMMARIES OF SIGNIFICANT U.S. AND INTERNATIONAL SPILLS 80 (1992), available at http://response.restoration.noaa.gov/book_shelf/26_spilldb.pdf. Within six hours of the collision, the Exxon Valdez spilled approximately 10.9 million gallons of its 53 million gallon cargo of Prudhoe Bay Crude. *Id.* The oil eventually impacted over 1,100 miles of coastline in Alaska, making the Exxon Valdez the largest oil spill in U.S. waters prior to Deepwater Horizon. *Id.*

³¹ See Gidiere et al., *supra* note 12, at 375 (highlighting the objectives of OPA and the mechanisms it set in place to prevent damage like that of Exxon Valdez). See also David Jackson, *Obama Panel Says More Needs to be Done to Prevent Oil Spills*, USA TODAY (Jan. 11, 2011, 1:40 PM), available at <http://content.usatoday.com/communities/theoval/post/2011/01> (explaining that more needs to be done to prevent oil spills).

³² The six types of damages under OPA are:

Natural resource damages – derive from injury to, destruction of or loss of use of natural resources. Natural resources by definition belong to the U.S., a state or local government, Indian Tribe, or foreign government. Thus damages are only recoverable by trustees for these entities. 33 U.S.C. § 2702(b)(2)(A) (1990).

Revenue damages – net loss of tax, royalties, rent, fees or net profit because of the destruction of property or natural resources. These damages are only recoverable by the U.S., a state or its political subdivision. 33 U.S.C. § 2702(b)(2)(D) (1990).

Public service damages – the costs for providing means for removal, including protection from fire, safety or health hazards caused by the discharge of oil. These damages are recoverable only by a state or its political subdivision. 33 U.S.C. § 2702(b)(2)(F) (1990).

Real or personal property damages – include injury to, or economic losses from the destruction of real or personal property. These damages are recoverable by any claimant who owns or leases that property. 33 U.S.C. § 2702(b)(2)(B) (1990).

Subsistence use damages – damages for loss of subsistence from use of natural resources, regardless who the owner of the resources are. 33 U.S.C. § 2702(b)(2)(C) (1990).

Profits and earning capacity damages – equal to lost profits or impairment of earning capacity due to injury, destruction, or loss of property or natural resources. These damages are recoverable by any claimant. There is no requirement that the claimant own or lease such property. 33 U.S.C. § 2702(b)(2)(E).

³³ 33 U.S.C. § 2702(b)(2)(E) (1990) (stating that profits and earning capacity damages are equal to lost profits or impairment in earning capacity due to the injury, destruction, loss of property or natural resources and may be brought by any claimant).

departure from traditional maritime law,³⁴ this provision of OPA awards damages to those who suffer lost profits or impaired earning capacity but have *not* suffered damage to property that they own or lease.³⁵ It is under this provision that Mr. Overton and those similarly situated may find relief.

In order to make out a claim under Section 2702(b)(2)(E), claimants must establish: 1) That real or personal property or natural resources were injured or lost; 2) The claimant's income was reduced resulting from injury to, destruction of, or loss of property or natural resources and the amount of the reduction; and 3) The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, established by income tax returns, financial statements, etc.³⁶ Element two summarizes the causation element found in (b)(2)(E). The actual language of the provision reads: "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 to any claimant".³⁷

It is this language that is at the source of the causation requirement controversy.³⁸ At first blush, the statute seems to quite obviously exclude any requirement of causation beyond that the damages be "due to" the destruction of property or natural resources.³⁹ In fact, elsewhere in the statute (Section 2704(c)(1)), similarly in the context of the liability of the responsible party, the statute does include the term "proximately caused".⁴⁰

³⁴ In re Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 625 (1st Cir. 1994) (upholding the traditional rule that the plaintiff's federal claims for purely economic losses under general maritime law are barred). See David P. Lewis, *The Limits of Liability: Can Alaska Oil Spill Victims Recover Pure Economic Loss?*, 10 ALASKA L. REV. 87, 88 (1993) ("The general maritime law prohibits recovery for pure economic loss without any connection to a physical injury to person or property.")

³⁵ This rule departs from the decision famously laid out in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309 (1927). Justice Holmes wrote, "[n]o authority need be cited to show that as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other person, unknown to the doer of wrong. . . . The law does not spread its protection so far." *Id.* OPA also distinguishes itself from traditional maritime law insofar as that it doesn't include a proximate cause requirement. See *infra* text accompanying notes 32–45.

³⁶ George M. Chalos, *A Practical Guide to the Oil Spill Liability Trust Fund Claim Submission Procedures*, 3 U. DENV. WATER L. REV. 80, 87 (1999) (explaining the statutory mechanisms behind OPA and the Oil Spill Liability Trust Fund).

³⁷ 33 U.S.C. § 2702(b)(2)(E) (1990).

³⁸ Martin J. Davies, director of the Tulane Maritime Law Center at Tulane University Law School in New Orleans has noted that OPA "doesn't say 'proximately caused by', it says 'due to.'" Kristin Choo, *Lawyers See Both Promise and Problems in the \$20 Billion Gulf Coast Compensation Fund*, 96 A.B.A.J. 34, 34 (2010) (discussing the potential legal repercussions of the BP Deepwater Horizon oil spill). "Due to" he says, "is a slippery phrase. The big question will be: How far away will the line be drawn by the courts?" *Id.*

³⁹ See 33 U.S.C. § 2702(b)(2)(E) (1990).

⁴⁰ See 33 U.S.C. § 2704(c) (1990) (providing exceptions to the limits on liabilities where there are instances of negligence by the responsible party); see also *infra* text accompanying notes 85–87 .

It is a fundamental tenet of statutory construction that where Congress included particular language in one section of a statute but omitted it in another section of the same act, it is generally presumed that Congress acted intentionally and purposely in the disparate exclusion.⁴¹ Congress's decision to use the term "proximately" in one provision of OPA and exclude it in another can be explained using this concept of an inference of intentional exclusion.⁴² Furthermore, the Supreme Court has held that where a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and *must* be given effect.⁴³ Thus, the intentional exclusion of the term "proximately" in Section (b)(2)(E) requires that this section be read to specifically *exclude* a proximate cause requirement.

John C.P. Goldberg's argues that when Section 2702(b)(2)(E) is read together with Section 2702(a) there is an implied proximate cause standard, and that this interpretation overcomes this inference of intentional exclusion because the statute "explicitly" states two distinct causation requirements.⁴⁴ Section 2702(a) says that each responsible party is liable for the removal costs and damages specified in subsection (b) that *result from* such incident.⁴⁵ Goldberg argues that the "due to" language in subsection (b)(2)(E) acts as a modifier on the "result from" language in subsection (a) and together these subsections impose a proximate cause standard.⁴⁶

While this is a clever reading of the statute, Goldberg has not adequately shown that this "second-layer causation requirement" necessarily implies the inclusion of a proximate cause standard.⁴⁷ Moreover, even if subsection (b)(2)(E)'s language does act as a modifier on (a)'s "result from" language, it does not implicitly follow that there is a proximate cause requirement.⁴⁸

⁴¹ *Russello v. U.S.*, 464 U.S. 16, 23 (1983) (quoting *U.S. v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir.1972)). See *Boumediene v. Bush*, 553 U.S. 723, 777 (2008) (applying clear Congressional intent to statutory construction).

⁴² *Russello*, 464 U.S. at 23 (identifying the presumption that where Congress uses particular language in provision, the exclusion of that same language in another provision is intentional).

⁴³ *Chevron U.S.A. Inc. v. N.R.D.C. Inc.*, 467 U.S. 837, 843 n. 9 (1984). See, e.g., *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45 (2002) (applying *Chevron* analysis to the Interstate Commerce Commission's interpretation of a statute).

⁴⁴ See Memo from John C.P. Goldberg to Kenneth Feinberg, *supra* note 23, at 16. See also *id.* at 21 n. 42 ("However, as explained above, the interpretation of OPA provided here now does *not* rest on finding in Section 2702(b)(2)(E) an implicit proximate cause limitation of a sort that might run afoul of the *Russello* inference of intentional exclusion. Rather, it rests on the fact that OPA explicitly sets two distinct causation-related requirements for claims seeking recovery from economic loss . . .").

⁴⁵ 33 U.S.C. § 2702(a) (1990).

⁴⁶ See Memo from John C.P. Goldberg to Kenneth Feinberg, *supra* note 23, at 20.

⁴⁷ *Id.*

⁴⁸ The reading of the two subsections together simply mandate that (1) the damages (to property

Judge Cardozo famously held in the landmark case *Palsgraf v. Long Island Railroad Co.* that proximate cause was essentially a foreseeability standard.⁴⁹ Cardozo wrote, “The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.”⁵⁰ However, the reading of subsections (a) and (b)(2)(E) advocated by Goldberg does not import any requirement of foreseeability or “range of apprehension” analysis into the statute.⁵¹ The requirement that the claimant’s loss in profits be caused by damage that resulted from the discharge of oil is not the same thing as a requirement that the loss in profits be the proximate cause of the discharge of oil (i.e. be a foreseeable consequence of the discharge). Therefore, Goldberg’s argument that OPA Section 2702(b)(2)(E) bypasses the inference of intentional exclusion because of an implied proximate cause is unsubstantiated and thus directly contradicts the inferred congressional intent.⁵²

Goldberg also argues that when confronted with variations of the stand-

and natural resources) *resulted from* the discharge of oil, and (2) the claimant has suffered a loss in profits or impairment of earning capacity *due to* such damage.

⁴⁹ 162 N.E. 99, 99-100 (1928). *Palsgraf* involved a certain Mrs. Palsgraf who was injured by falling scales on a Long Island Railroad train platform. The incident was precipitated by two railroad employees who assisted a passenger carrying a package, catch and board a moving train. One of the employees pushed the passenger, from behind, causing the passenger to drop the package on the rails. Unbeknownst to the railroad employees, this package contained fireworks, and the package exploded when it hit the rails. The shock knocked down scales at the other end of the platform which injured Mrs. Palsgraf. Palsgraf sued the railroad, claiming her injury resulted from negligent acts of the employee.

⁵⁰ *Id.* at 100. See D.E. Buckner, Annotation, *Foreseeability as an Element of Negligence and Proximate Cause*, 100 A.L.R.2d 942 § 1 (1965) (“[T]he comment in 155 A.L.R. 157 [] found that many courts also regard ‘foreseeability’ to be an essential element in the definition of ‘proximate cause,’ but that there was a sharp conflict of authority upon that question. On one side of the controversy, it was found that some courts state the definition of ‘proximate cause’ in terms of ‘foreseeable’ or ‘natural and probable’ consequences, and take the view that although a defendant may have been ‘negligent,’ his liability is limited to consequences which were ‘reasonably foreseeable,’ not in exact detail, but in general form, and that injury or harm which was ‘unforeseeable’ or not a ‘natural and probable consequence’ of the original ‘negligent conduct’ was not ‘proximately caused’ by such ‘negligence.’ On the other side were the courts which take the ostensibly contrary position and hold or state that ‘foreseeability’ of harm is an essential element of ‘negligence’ or a test of the ‘scope of duty,’ but that when the duty is defined and the defendant’s negligence is established, then ‘foreseeability’ is not a factor to be taken into consideration in deciding whether the defendant’s ‘negligent conduct’ was a ‘proximate’ or ‘legal’ cause of the injury or harm, so that consequently a ‘negligent’ defendant will be liable for all the ‘natural and ordinary’ or ‘direct’ consequences of his conduct whether such consequences were ‘reasonably foreseeable’ or not.”).

⁵¹ Goldberg’s interpretation of the statute fails to comport with the Restatement (third) of Tort’s understanding of proximate cause, which Goldberg himself adopts in his letter to Feinberg. The Restatement also uses foreseeability as a gauge and defines proximate cause as “a separate filter beyond actual causation, by which liability is excluded for harms that are so haphazardly caused as to not count as the realization of one of the risks that rendered the actor’s conduct careless”. See Memorandum from John C.P. Goldberg to Kenneth Feinberg (November 22, 2010), *supra* note 23, at 20 n. 41.

⁵² *Chevron U.S.A. Inc. v. N.R.D.C. Inc.*, 467 U.S. 837, 843 n. 9 (1984) (holding that where the court is left with the conclusion that Congress had an intention on the precise question at issue, that intention is the law and must be given effect); see *supra* text accompanying note 38.

alone phrase “result from” in statutory texts, the courts have commonly read in both an actual causation and a proximate cause requirement.⁵³ However, it is clear as a matter of judicial policy that courts will not use a gap-filler type device to override the plain meaning of a statute.⁵⁴ Such a presumption will only be used where there is an ambiguity in the Act with no clear language evincing the drafters’ intention.⁵⁵ Here, however, there is no ambiguity because of the intentional exclusion of proximate cause language. Thus, without a concrete showing of an explicit proximate cause requirement in the statute, which Goldberg has failed to do, the inference of intentional exclusion stands and the judicial presumption is not applicable here.

B. A Comparison of Interpretations: OPA, CERCLA, and TAPAA

Goldberg continues his argument in favor of the inclusion of a proximate cause requirement by looking at the judicial interpretation of two statutes that served as statutory predecessors of OPA.⁵⁶ The “resulting from” language of both CERCLA and TAPAA was interpreted by United States Courts of Appeals to include a proximate cause requirement, even without such explicit inclusion.⁵⁷ Goldberg claims that because these statutes impose liability on “facially broader” terms⁵⁸ than OPA, OPA’s “second-layer causation requirement” makes the finding of a proximate causation element “irresistible”.⁵⁹ However, by distinguishing the statutory

⁵³ See Memorandum from John C.P. Goldberg to Kenneth Feinberg (November 22, 2010), *supra* note 23, at 20 (stating that it has long been common for lawyers to use such phrases to encompass notions of both actual and proximate cause).

⁵⁴ *United States v. Wells*, 519 U.S. 482, 491 (1997) (“We do, of course, presume that Congress incorporates the common-law meaning of the terms it uses if . . . ‘the statute [does not] otherwise dictate.’” (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989))).

⁵⁵ See *Wells*, 519 U.S. at 499; see also *Reno v. Koray*, 515 U.S. 50, 65 (1995).

⁵⁶ Memorandum from John C.P. Goldberg to Kenneth Feinberg, *supra* note 23, at 21-23 (arguing for the adoption of the interpretations of CERCLA and TAPAA in the analysis of OPA); see *Comprehensive Environmental Response, Compensation, and Liability Act* 42 U.S.C. § 9607 (1980); see also *Trans-Alaska Pipeline Authorization Act* 43 U.S.C. §1653(c)(1) (1973).

⁵⁷ *Benefiel v. Exxon Corp.*, 959 F.2d 805, 807 (9th Cir.1992) (holding that Congress envisioned damages arising out of the physical effects of oil discharges and not the remote and derivative damages of the type claimed by the plaintiffs in this case); *State of Ohio v. U.S. Dep’t of Interior*, 880 F.2d 432, 472 (D.C. Cir. 1989) (adopting traditional causation standards, including proximate causation, in light of ambiguity in the statute).

⁵⁸ Goldberg is referring to the “resulting from” and “result of” language in CERCLA and TAPAA, respectively. See Memorandum from John C.P. Goldberg to Kenneth Feinberg, *supra* note 23, at 21-23.

⁵⁹ Goldberg asserts this proposition using an *a fortiori* argument. He claims that if the courts read in a proximate cause requirement in CERCLA and TAPAA which contain only one level of causation, *all the more so*, will courts impute such a requirement on to OPA which contains a dual leveled causation requirement via the reading of § 2702(a) together with § 2702(b)(2)(E). See *supra* text accompanying note 40. This type of *a fortiori* argument is known as a *minore ad maius* argument,

construction of OPA from CERCLA and TAPAA, this note will demonstrate that such a finding is in fact very much *resistible*.

TAPAA Section 1653(c)(1) stipulates that the owner and operator of a vessel shall be strictly liable, without regard to fault, in accordance with the provisions of this subsection for all damages, including clean-up costs, sustained by any person or entity, public or private, including residents of Canada, as the “result of” discharges of oil from such vessel.⁶⁰ This provision was the subject of the case *Benefiel v. Exxon Corporation*.⁶¹ *Benefiel* was a case arising out of the Exxon Valdez oil spill.⁶² The plaintiffs in the case purchased gasoline in California during a specified period following the spill.⁶³ They brought an action to recover damages representing what they claimed was the increased price they were required to pay as a result of the spill.⁶⁴ The court ultimately rejected the plaintiff’s claims on proximate cause grounds.⁶⁵ In deciding the case, the court interpreted the “result of” language in TAPAA to incorporate a required showing of proximate cause.⁶⁶ The court supported its finding stating that “we are confident that Congress in enacting TAPAA did not intend to abrogate all principles of proximate cause”.⁶⁷

However, because of a distinction in the statutory construction of OPA, the *Benefiel* court’s interpretation of TAPAA may not be superimposed onto OPA. The only causation language that TAPAA includes is the “result of” language the court cited in the *Benefiel* decision.⁶⁸ TAPAA does not include explicit “proximate cause” language elsewhere in the statute, such that would trigger the inference of intentional exclusion.⁶⁹ OPA on the other hand, as explained above, does include explicit “proximate cause” language elsewhere in the statute.⁷⁰ Thus, the *Benefiel* court was permitted to import uniformly accepted principles of common law (namely a proximate cause requirement) because there was no contrary language in

which denotes an inference from smaller (or weaker) to bigger (stronger).

⁶⁰ 43 U.S.C. § 1653(c)(1) (1973).

⁶¹ *Benefiel*, 959 F.2d at 806.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 807 (holding that the TAPAA is aimed at “damages arising out of the physical effects of oil discharges. The remote and derivative damages of the type claimed by the plaintiffs here fall outside the zone of dangers against which Congress intended to protect when it passed TAPAA.”).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653(c)(1) (1973).

⁶⁹ See generally Trans-Alaska Pipeline Authorization Act 43 U.S.C. §§ 1651 et seq.

⁷⁰ Oil Pollution Act of 1990, 33 U.S.C. § 2704(c)(1) (1990); see *supra* text accompanying note 40.

the statute to rebut this presumption.⁷¹ A similar treatment of OPA, however, would be outside the scope of the judiciary as the statutory construction of OPA includes an inference of intentional exclusion of this principle.⁷²

A comparison of OPA with CERCLA yields strikingly similar results. CERCLA Section 9607(a)(4)(C) provides that any person who accepts or accepted any hazardous substances for transport from which there is a release shall be liable for damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss "resulting from" such a release.⁷³ The D.C. Circuit Court in *State of Ohio v. United States Department of the Interior* was presented with challenges to many aspects of CERCLA, all of which focused on the regulations' alleged undervaluation of the damages recoverable from hazardous materials spills that despoil natural resources.⁷⁴ The challenge relevant to this note's analysis was whether the "resulting from" language in Section (a)(4)(C) required proof of actual cause or proximate cause.⁷⁵ Upon a finding that the statute was ambiguous as to this point of law,⁷⁶ the Court of Appeals for the D.C. Circuit embarked on a thorough analysis of CERCLA and its legislative history for guidance as to the appropriate causation standard.⁷⁷ The court ultimately upheld the Department of Interior's reading of the statute, which adopted traditional causation standards, namely the inclusion of both actual cause and proximate cause.⁷⁸

Like with TAPAA, the court's interpretation here may not be superimposed on to OPA because of a crucial difference in statutory construction. Unlike in OPA, where Congress included the term "proximately" elsewhere in the statute (implying the purposeful exclusion

⁷¹ *United States v. Wells*, 519 U.S. 482, 491 (1997) ("We do, of course, presume that Congress incorporates the common-law meaning of the terms it uses if . . . "the statute [does not] otherwise dictate." (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992))); see *Benefiel v. Exxon Corp.*, 959 F.2d 805, 807 (1992) (adopting a conclusion consistent with uniformly accepted principles of the common law of torts).

⁷² Oil Pollution Act of 1990, 33 U.S.C. §2704(a)-(c) (1990); see *supra* text accompanying notes 35-36.

⁷³ 42 U.S.C. § 9607(a)(4)(C) (1980) (providing broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment).

⁷⁴ 880 F.2d 432, 438 (D.C. Cir.1989).

⁷⁵ *Id.* at 470.

⁷⁶ *Id.*

⁷⁷ *Id.* at 470-72.

⁷⁸ *Id.* at 472.

of it in Section 2602(b)(2)(E)), the term “proximately” does not appear in the entirety of CERCLA.⁷⁹ Without this variation in statutory construction to introduce an inference of congressional intention, the court in *Ohio* was permitted to import traditional common law principles of causation to resolve the ambiguity of the phrase “resulting from.”⁸⁰ What is additionally interesting is that the court in *Ohio* held that the “resulting from” language, without the interpreting value of on-point legislative history, in CERCLA rendered the statute *ambiguous*.⁸¹ Thus, contrary to Goldberg’s argument, the “result from” language does not offer courts an automatic cue to infer notions of actual and proximate causation.⁸² Rather, as evinced by this court’s treatment of the issue, such a finding is appropriate only after the court has exhausted its efforts in determining Congress’s intended meaning of the statute.⁸³

C. Legislative History

This last section of Part I of this note will support the interpretation of OPA’s economic damages provision to exclude a proximate causation standard through a brief assessment of House and Senate reports. The House Conference Report provides a provision-by-provision background for all of OPA.⁸⁴ Insofar as Section 2704, the OPA provision that provides for limits on liability for responsible parties and explicitly includes the term “proximately,”⁸⁵ the House Report mirrors the section’s clear language requiring a showing of proximate cause. The report reads, “Liability is unlimited if the incident was proximately caused by gross negligence, willful misconduct”⁸⁶

However, with respect to Section 2702(b)(2)(E), the provision on damages for lost profits and impaired earning capacity, the House Report

⁷⁹ See generally 42 U.S.C. § 9607 (1989).

⁸⁰ *State of Ohio v. U.S. Dep’t of Interior*, 880 F.2d 432, 472 (1989); see *Chevron U.S.A. Inc. v. N.R.D.C. Inc.*, 467 U.S. 837, 843 n. 9 (1984).

⁸¹ *Ohio*, 880 F.2d at 470 (concluding that CERCLA was ambiguous as to proof of causation).

⁸² Memo from John C.P. Goldberg to Kenneth Feinberg, *supra* note 23, at 20 (“Indeed, even when confronted with statutory liability provisions that use variants on the phrase “result from” as a *stand-alone* causation requirement, courts have read into that phrase both an actual causation requirement and a proximate cause limitation – the latter excluding liability for certain remote consequences. They have done so because it has long been commonplace for lawyers and courts to use these sorts of phrases to encompass notions of both actual and proximate cause.”).

⁸³ *Ohio*, 880 F.2d at 472.

⁸⁴ H.R. REP. NO. 101-653 (1990).

⁸⁵ 33 U.S.C. § 2704(c)(1) (1990) (providing that the limits on liability set forth in subsection (a) do not apply if the incident was caused by gross negligence by the responsible party).

⁸⁶ H.R. REP. NO. 101-653, at 9.

gives no indication that it was Congress's intent to include an implied proximate cause standard.⁸⁷ The Report gives no indication that it intended to import accepted common law principles of causation either.⁸⁸ Rather, the report reads:

Subsection (b)(2)(E) provides that any claimant may recover for loss of profits or impairment of earning capacity resulting from injury to property or natural resources. 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.⁸⁹

This section of the House Report identifies the classic (b)(2)(3)(E) claimant: the individual who suffers a loss in profits as a result of damages to real or personal property, or natural resources even though he does not own such property or resources.⁹⁰ The singular causation requirement that the House Report, as well as the statute itself, puts on recovery is that the loss of profits or impaired earning capacity *result from* the injury to property or natural resources.⁹¹

This concept of a broad causation requirement is echoed in the 1990 Senate Report.⁹² This Report says that the Section (b) 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."⁹³ This statement, taken together with the statutory text, makes the argument of an implied proximate cause requirement highly attenuated at best. In fact, such an argument seems to expressly conflict with Congress's underlying policy of providing recovery for a wide range of cases as such a requirement would place a *de facto* limitation on those who could recover.⁹⁴

For instance, consider the situation of the beachfront resort owner in St. Petersburg, Florida who has not sustained damage to his property or natural

⁸⁷ See generally H.R. REP. NO. 101-653 (1990). Also note that nowhere in the House Report is there any mention of the "dual leveled" causation argued by Goldberg. *Id.*

⁸⁸ H.R. REP. NO. 101-653, at 9 (1990).

⁸⁹ *Id.*

⁹⁰ *Id.* Here, the legislative intent shows a clear departure from the rule in *Robins Dry Dock*, which required that economic losses stem from damage to property or resources owned by the claimant. 275 U.S. 303, 309-10 (1927).

⁹¹ H.R. REP. NO. 101-653, at 9.

⁹² S. REP. NO. 101-94 (1990).

⁹³ *Id.* at 12.

⁹⁴ *Id.*; Deborah S. Bardwick, *The American Tort System's Response to Environmental Disaster: The Exxon Valdez Oil Spill as a Case Study*, 19 STAN. ENVTL. L.J. 259, 262 (2000).

resources but is suffering a dramatic loss in profits because his clientele believes the beach is covered in crude oil and is opting to vacation elsewhere.⁹⁵ Under this interpretation, the resort owner may not be eligible to recover under OPA Section 2702(b)(2)(E) because in addition to showing actual causation, which would require a showing that the loss in profits was a result of the damage to the Gulf Coast, the owner would have to show proximate causation. Such a showing would require the resort owner to show that his lost profits were a foreseeable consequence of the spill, and that there was no superseding cause severing the causal nexus running between BP and the profit loss.⁹⁶ Then, the resort owner would have to overcome opposing counsel's arguments that the decline in reservations had no other cause, such as the recent economic recession, the opening of a higher end, yet less expensive resort down the beach, or the failure of the resort to effectively market to their clients and keep the resort in a favorable public opinion.

Thus, the inclusion of a proximate cause requirement in OPA Section 2702(b)(2)(E) would effectively frustrate Congress's goal of creating a wide-reaching statute that increases oil spill victims' access to adequate compensation for their losses.⁹⁷

III. THE CAUSATION STANDARD IN SECTION 2702(B)(2)(E): THE JUDICIARY WEIGHS IN (SORT OF)

A scholarly analysis of OPA, or any statute for that matter, would not be complete without an investigation of interpretations offered by the courts. In the matter of OPA, there is a limited number of generally relevant cases and even fewer cases that have offered interpretive value to the statute. Moreover, the cases that focus on the causation element in Section 2702(b)(2)(E) do not offer a definitive answer as to what the appropriate causation standard should be.⁹⁸ While the courts do not rule as to the

⁹⁵ See David Segal, *Should BP's Money Go Where the Oil Didn't?*, N.Y. TIMES, Oct. 23, 2010, at BU1 (evaluating the issue of proximity claims in the wake of Deepwater Horizon). See also text accompanying notes 1-5; see also Deborah S. Bardwick, *The American Tort System's Response to Environmental Disaster: The Exxon Valdez Oil Spill as a Case Study*, 19 STAN. ENVTL. L.J. 259, 275 (2000).

⁹⁶ *Yun v. Ford Motor Co.*, 647 A.2d 841, 846 (App. Div. 1994); Bardwick, *supra* note 95, at 279.

⁹⁷ S. REP. NO. 101-94, at 12 (1990); 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, 893 (2011).

⁹⁸ See, e.g., *Gatlin Oil Co. v. U.S.*, 169 F.3d 207, 210-11 (1999) (holding that the removal costs and damages 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, but providing no greater clarification on the causation standard in this section of OPA); Robert Force, Martin Davies & Joshua

correct standard of causation, the decisions as to the existence of questions of fact bear on what causation standards the courts are willing to recognize.⁹⁹

Dunham-Price Group v. Citgo Petroleum Corp. was brought before the United States District Court for the Western District of Louisiana after an oil spill in the Calcasieu River.¹⁰⁰ In response to the spill, the U.S. Coast Guard ordered the closure of approximately twenty-two miles of the river for cleanup operations.¹⁰¹ Dunham-Price, a concrete facility, alleged that it sustained increased expense, business interruption and related damages as a result of the spill.¹⁰² Dunham-Price argued that Section 2702(b)(2)(E) of OPA does not mention or require a direct causal link between a claimant's economic losses and damage to property or natural resources; in other words, Dunham argued the exclusion of a proximate cause requirement.¹⁰³ While the court did not explicitly express support in favor of this reading, it did find that Dunham had demonstrated genuine issues of material fact that should be decided by a trier of fact.¹⁰⁴ Such a holding strongly indicates that the court would not object to a jury finding sufficient causation under the broad causation standard proffered by Dunham.¹⁰⁵

Similarly, in *In Re Settoon Towing*, the plaintiff sought recovery for economic losses under Section 2702(b)(2)(E) after an oil spill cleanup operation blocked access to its production platform.¹⁰⁶ While applying OPA to the case, the court looked first at the traditional maritime tort law and noted that under these principles the plaintiff would be precluded from recovery because the plaintiff alleged economic damages too remote to property damage.¹⁰⁷ However, the court held that OPA damages provisions

S. Force, *Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties, and State Remedies in Oil Spill Cases*, 85 TUL. L. REV. 889, 900 (2011).

⁹⁹ See *Dunham-Price Group v. Citgo Petroleum Corp.*, 2010 U.S. Dist. LEXIS 31901, at *8 (W.D.La. 2010) (denying summary judgment to defendant oil company where as a result of a temporary closure of a waterway after an oil spill, plaintiff sustained loss use, increased expense, and business interruption); see also *In Re Settoon Towing*, 2009 U.S. Dist. LEXIS 113530, at *13 (E.D.La. 2009) (denying summary judgment to defendant oil company where plaintiff had suffered damages as a result of its inability to access its production platform while an oil spill cleanup was in progress).

¹⁰⁰ 2010 U.S. Dist. LEXIS 31901, at *1, 1-2.

¹⁰¹ *Id.* at *2.

¹⁰² *Id.*

¹⁰³ *Id.* at *4 (“Dunham-Price insists that [OPA] does not mention or require a direct causal link between a claimant’s economic losses and damage to property or natural resources.”).

¹⁰⁴ *Id.* at *8 (relegating the decision as to whether Dunham-Price’s economic losses are due to Citgo’s oil spill to a trier of fact).

¹⁰⁵ *Id.*

¹⁰⁶ *Settoon Towing*, 2009 U.S. Dist. LEXIS 113530, at *8.

¹⁰⁷ *Id.* at *11 (“[Plaintiff] does not allege that it suffered physical injury to a proprietary interest, but rather economic damages that are remote to ExPert’s property damage that was allegedly caused by Settoon’s negligence. Thus, pursuant to the Rule of *Robins Dry Dock* and its progeny, if [plaintiff’s]

preempt general maritime law and found that the plaintiff raised genuine issues of material fact as to whether the economic losses were *due to* the property damage resulting from the discharge of oil.¹⁰⁸ Thus, while the court did not clearly find for the exclusion of a proximate cause requirement in Section 2702(b)(2)(E), it did lay the groundwork for such a conclusion.¹⁰⁹ First, the court's acknowledgment of OPA liability as something separate and unique from traditional maritime tort liability allows for the premise that OPA extends liability *differently* than traditional tort law.¹¹⁰ Second, the finding of an OPA preemption over traditional liability allows for a conclusion that where there is a divergence in the law, such as the requirement of a proximate cause showing, OPA will prevail.¹¹¹

IV. IMPLICATIONS OF SECTION (B)(2)(E) AND THE ARGUMENT FOR THE ADOPTION OF THE RADIAL CAUSATION DOCTRINE

The reading of OPA Section 2702 suggested in this note delegitimizes Ken Feinberg's decision to deny payment to claimants that cannot show proximate cause.¹¹² Pursuant to the manifested intent of Congress and the formulation of OPA, claimants such as the resort owner in Florida with no damage to his property or the restaurateur in New York or an out of work fisherman in New Orleans who cannot maintain his supply contracts, should be granted relief for their lost profits and impairment of earning capacity.¹¹³ Using this analysis of OPA, claimants would be responsible for showing that their economic losses were due to the property damage resulting from the discharge of oil in the Gulf, among the other elements listed in Part I.¹¹⁴ There would be no requirement that these claimants

claim against ExPert were made under the general maritime law, they would be precluded.").

¹⁰⁸ *Id.* ("However, the OPA damages provision preempts the general maritime law.") (citing *Gabarick v. Lourin Mar. (Am.) Inc.*, 623 F. Supp.2d 741, 746 (E.D.La. 2009)).

¹⁰⁹ *See id.* at *11-12.

¹¹⁰ *See id.*

¹¹¹ *See id.*

¹¹² *See* http://www.gulfcoastclaimsfacility.com/proto_1.php, Para. II.F. ("The GCCF will only pay for harm or damage proximately caused by the spill. The GCCF's causation determinations of OPA claims will be guided by OPA and federal law interpreting OPA and the proximate cause doctrine."); CRUDE JUSTICE – ONE YEAR AFTER THE GULF OIL SPILL: IS JUSTICE BEING SERVED? (2011), http://www.afj.org/connect-with-the-issues/the-corporate-court/crude_justice/.

¹¹³ *See generally* text accompanying notes 21-110.

¹¹⁴ Chalos, *supra* note 36 at 87 (listing the elements necessary for recovery under OPA Section 2702(b)(2)(E) as:

That real or personal property or natural resources were injured or lost; and

The claimant's income was reduced resulting from injury to, destruction of, or loss of property or natural resources and the amount of the reduction; and

The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, established by income tax returns, financial statements, etc.)

further prove that the spill was the proximate cause of the loss.

While it seems clear that OPA does not contain a proximate cause requirement, a question remains as to whether it *should* contain such a limitation mechanism. Consider the magnitude of potential liability stemming from this policy. Oil pollution is “the natural consequence of the world’s increased dependence on oil to satisfy industrial needs and basic energy requirements.”¹¹⁵ Each year thousands, if not millions, of tons of crude are released into the sea as a result of tanker accidents.¹¹⁶ Under OPA, the liability associated with these accidents is dangerously far-reaching and potentially unlimited.¹¹⁷ While it is crucial, as a matter of public policy, to offer protection to those impaired as a result of oil spills, it is similarly in the public’s best interest to prevent frivolous and remote claims from being filed.¹¹⁸ Moreover, it is a fundamental concept of tort law that liability must be discontinued eventually.¹¹⁹ So while some limitation on recovery is undoubtedly necessary, given the magnitude of damage and global reach of marine oil pollution, a proximate cause requirement remains an untenable solution because it would prevent recovery for most claimants.

One way of resolving these competing interests while providing greater certainty to OPA is rooted in the general practice of current oil spill claims management. Most claims administrators consider a series of factors in determining whether to pay claims of economic loss. These factors include geographic proximity, time, foreseeability, and scope of economic loss sustained (amount and percentage of total revenues). The resolution this note would like to propose, called the Radial Causation Doctrine, takes these considerations and codifies them in a systematic fashion. Taking into

¹¹⁵ 3-IX Benedict on Admiralty §111.

¹¹⁶ See THE INTERNATIONAL TANKER OWNERS POLLUTION FEDERATION LIMITED, STATISTICS: NUMBERS AND AMOUNTS OF SPILLS (2009), <http://www.itopf.com/information-services/data-and-statistics/statistics/#no>; see also THE DUMPING OF HYDROCARBONS FROM SHIPS INTO THE SEAS AND OCEANS OF EUROPE: THE OTHER SIDE OF OIL SLICKS (2009), oceans.org/sites/default/files/reports/oil-report-english.pdf.

¹¹⁷ This is because OPA’s broad “due to” causation requirement provides for a wide range of injuries and are not so narrowly focused as to prevent victims of an oil spill from receiving reasonable compensation. S. REP. NO. 101-94, at 12 (1990); RAWLE O. KING, DEEPWATER HORIZON OIL SPILL DISASTER: RISK, RECOVERY, AND INSURANCE IMPLICATIONS (2010), www.fas.org/sgp/crs/misc/R41320.pdf.

¹¹⁸ See Fed. R. Civ. P. 11 (requiring that an attorney perform a due diligence investigation concerning the factual basis for any claim or defense so as to prevent the costliness and time consuming nature of frivolous lawsuits).

¹¹⁹ Yun v. Ford Motor Co., 647 A.2d 841, 846 (App. Div. 1994) (describing proximate cause as a standard for limiting liability for the consequences of an act based “‘upon mixed considerations of logic, common sense, justice, policy and precedent.’” (quoting Scafidi v. Seiler, 574 A.2d 398, 402 (1990) (quoting Caputzal v. The Lindsay Co., 222 A.2d 513, 517 (1966))); City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 423 (2002).

account the highly politicized nature of the claims process, as well as practical solutions developed in the field, this proposal avoids a bright-line rule in favor of a balancing test.¹²⁰

The Radial Causation Doctrine organizes claims into four concentric circles.¹²¹ In the center circle are claimants who suffered economic losses directly tied to the damage of their real or personal property or natural resources.¹²² This includes, for instance, a fisherman whose fishing vessel was destroyed in the explosion of a barge and has thus lost his source of livelihood, as well as beachfront resort whose shoreline is actually steeped in crude oil. Here, the claimant need only show that the economic loss was due to the damage caused by the spill.

In the next outward circle are claimants in a clearly delineated geographic periphery to the spill who do not allege damage to their property but have nonetheless suffered an economic loss.¹²³ This stage includes, for example, coastal resorts within a certain number of miles from the spill whose beaches are unharmed but who have suffered reputational harm and have lost reservations. This stage might also include restaurants, bars and other tourist venues within this previously delineated geographic area who have suffered economic losses. Moreover, this stage would include claimants whose economic injuries are more indirect yet are still located within this periphery. An example could be a manufacturer similarly located along the coast that supplies the beer to the bars and restaurants which have cancelled their contracts as a result of diminished reservations. Even further, the distributor who supplies that manufacturer with glass bottles could collect if he too is located within this geographic range and has suffered economic loss.¹²⁴ These claimants, as well, need

¹²⁰ This note contemplates that the Radial Causation Doctrine be adopted by means of amendment to OPA, or via regulations enacted by the National Pollution Funds Center, the administrative agency created by the U.S. Coast Guard to implement Title I of OPA.

¹²¹ Claims resulting from instances of marine oil pollution, such as Deepwater Horizon, are often described as extending outwards like a concentric circle with ripple effects felt all over the country. See John Kennedy, *Surviving the Big, Oily Mess*, 850 MAGAZINE (Aug. 11, 2010), available at <http://850businessmagazine.com/component/content/article/37-its-the-law/408-getting-what-bp-owes-you.html>. This concept served as inspiration for the Radial Causation Doctrine. Furthermore, multi-factor tests are commonly used in the context of maritime law. See also *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 308 (1970). Such a test is used to determine whether a particular ship owner should be held to be an "employer" for Jones Act purposes. *Id.* See attached diagram for a visual understanding of the Radial Causation Doctrine.

¹²² This circle is comprised of claimants who would be eligible for recovery under the traditional *Robins Dry Dock* rule which required that economic losses stem from damage to property or resources owned by the claimant. 275 U.S. 303, 309 (1927); *Byrd v. English*, 117 Ga. 191, 194 (1903).

¹²³ The exact limits of this periphery would need to be determined by experts who have experience in third party claims stemming from spills of oil and other hazardous materials.

¹²⁴ Such claimants would likely be unable to show proximate cause and thus be barred from collecting under Feinberg's interpretation of OPA. Under this model, however, they would be eligible

only show that the loss sustained was due to the spill.

The next stages include claimants who suffer economic damages (but do not allege property damage) and are located outside that geographic periphery. The first circle in this range affects claimants who have suffered economic loss, who are geographically located outside the periphery, but in the generally affected region of the spill. This might include, for example, manufacturers who have supply contracts with entities within the affected area: for instance the T-shirt manufacturer who cannot sell 10,000 "I love Pensacola" shirts located 100 miles from the spill. Here, such claimants may collect but they have a higher burden of causation to satisfy. First, they must show that their losses were due to the spill, just as the inner circles of claimants must show. Second, these claimants must show an additional level of reliance and loss. Whereas the inner circles could recover for any economic loss sustained, this circle must show that the loss of profits comprised a certain percentage of their overall business. Claimants can satisfy this standard by showing that the loss in profits comprised a certain percentage of gross earnings that created a particular reliance on the lost business. Another factor taken into consideration is the duration and strength of the business relationship. For instance, if the T-shirt manufacturer who claims economic damage had been supplying thousands of T-shirts a year to the Pensacola region for the past 15 years and this production comprises a significant percentage of his earnings then he will be eligible to recover. On the other hand, a manufacturer located outside the periphery who has had only occasional contractual dealings with the resorts along the coast that amount to only a sliver of his overall business could not collect.

The outermost circle includes claimants who have suffered economic loss and are located outside the region affected by the spill. This circle includes claimants on the other side of the country, as well as the other side of the world. One example could be the restaurateur in New York who can no longer import fish from the region affected by the spill. Claimants in this category have the highest burden of causation to satisfy. In addition to the showing that the economic loss was due to the spill, and that the loss comprised a certain percentage of his overall business, this claimant is also charged with a showing of proximate cause. The claimant must show that his loss was a foreseeable consequence of the spill.

These parameters are meant to function as a statutory floor. In other words, claims administrators could award damages to more claimants than

to recover.

the proposal provides for, but they may not provide less. This allows for claims administrators to exercise their judgment in situations that are highly politicized and demand careful attention, yet still protect those who sustain economic loss as a result of oil spills.

CONCLUSION

In conclusion, the finding against the inclusion of a proximate cause requirement in OPA Section 2702(b)(2)(E) proffered in this note is consistent with Congress's intent to provide compensation for a wide range of claimants injured in the wake of oil spills. This finding is supported by the plain meaning of the statute, legislative history, judicial decisions regarding OPA, and a comparison with OPA's statutory predecessors. Consequently, Ken Feinberg's decision to require a showing of proximate cause is inconsistent with OPA. Adoption of the Radial Causation Doctrine suggested in this note provides clarity to the otherwise ambiguous question of where OPA cuts off liability. This doctrine will provide a limit for potentially infinite liability while still protecting those harmed most by the spill. Until a statutory mechanism such as this is adopted, or the courts come to a definitive conclusion regarding the limits of OPA liability, a plethora of oil spill victims will be denied their right to compensation.

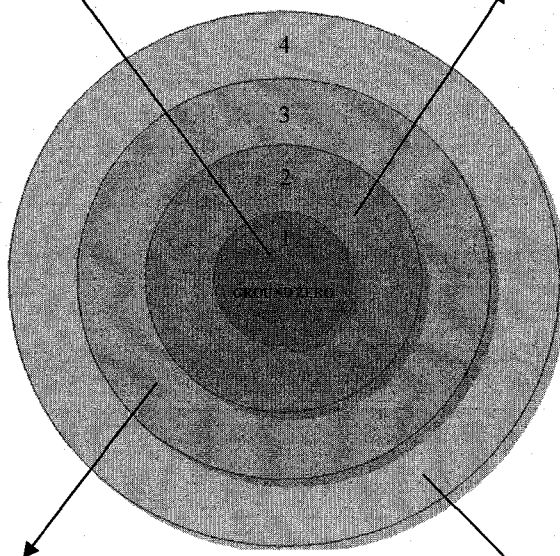
THE RADIAL CAUSATION DOCTRINE

Circle 1: Claimants who have suffered losses tied directly to the damage of their real or personal property. This includes, for instance, a fisherman whose fishing vessel was destroyed in the explosion of a barge and has thus lost his source of livelihood, as well as a beachfront resort whose shoreline is actually steeped in crude.

Claimant need only show that economic damage was due to the spill.

Circle 2: Claimants in a clearly delineated geographic periphery who do not allege damage to their property but nonetheless suffer economic damages. This stage includes, for example, coastal resorts within a certain number of miles from the spill whose beaches are unharmed but who have suffered reputational harm and have lost reservations. This stage might also include restaurants, bars and other tourist venues within this previously delineated geographic area who have suffered economic losses

Claimant need only show that economic damage was due to the spill.



Circle 3: Claimants outside the geographic periphery, but still within the generally affected region of the spill who do not allege damage to their property but nonetheless suffer economic damages. This might include, for example, manufacturers who have supply contracts with entities within the affected area: for instance the T-shirt manufacturer who cannot sell 10,000 "I love Pensacola" shirts located 100 miles from the spill. *Claimants must show that economic damage was due to the spill, and that the loss of profits comprised a certain percentage of gross earnings such that there was a particular reliance on the profits lost.*

Circle 4: Claimants have suffered economic loss but are located outside the region affected by the spill who do not allege damage to their property but nonetheless suffer economic damages. One example could be the restaurateur in New York who can no longer import fish from the region affected by the spill. *Claimants must prove proximate cause.*